

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

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**B.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Tampa, FL, Employer**

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**Docket No. 08-236  
Issued: August 1, 2008**

*Appearances:*  
*Appellant, 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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 31, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 2, 2007 merit decision concerning the Office's rescission of its acceptance of his claim for two employment conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.<sup>1</sup>

**ISSUE**

The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim file number 06-2131250.

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<sup>1</sup> The record also contains a March 1, 2007 decision, in which the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

## **FACTUAL HISTORY**

On October 15, 2004 appellant, then a 49-year-old modified postal clerk, filed a claim (file number 06-2131250) alleging that he sustained an emotional condition in the performance of duty. He indicated that he first became aware of his claimed condition on June 23, 2004 and that he first became aware that it was caused or aggravated by his employment on August 17, 2004.<sup>2</sup>

In an accompanying statement, appellant stated that, since he was transferred from a long-held desk job after June 2003, managers at the employing establishment ignored his requests for a job that was within his work restrictions. He stated, "I am suffering anxiety and depression because of erratic and insufficient sleep, my isolated social situation (due to night hours), uninformed managers, a deteriorating physical condition and a constantly fluid job situation (in terms of location managers, fellow workers and tasks over which I have little of no control)." Appellant alleged that on June 23, 2004 he was working in the lobby when two separate customers approached him and told him that two clerks at the counter, Steve Anderson and Rosie Gillmaster, were "making derogatory comments about my work habits/productivity to the customers. He indicated that he informed a supervisor, Brenda Falleck, about the incident. Appellant alleged that, Ted Nalezynski, a coworker, gave him the silent treatment and went out of his way to make him feel uncomfortable and that John Cook, another coworker, told him that he "did n[o]t like [his] act."

Appellant submitted reports of Dr. Gary K. Arthur, an attending Board-certified psychiatrist. In an August 17, 2004 report, Dr. Arthur stated that his reported sustaining depression and anxiety due to his physical condition and harassment from coworkers.

On April 11, 2005 the Office accepted that appellant sustained a recurrent episode of major depressive disorder and anxiety disorder. With regard to his claimed employment factors, the Office only accepted that on June 23, 2004 two separate customers told him that two clerks at the counter, Mr. Anderson and Ms. Gillmaster, were making derogatory remarks about his work habits and productivity.<sup>3</sup>

In October 27, 2005 statements, Mr. Anderson and Ms. Gillmaster asserted that they did not make any derogatory statements to customers about appellant. In an undated statement, Mr. Cook indicated that he did not make any derogatory remarks to customers about appellant and that he did not make any derogatory remarks directly to him about his disability.

In an October 28, 2005 statement, appellant claimed that in 2003 a supervisor, Duane Allen, retaliated against him for his restrictive medical condition by gradually stripping away his work duties. He asserted that Mr. Allen "would say things on the public address system to embarrass him" and that, in June 2003, as a form of harassment, he arranged to transfer him to

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<sup>2</sup> The Office accepted in 1989 (under file number 06-441119) that appellant sustained right carpal tunnel syndrome, thoracic outlet syndrome, bilateral shoulder strains and brachial plexus lesions due to his repetitive job duties. It also accepted (under file number 06-2117872) that appellant sustained cervical and lumbar strains on July 4, 2004 due to pushing a heavy mail container.

<sup>3</sup> Appellant retired effective April 11, 2005 on disability retirement. He initially opted to receive monies through his disability retirement but effective October 2005 he opted to receive Office benefits.

another branch to work in a job that exceeded his work restrictions. Appellant claimed that a manager, Kevin Augustine, made negative comments about him and stated that he intended to get light-duty workers to do more or “ship them out.” Another manager, Joe Santos, slammed his hands on a desk and shouted, “You better do this work or I [wi]ll ship you out.” Appellant asserted that a coworker, Myra Jackson, heard a supervisor, Cheryl Stephens, make derogatory remarks about him faking his inability to count mail. In January 2005, he was transferred to another position that also was physically inappropriate. Appellant claimed that Mr. Anderson stated within his earshot that “anyone who is injured should n[o]t be here” and that another coworker, Mike Magro, slandered him as “a shirker” and questioned why he could not be more active at work given his perception of appellant’s activity level while on vacation. He claimed that Mr. Nalezynski angrily glared at him and lectured him regarding work matters. In an October 31, 2005 statement, appellant alleged that a supervisor, Ms. Stephens, openly shared his psychiatric information with Mr. Nalezynski and that both individuals ridiculed him based on that information.

In an October 27, 2005 statement, Chuck LoBalbo, a coworker, stated that he heard Mr. Magro make derogatory statements, both in and outside appellant’s presence, which focused on appellant “allegedly faking his disabilities and failing to do any work.” He asserted that in 2002 and 2003 he heard Mr. Allen “make embarrassing comments about [appellant] over the public address system.” In another October 27, 2005 statement, Ms. Jackson claimed that Ms. Stephens made ridiculing statements about appellant to Ms. Gillmaster, Mr. Anderson and Mr. Nalezynski regarding her belief that he was faking his injuries and not doing any work. She claimed that in late 2004 Ms. Stephens shared appellant’s medical information with Mr. Nalezynski and ridiculed the information by making statements such as “what nonsense is he up to now.”<sup>4</sup>

The record contains statements in which employing establishment officials denied any knowledge of supervisors or coworkers making derogatory comments about appellant’s physical condition or ability to work. The officials denied that appellant was made to work beyond his work restrictions. In a November 25, 2005 statement, Ms. Falleck denied that appellant informed her that coworkers were making derogatory remarks about him. In a November 4, 2005 statement, Ms. Stephens denied that appellant’s confidential medical information was inappropriately shared.

In a November 23, 2005 letter, the Office advised appellant that it proposed to rescind its acceptance of his claim for a recurrent episode of major depressive disorder and anxiety disorder. It provided appellant with 30 days from the date of the letter to provide evidence and argument if he disagreed with this proposed action. The Office indicated that appellant did not submit evidence establishing the one accepted employment factor, *i.e.*, the June 23, 2004 incident when two separate customers told him that two clerks at the counter were making derogatory remarks about his work habits and productivity. It noted that Mr. Anderson and Ms. Gillmaster denied making the statements and that Ms. Falleck denied being informed about the incident.

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<sup>4</sup> In an October 27, 2005 statement, Ruth Ann Cross, a coworker, stated that she often saw appellant limping while he performed his work and felt that his duties exceeded his work restrictions.

In a statement received by the Office on January 25, 2006, appellant again argued that he was required to work beyond his work restrictions in several jobs for the employing establishment. He also repeated a number of his claims that supervisors and coworkers harassed him regarding his physical condition and ability to work. Appellant also submitted additional reports of Dr. Arthur.

In a February 3, 2006 decision, the Office rescinded its acceptance of a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250. It determined that the evidence did not establish the existence of the previously accepted employment factor alleged to have occurred on June 23, 2004. The Office found that it was accepted that appellant had depression and chronic anxiety that was aggravated by the fact that he still had residuals of his accepted employment-related physical injuries. It indicated that appellant would be able to pursue benefits for these emotional conditions under file number 06-441119 (accepted for right carpal tunnel syndrome, thoracic outlet syndrome, bilateral shoulder strains and brachial plexus lesions) and file number 06-2117872 (accepted for cervical and lumbar strains).

Appellant requested a hearing before an Office hearing representative. At the June 6, 2006 hearing, he provided testimony which was similar to that contained in his prior statements of record. Appellant indicated that, in early 2006, the conditions of depression and chronic anxiety were accepted under claim numbers 06-441119 and 06-2117872, *i.e.*, the claims for his accepted physical conditions. He stated that he continued to pursue his emotional condition claim under claim number 06-2131250 because he had some outstanding bills that accrued between 2004 and the time his claim was accepted in early 2006 under claim numbers 06-441119 and 06-2117872. Appellant submitted some brief excerpts from an Equal Employment Opportunity (EEO) claim and a class-action suit in federal court.

In an August 23, 2006 decision, the Office hearing representative affirmed the Office's February 3, 2006 decision. She indicated that the Office had adequately explained why it rescinded its acceptance of appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250.<sup>5</sup> The Office hearing representative also discussed some of the employment factors claimed by appellant after the initial acceptance of his claim and indicated that they had not been established.

Appellant submitted a September 22, 2005 statement in which John Watts, a coworker, stated that Mr. Augustine and Mr. Allen intended to remove appellant from the employing establishment because he was a limited-duty employee. In a March 1, 2007 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In a June 15, 2007 letter, appellant requested reconsideration and argued that he was harassed by managers and coworkers regarding his physical condition and ability to work. In an August 2, 2007 decision, the Office affirmed its August 23, 2006 decision.

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<sup>5</sup> The Office hearing representative indicated that appellant's claim continued to be accepted for depression and chronic anxiety under the claims for his accepted physical conditions.

## **LEGAL PRECEDENT**

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>6</sup> The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>7</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>8</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.<sup>9</sup>

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 Act. 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.<sup>10</sup>

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 adversely affected by employment factors.<sup>11</sup> 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.<sup>12</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of

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<sup>6</sup> 5 U.S.C. § 8128.

<sup>7</sup> *John W. Graves*, 52 ECAB 160, 161 (2000).

<sup>8</sup> *See* 20 C.F.R. § 10.610.

<sup>9</sup> *John W. Graves*, *supra* note 7.

<sup>10</sup> *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>11</sup> *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

<sup>12</sup> *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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.<sup>13</sup> When a claimant has not established any compensable employment factors, the Board need not consider the medical evidence of record.<sup>14</sup>

### ANALYSIS

On April 11, 2005 the Office accepted that appellant sustained a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250.<sup>15</sup> With regard to appellant's claimed employment factors, the Office only accepted that on June 23, 2004 two separate customers told him that two clerks at the counter, Mr. Anderson and Ms. Gillmaster, were making derogatory remarks about his work habits and productivity.

In a February 3, 2006 decision, the Office rescinded its acceptance of a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250. It determined that the evidence did not establish the existence of the previously accepted employment factor alleged to have occurred on June 23, 2004.<sup>16</sup> The Office affirmed this rescission determination in decisions dated August 23, 2006 and August 2, 2007.

The Board finds that the Office properly justified its rescission of its acceptance of appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250. It has provided a clear explanation of the rationale for rescission.<sup>17</sup> The Office explained that appellant had not submitted sufficient evidence to establish the incident of alleged harassment that had served as the only accepted employment factor. Appellant did not submit any witness statements showing that Mr. Anderson and Ms. Gillmaster made derogatory remarks about his work habits and productivity on June 23, 2004. The Office further explained that the record had been supplemented to include witness statements in which the persons alleged to have been involved in the June 23, 2004 disputed appellant's account. In October 27, 2005 statements, Mr. Anderson and Ms. Gillmaster asserted that they did not make any derogatory statements to customers about appellant. In a November 25, 2005 statement, Ms. Falleck, a

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<sup>13</sup> *Id.*

<sup>14</sup> See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

<sup>15</sup> The Office accepted in 1989 (under file number 06-441119) that appellant sustained right carpal tunnel syndrome, thoracic outlet syndrome, bilateral shoulder strains and brachial plexus lesions due to his repetitive job duties. It also accepted (under file number 06-2117872) that appellant sustained cervical and lumbar strains on July 4, 2004 due to pushing a heavy mail container.

<sup>16</sup> The Office also found that it was accepted that appellant had depression and chronic anxiety that was aggravated by the fact that he still had residuals of his accepted employment-related physical injuries. It indicated that appellant would be able to pursue benefits for these emotional conditions under file number 06-441119 (accepted for right carpal tunnel syndrome, thoracic outlet syndrome, bilateral shoulder strains and brachial plexus lesions) and file number 06-2117872 (accepted for cervical and lumbar strains).

<sup>17</sup> See *supra* note 7 and accompanying text.

supervisor, denied that appellant informed her that coworkers were making derogatory remarks about him.<sup>18</sup>

After the Office accepted his claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250, appellant alleged additional employment factors and submitted witness statements in support of these allegations.<sup>19</sup> It discussed some of these allegations in its decisions affirming the initial February 3, 2006 rescission decision and determined that they had not been factually established. The Board notes that these apparent determinations must be considered dicta with respect to the present appeal. As these allegations were raised after the Office accepted appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250, they are not relevant to the analysis of whether the Office properly rescinded the claim by determining that appellant had not established any of the employment factors alleged prior to the claim's acceptance.

For these reasons, the Office properly rescinded its acceptance of appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250. Appellant would still be able to receive compensation benefits for depression and chronic anxiety accepted under his claims for physical conditions, claim numbers 06-441119 and 06-2117872.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a recurrent episode of major depressive disorder and anxiety disorder under claim number 06-2131250.

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<sup>18</sup> Appellant had asserted that he informed Ms. Falleck about the June 23, 2004 incident. The Office also properly indicated that appellant had not submitted evidence establishing his other claims of harassment which it had not previously accepted. Appellant had not shown that two coworkers, Mr. Nalezynski and Mr. Cook, had committed harassment as alleged. The Office noted that, as appellant did not establish any compensable employment factors, it was not necessary for it to consider the medical evidence of record. *See supra* note 14.

<sup>19</sup> For example, he alleged that he had been harassed by several supervisors and coworkers, including Mr. Allen, Mr. Augustine, Mr. Santos, Ms. Stephens and Mr. Magro.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 2, 2007 decisions is affirmed.

Issued: August 1, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board