# United States Department of Labor
# Employees' Compensation Appeals Board

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| **DAVID CUELLAR, Appellant** | ) | |
| **and** | ) | **Docket No. 05-429** |
| | ) | **Issued: July 18, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer** | ) | |

*Appearances:*
*David Cuellar, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On December 7, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 13, 2004 merit decision denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

### ***FACTUAL HISTORY***

On March 22, 2003 appellant, then a 54-year-old industrial truck operator, filed a traumatic injury claim alleging that he sustained an emotional condition in the performance of duty on March 18, 2003. In an accompanying statement, appellant alleged that when he attempted to enter the employing establishment on March 18, 2003 a postal security officer denied him entry because he had a duffel bag affixed to a rolling caddy. He stated that the

security officer still denied him entry after he explained that the bag contained food, water, medications and testing equipment necessitated by his diabetes, hypertension, heart disease, Meniere's disease and post-traumatic stress disorder and indicated that he would allow the bag to be searched. Appellant alleged that the security officer told him that Mr. Self, the plant manager, had mandated that all bags had to be secured in lockers and that all employees had been advised of this policy by March 17, 2003. Appellant told the security officer that he had not been advised of the policy change and that he had not been assigned a locker. Appellant claimed that he observed employees entering the building with bags larger than his and asserted that the security officer told him that the new policy did not apply to these employees as they were managers who did not have assigned lockers. He observed employees leaving the building with bags larger than his and claimed that the security officer told him that Tour 1, known as the "graveyard shift," did not yet enforce the new policy.

Appellant entered the building without his bag and enlisted the help of Bobby Johnson, a supervisor, to convince the security officer to grant him an exemption which would allow him to bring his bag into the building. He stated that the security officer indicated that he could bring in whatever would fit into a paper bag, but that appellant responded that he would not be able to fit all his necessary belongings, including enough food for two breaks and a lunch, and that he could not rely on the vending machines for food. Appellant asserted that the security officer advised him that he could bring the bag into the building without the rolling caddy, but appellant was unable to do so because he had a three-pound lifting restriction. The security officer indicated that only Mr. Self could provide an exemption. Appellant looked for Mr. Self, but was instructed by Mack Taylor, a senior manager, to report to his assignment and get to work. Appellant advised Mr. Taylor that he could not safely work without the articles in his bag, but that he responded, "I do n[o]t care, get back to work."

Appellant told Mr. Taylor that his only recourse was to check out and leave the employment premises. He felt weak as he walked to his vehicle and discovered that his blood sugar was low after performing a test in his vehicle. Appellant stated that he contacted Mr. Johnson, who told him to make another attempt to contact Mr. Self. He left a message with the office of Mr. Self explaining his situation and requested that Mr. Self call him on his cell phone. Appellant waited 15 minutes for Mr. Self to call and then drove home after not receiving any response. He claimed that the emotional stress of the events of March 18, 2003 caused him to sustain severe anxiety attacks, uncontrolled hypertension, moderate to severe vertigo, angina and constant headaches. Appellant stopped work on March 24, 2003 and did not return.

Appellant submitted a March 11, 2003 form report of Dr. Edward J. Fik, an attending Board-certified psychiatrist.

In a letter dated April 11, 2003, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

In an undated statement received by the Office on April 21, 2003, Mr. Johnson indicated that, at about 2:45 p.m. on March 17, 2003, he was told to advise employees that they were not allowed to bring rollers, oversized purses and other materials into the building. He noted that, because appellant had left for the day prior to that time, he had no opportunity to advise him of the policy change. Mr. Johnson indicated that on March 18, 2003 appellant spoke to him about

his inability to bring his bag and rolling caddy into the building and noted that a security officer told him that only Mr. Self could provide an exemption from the new policy. He responded in the affirmative when appellant asked him whether he could use annual leave for the rest of the day. Mr. Johnson indicated that he approved three more days of annual leave and that appellant was considered to be absent without leave after taking leave.[1]

In a statement dated April 28, 2003, appellant alleged that three managers discriminated against him due to his employment injuries and asserted that, after he returned to work on February 10, 2003, the managers "increased their harassment by sneaking around the work area I was assigned, hiding behind equipment, to watch me." He claimed that one manager would bring other managers to his work unit and point at him and laugh in the presence of his coworkers. Appellant alleged that the three managers would display hostility every time they spoke to him. He claimed that Myra McMillan, a manager, told his union representative that he was like a terrorist and could not be trusted. Appellant filed an Equal Employment Opportunity (EEO) claim and a grievance regarding these matters but had not received a final decision in either matter.

In a May 7, 2003 statement, Howard Finfer, a coworker, stated that he was advised on March 17, 2003 about the new security policy. Mr. Finfer stated that he went to the office of the postal police and explained that he had to bring an oversized container into the workroom, which held his prescription medicines, blood sugar test kit and food and water for his workday. He asserted that he was allowed to bring his oversized container into the workroom each day.[2]

The record also contains documents associated with appellant's grievance against the employing establishment. In one document, it was asserted that appellant was discriminated against because other employees were allowed to bring oversized containers into the workplace, including one employee who was allowed to bring in such a container to accommodate his medical needs.[3]

By decision dated November 20, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

Appellant requested a hearing before an Office hearing representative, which was held on July 1, 2004. He testified that Ms. McMillan told him on March 18, 2003 that there was "no way" that he could bring his bag into his workplace and that she told his union representative that she had not been "fooled." Appellant asserted that Ms. McMillan compared him to a soldier who "fragged" his supervisors in Iraq or Afghanistan.

[1] The record reveals that appellant used 30 hours of annual leave between March 18 and 21, 2003. In another undated statement received on June 4, 2003 Mr. Johnson asserted that appellant was treated the same as other employees under the new security policy. He noted that, although appellant might have been able to bring in his bag and rolling caddy in the past, these items had actually been prohibited for years.

[2] Appellant also submitted numerous form reports of Dr. Fik.

[3] The document appears to have been produced by appellant's union representative but it was not signed or dated.

In a statement dated July 19, 2004, appellant believed that Ms. McMillan discriminated against him on March 18, 2003 because he prevailed in a dispute regarding the wearing of hard hats by forklift operators. He suggested that Ms. McMillan transferred him to a more physically demanding position in retaliation. Appellant claimed that Ms. McMillan forced him to work beyond his physical restrictions and that she and others "harassed, heckled and constantly observed" him. He felt that this harassment was carried as a means to "goad" him into committing an act which would require a disciplinary action. Appellant claimed that it was not reasonable to provide him with the option of keeping his medication, food and other supplies in the locker room because it was a great distance from the work floor to the locker room.

Appellant also submitted a July 8, 2004 Department of Veterans Affairs decision concerning various matters including the effective date of his service-related injuries, the disabling percentages of these injuries, his employability status and his entitlement to educational assistance.

In a statement dated July 27, 2004, Ms. McMillan stated that appellant did not make any attempt to downsize his belongings in accordance with the security officer's request and had refused a request to leave his medications in the medical unit. She indicated that she did not fail to trust appellant and asserted that she mentioned the soldier who threw a grenade into his camp in Iraq not as a means to accuse appellant but rather to generally illustrate that one never knows what a person may do. Ms. McMillan stated that she attempted to calm appellant down on March 18, 2003 so that they could work out the "bugs" in the new security policy, but that he would not listen to her input. She did not require that appellant work beyond his physical restrictions.

By decision dated September 13, 2004, the Office hearing representative affirmed the November 20, 2003 decision.

## ***LEGAL PRECEDENT***

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[4] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

adversely affected by employment factors.[6] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[8] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[9]

## ***ANALYSIS***

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated November 20, 2003 and September 13, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that personnel at the employing establishment discriminated against him on March 18, 2003 by refusing to allow him to go to his workplace with a duffel bag affixed to a rolling caddy that contained food, water, medications and testing equipment necessitated by his medical condition. He asserted that other employees were allowed to bring similar oversized containers to their workplaces. Appellant claimed that none of the alternatives suggested by supervisors or the security officer, such as consolidating his items or keeping them in a locker, were feasible. He claimed that several supervisors, including Mr. Taylor and Ms. McMillan, were unresponsive to his needs. Appellant alleged that Ms. McMillan did not trust him and harassed him by comparing him to a terrorist or a soldier who "fragged" his superiors. He claimed that Ms. McMillan and other supervisors verbally abused him, laughed at him in front of coworkers and watched him while hiding behind machines.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[10] However, for

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[7] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[8] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[9] *Id.*

[10] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[11]

The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[12] Appellant has not shown that the employing establishment discriminated against him by not allowing him to enter his workplace with his bag and rolling caddy. The record contains a statement in which Mr. Finfer, a coworker, stated that he went to the office of the postal police and got approval to bring in an oversized container. However, this vague statement does not establish that the circumstances of appellant and Mr. Finfer are sufficiently similar to constitute discrimination against appellant. The record contains several statements of supervisors, which show the lengths they went to attempt to accommodate appellant's needs. Appellant filed an EEO claim and a grievance with the employing establishment regarding these matters but the record does not contain any final decision regarding these actions.

Appellant alleged that supervisors made abusive statements and engaged in actions, such as laughing at him, which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[13] His statements regarding the claimed abuse from supervisors were vague and unsubstantiated. Although Ms. McMillan acknowledged making a comment about a soldier who threw a grenade into his camp in Iraq, she clarified that she made the reference not as a means to accuse appellant but rather to generally illustrate that one never knows what a person may do. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

The Board finds that appellant did not show that the employing establishment mishandled the administrative aspects of responding to his request to enter the workplace with his bag and rolling caddy, nor did he show that the employing establishment committed any wrongdoing in monitoring his activities at work. These allegations relate to administrative or personnel matters, unrelated to appellant's regular or specially assigned work duties and do not fall within the coverage of the Act.[14] Although the handling of security matters and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[15] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the

[11] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[12] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[13] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[14] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[15] *Id.*

evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[16] However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also claimed that Ms. McMillan forced him to work beyond his physical restrictions. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[17] However, Ms. McMillan indicated that appellant was never asked to work beyond his restrictions and appellant did not submit any evidence showing that he was required to do so.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act. Therefore, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[18]

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

[16] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[17] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

[18] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 13, 2004 decision is affirmed.

Issued: July 18, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board