

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

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**M.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Scranton, PA, Employer**

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**Docket No. 11-446  
Issued: October 13, 2011**

*Appearances:*

*Peter G. Loftus, Esq., for the appellant*

*No appearance, for the Director*

Oral Argument July 13, 2011

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 20, 2010 appellant, through counsel, filed a timely appeal from a June 25, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his emotional condition claim. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On appeal appellant's counsel contends that OWCP erred in failing to accept any compensable factors.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 23, 2009 appellant, then a 54-year-old mail carrier, filed an occupational disease claim alleging that in November 2008 he first became aware of stress, high blood pressure, panic attacks, heart disease and difficulty breathing. It was not until March 18, 2009 that he realized it was due to work. Appellant stopped work on March 18, 2009 and retired from the employing establishment effective January 29, 2010.

In a May 25, 2009 statement, Diane Passarelli, appellant's supervisor, noted that appellant became upset when she assigned him to work Route 808 on March 18, 2009 to cover his undertime on Route 810. Appellant asked for a union representative and she informed him that she would get one. Ms. Passarelli related that appellant asked to call his wife, which she allowed, and that she overheard him telling his wife to make an appointment with his physician.

By letter dated July 16, 2009, OWCP informed appellant that the evidence of record was insufficient to support his claim. It requested additional medical and factual evidence.

OWCP received reports dated July 9 and 10, 2009 from Dr. Stephanie Boyarsky, appellant's treating Board-certified family practitioner, who found that appellant was totally disabled from work beginning March 18, 2009. Dr. Boyarsky diagnosed severe anxiety and that appellant reported being harassed at work. On March 18, 2009 appellant developed panic feelings, left leg tingling, nausea and trouble breathing after being instructed to undertime his work. Dr. Boyarsky attributed appellant's elevated blood pressure, shortness of breath and chest pain to his work stress. She concluded that appellant was totally disabled from returning to work as his asthma, coronary artery disease and hypertension were exacerbated and aggravated by work stress. Dr. Boyarsky related that appellant had been seen several times since his hospital admission on March 18, 2009. The diagnosed conditions included: chronic obstructive pulmonary disease, obesity, coronary artery disease, uncontrolled hypertension, sleep apnea, severe anxiety, hyperlipidemia, gastroesophageal reflux and abdominal pain from gallbladder disease. Dr. Boyarsky reiterated that appellant was unable to return to work.

In an August 4, 2009 letter, appellant detailed his allegations of harassment and stress at the employing establishment, commencing in November 2006. He submitted affidavits and statements in support of his claim.

In an August 4, 2009 statement, appellant attributed his emotional condition to harassment since November 2006 and an incident which occurred on March 18, 2009. In November 2006, he experienced panic and sweating after being told by Rick Dickson that more mail should be delivered in less time. Appellant alleged that Mr. Dickson constantly stood behind him urging him to case mail and get out of the office faster. During a meeting to discuss alleged harassment, he was asked why he did not bid out of Mr. Dickson's unit. On March 18, 2009 appellant stated that his stress was aggravated when he was told by Ms. Passarelli, his supervisor that he would have to undertime his work on job, Route 808. He contended that he was expected to perform like a 20-year old when he was 50 years old and alleged age discrimination. In response to Ms. Passarelli's undertime instruction, appellant responded that it was impossible to do so with the volume of work. He requested to speak to a union representative. Subsequently, Ms. Passarelli and two other supervisors spoke at her desk which

he believed was about him. At this point, appellant experienced chest pain, started to sweat, felt panic and tingling in his left leg. Ms. Passarelli approached him and instructed him that he was to undertime by one hour. Appellant again stated to do so was impossible and requested a union representative for a second time. He also asked to telephone his wife, who told him that she would call back after talking to their physician. After starting to case his mail, appellant began to sweat profusely and went to his motor vehicle to get prescription medication. When he returned, Brian Tucker, a supervisor, inquired as to where he had been. Appellant asked a third time for union representation. Mr. Tucker asked Ms. Passarelli if there was casing work for appellant to do in the office. Ms. Passarelli responded no and that appellant had to undertime Route 808. Again, appellant requested union representation which was not provided. He answered a telephone call from his wife and was told that his physician wanted him to go to the emergency room. Appellant told Walter Sanko, a union representative, what had transpired and went to the emergency room. He contended that Ms. Passarelli's statement regarding the events on March 18, 2009 was not factual.

Subsequently appellant submitted statements from Mr. Sanko and Andrew J. Cagnetti, a Union Vice-President.

In a July 31, 2009 statement, Mr. Sanko related that the main post office was known to have a hostile working environment. He contended that appellant had been erroneously docked for pay in the past, which he grieved and had reinstated. Mr. Sanko stated that appellant related he felt he was being targeted after being instructed to undertime. On March 18, 2009 appellant related that he was not feeling well due to extreme stress. Mr. Sanko spoke to Ms. Passarelli about what had transpired with appellant and that her story changed over the next week.

In an August 1, 2009 statement, Mr. Cagnetti stated that he had to intervene numerous times for appellant due to harassment by his supervisors.

On August 18, 2009 OWCP received undated statements from Linda K. Shall, Postmaster, and Ms. Passarelli regarding the incidents on March 18, 2009 and a statement dated August 13, 2009 from Brian Tucker, Postmaster.

Ms. Shall related that Mr. Tucker and Ms. Passarelli were not discussing appellant during their talk and that appellant did not have permission to leave the facility or his case without Mr. Tucker's permission. As to his request for a union representative, she stated that she was aware of only one request and that Ms. Passarelli stated that she informed him that he was to continue casing his mail while she got a union representative. Ms. Shall did not believe appellant was mistreated, that his projected route showed a time of 7 hours and 10 minutes and that he actually demonstrated 7 hours and 34 minutes.

Ms. Passarelli denied refusing appellant union representation or that he was the only carrier required to do undertime. She spoke with Ms. Shall and Mr. Tucker, informed them what had happened with appellant and that she was going to get a union representation. Ms. Passarelli stated that she and another carrier went out on appellant's route and returned with an hour to spare. She tried to calm appellant down and he did not mention any pain or tingling to her at the time.

In an August 13, 2009 statement, Mr. Tucker disagreed with appellant's version of the events on March 18, 2009. Ms. Passarelli told appellant he had to undertime and he argued with her about this and was going home because he felt ill.

By decision dated December 24, 2009, OWCP denied the claim, finding that appellant failed to establish any compensable factor of employment.

Appellant requested an oral hearing before an OWCP hearing representative, which was held on April 14, 2010. In a March 24, 2010 report, Dr. Linda D. Barrasse, a treating Board-certified internist with a subspecialty in cardiovascular disease, related that she had treated appellant since April 2010. She diagnosed hypertension and coronary artery disease which she concluded had been aggravated by work. Dr. Barrasse noted that hypertension and angina could be triggered by emotional upsets and there "has been a causal effect of work contributing to his coronary artery disease."

In an April 6, 2010 affidavit, Cindy Lucas, a coworker, stated that on March 18, 2009 she saw supervisors counting appellant's mail prior to his arrival, which was indicative that they were going to harass him. When she saw him later that morning he was upset, sweating profusely and flushed. Ms. Lucas stated that appellant was always given a great amount of undertime by the supervisors and that the younger carriers "weren't picked on as much."

In an April 6, 2010 affidavit, James Snyder, a coworker, related that on March 18, 2009 he was present when appellant was being given a hard time by Ms. Passarelli and Mr. Tucker. They went back and forth after appellant requested a union representative. Appellant asked to go to the bathroom to check his blood pressure and when he returned he again asked for a union representative. Later that day he heard Mr. Sanko ask Ms. Passarelli about whether appellant had requested a union representative and she replied yes. Ms. Passarelli informed Mr. Sanko that she was on her way to get a union representative, but Mr. Snyder stated that it did not look to him that she was getting union representation for appellant. He stated that it would not have taken any time to get a union representative for appellant and that appellant "would have need a union steward right away because he goes out on the road."

In an April 7, 2010 affidavit, Mr. Sanko related that he was working on March 18, 2009 when Al Galka told him appellant was having problems and he went to check on the situation. He saw appellant sweating and stated that the "supervisors were being relentless on [appellant] that day." Mr. Sanko found out that appellant had requested a union steward, but no supervisor came to get him. He noted that the supervisors could have called to him when appellant first requested union representation. Mr. Sanko stated that Ms. Passarelli denied that appellant had requested union representation, but when Mr. Sanko informed her that appellant had been overheard as making a request she stated that appellant may have asked for a union representative. Ms. Passarelli subsequently stated that she did not get a union representative because she stopped to speak with the postmaster. As a result of what occurred on March 18, 2009 appellant filed two grievances. A grievance was also filed for the employing establishment's violating policy and causing a hostile work environment when it required appellant to undertime and failed to work with him. Appellant stated that Ms. Passarelli signed and agreed on April 13, 2009 that any proposed undertime would be discussed with carriers and

their projections not used as the sole determination of the daily workload, leaving or return time for a carrier.

In an April 8, 2010 affidavit, Mr. Galka stated that on March 18, 2009 appellant worked an eight-hour day. He was asked to do an extra hour of undertime and that carriers were usually given 15 to 20 minutes of undertime although appellant was given more. Mr. Galka saw that appellant was sweating.

In an April 9, 2010 affidavit, Thomas Gavin, President of the Union Branch 17, provided information about what a typical day for a carrier entails. On March 18, 2009 appellant's projected office hours were 1 hour and 12 minutes, that he arrived at 7:30 a.m., his projected leave time was 7:31 a.m. when the projected leave time for all other routes is 8:28 a.m. Mr. Gavin stated that the two grievances filed on behalf of appellant and their outcome constituted admission by the employer that appellant had not been dealt with properly on March 18, 2009.

On April 16, 2010 OWCP received copies of the grievances filed by appellant due to March 18, 2009 injury. Ms. Passarelli agreed that management would allow union representation as soon as possible in settlement of the grievance that the employing establishment violated various articles when no union representative was provided as requested. In the second grievance settlement, she agreed that any proposed undertime would be discussed with carriers by management and projections would not be the sole determination of a carrier's daily workload, leaving or return time.

In a June 24, 2010 decision, an OWCP hearing representative affirmed the denial of appellant's claim.

### **LEGAL PRECEDENT**

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.<sup>2</sup> 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.<sup>3</sup> 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 FECA.<sup>4</sup> 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>5</sup>

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<sup>2</sup> *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>3</sup> *A.K.*, 58 ECAB 119 (2006); *David Agar*, 57 ECAB 137 (2005).

<sup>4</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>5</sup> *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>6</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>7</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>8</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, 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.<sup>9</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>10</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.<sup>11</sup>

### ANALYSIS

Appellant alleged that he sustained an emotional condition due to employment incidents and conditions. The Board must initially review whether the alleged incidents of employment are compensable factors under the terms of FECA.

Appellant alleged that on March 18, 2009 the employing establishment acted abusively with respect to instructing him to undertime by one hour; not acting on his requests to speak to a union representative and that his wife had to call to tell him that his physician wanted him to go to the emergency room. As noted, disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. On the other hand, the Board has held that a change in an employee's work shift may under certain circumstances be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty.<sup>12</sup> To show that administrative actions such

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<sup>6</sup> See *K.W.*, 59 ECAB 271 (2007); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>7</sup> See *M.D.*, 59 ECAB 211 (2007); *William H. Fortner*, 49 ECAB 324 (1998).

<sup>8</sup> *Jeral R. Gray*, 57 ECAB 611 (2006); *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>9</sup> *D.L.*, 58 ECAB 217 (2006); *Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>10</sup> *K.W.*, *supra* note 6; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>11</sup> *T.G.*, 58 ECAB 189 (2006); *Robert Breeden*, *supra* note 2.

<sup>12</sup> See *Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

as the proposed change in work shift implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse.<sup>13</sup>

Appellant submitted affidavits from coworkers and union representatives with copies of two grievances. The affidavits from Mr. Snyder and Mr. Sanko support appellant's allegation that he requested union representation after being told he was to undertime by one hour. Mr. Snyder overheard appellant request representation by a union steward several times but the requests were not acted upon. Mr. Sanko in his affidavit noted that he was subsequently told appellant requested a union representative, but until appellant had made several requests. He related that two grievances were filed on behalf of appellant based on the denial of union representation and instructing him to undertime, which were both settled. Ms. Passarelli and Ms. Shall acknowledged that appellant requested union representation. In the settlement of the two grievances, management agreed that it would allow for union representation as soon as possible and that any proposed undertime would be discussed with carriers by management and the projections would not be the sole determination of a carrier's daily workload. The Board finds that the evidence is sufficient to establish that appellant's supervisors erred in failing to provide timely union representation in response to appellant's multiple requests. Appellant has established a compensable factor with respect to his allegation.

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. Mr. Dickson instructed him to deliver mail more quickly and allegedly stood behind him while he was casing mail and telling him to be quicker about getting out of the office. Appellant alleged that in a meeting to discuss alleged harassment by Mr. Dickson in November 2006, he was told he could bid out of Mr. Dickson's unit. For harassment or discrimination to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>14</sup> The employing establishment denied that appellant was subjected to harassment or discrimination. Appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.<sup>15</sup> Mr. Cognetti, Ms. Lucas, Mr. Sanko and Mr. Gavin provided affidavits generally stating that appellant was harassed by his supervisors, but they failed to adequately describe any specific incidents of harassment or identify any date on which such harassment occurred. Appellant has not established as factual a basis for his perceptions of discrimination or harassment by his supervisors.<sup>16</sup> He has not established a compensable employment factor with

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<sup>13</sup> See *Richard J. Dube*, 42 ECAB 916 (1991).

<sup>14</sup> *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

<sup>15</sup> 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).

<sup>16</sup> *James E. Norris*, 52 ECAB 93 (2000).

respect to harassment and discrimination.<sup>17</sup> The evidence instead suggests that appellant's feelings were self-generated and thus, not compensable under FECA.<sup>18</sup>

In the present case, appellant has established error by his manager with respect to the events of March 18, 2009 when denied timely union representation after he was told to undertime his route. As he has established a compensable employment factor, OWCP must base its decision on an analysis of the medical evidence. The case will be remanded to OWCP for this purpose.<sup>19</sup> After such further development as deemed necessary, it should issue an appropriate decision on this matter.

### **CONCLUSION**

The Board finds that this case is in posture for decision. Appellant has substantiated a compensable factor of employment necessitating review of the medical evidence by OWCP. On remand, OWCP will consider the medical evidence and issue a *de novo* decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 25, 2010 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: October 13, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> See *Jamel A. White*, 54 ECAB 224 (2002).

<sup>18</sup> See *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>19</sup> See *Tina D. Francis*, 56 ECAB 180 (2004); *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).