United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and	)	**Docket No. 07-1290**
	)	**Issued: December 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Michael Hines, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 9, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 19, 2007 denying his emotional condition claim. Pursuant to 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 sustained stress and aggravated high blood pressure in the performance of duty.

FACTUAL HISTORY

On September 18, 2006 appellant, a 52-year-old labor custodian, filed an occupational disease claim for compensation (Form CA-2), alleging that he experienced an elevated blood pressure due to conditions of his federal employment. He stated that he first became aware of his condition on April 17, 2003 and first realized that it was related to his employment on September 8, 2006.

In an undated supplement to his Form CA-2, appellant attributed his high blood pressure to several work-related incidents. He stated that on September 8, 2006 he experienced stress and an increase in blood pressure due to a verbal exchange with his supervisor. Appellant informed Gerald Naidu, a supervisor, that he had gone by the maintenance office after clocking in as directed. When Mr. Naidu indicated that he had not seen him, appellant stated that supervisor Darrell Collins could verify his report, as he had walked right by him at 8:27 a.m. Appellant stated that, when Mr. Collins denied having seen him at the time indicated he became upset, excused himself and reported to the medical unit. He indicated that he experienced lightheadedness, nervousness and an increase in blood pressure as a result of this event.

In an undated statement, Mr. Collins indicated that, on September 8, 2006 at 12:34 p.m., he overheard Mr. Naidu ask appellant whether he had checked in with Mr. Collins. When Mr. Collins informed Mr. Naidu that he had not checked in, appellant reportedly turned around abruptly and said, "He is a damn liar." Mr. Collins stated that appellant was not provoked and that he and Mr. Naidu remained calm throughout the conversation. He described appellant's behavior as rude and stated that he "definitely created a hostile environment." Mr. Collins noted that appellant announced "sarcastically" that he would not "make contact," and that he did not respond when his name was announced over the intercom system for nearly an hour.

A September 14, 2006 accident report, signed by Mr. Naidu and supervisor Portia Munn, reflected that on September 8, 2006 Mr. Collins and Gayle McWilliams observed appellant "becoming angry and shouting," after Mr. Naidu "calmly asked" if he had checked in that morning. Appellant reportedly went to the medical unit 15 minutes after the incident, due to an elevated blood pressure. The accident report also reflected that on September 13, 2006 Mr. Naidu calmly questioned appellant about his unscheduled absences during the previous weekend. After experiencing a perceived increase in blood pressure, appellant was taken to the medical unit and then referred to the Emeryville Occupational Medical Center. Mr. Naidu opined that appellant had an "observed inability to contain emotions" and needed professional counseling.

On September 14, 2006 Mr. Naidu reported that appellant left work on September 8, 2006 and returned on September 13, 2006, indicating that he had work-related high blood pressure. Appellant reported that he became upset when Mr. Collins denied seeing him when he checked in for work on September 8, 2006. He again became upset and hostile on September 13, 2006 when he attempted to explain the first incident.

In a September 13, 2006 statement, Ms. McWilliams, a support clerk, indicated that, at approximately 12:30 p.m. on September 8, 2006, while standing at the maintenance operations support counter, she overheard a conversation between appellant and Mr. Naidu who were also at the counter. She did not recall the details of the conversation, but she remembered that appellant's voice became "louder and louder." Ms. McWilliams also recalled that, when Mr. Naidu spoke, he spoke in very low tones and that his demeanor was neither threatening nor disrespectful.

Appellant submitted an April 26, 2002 certificate of appreciation; an April 20, 2003 letter of commendation; and a November 18, 2004 certificate of appreciation from the employing establishment.

On September 12, 2005 appellant alleged abuse and threats by coworkers and supervisors. Citing harassment by coworkers, he alleged that: forklift drivers intentionally drove too fast, posing a threat to him; people ignored safety signs while he was cleaning bathrooms; coworkers intentionally dispersed trash after he had collected. Noting abuse by management, he alleged that various supervisors threatened him with a monkey wrench; asked him to forge a legal document; rolled eyes at him and grunted; and sarcastically touched his clothes and asked, "What is this supposed to be?"

The record contains a January 12, 2005 employing establishment timecard, bearing a picture of appellant. The letters "KKK" are clearly marked or etched across the face of the document.

Appellant filed an Equal Employment Opportunity (EEO) claim alleging discrimination on the basis of race, religion and sex. Specifically, he alleged that on April 2, 2005 acting supervisor, Elise Ambeau, gave him instructions and reported water on the workroom floor to appellant's group leader. Appellant also alleged that on May 6, 2005 the letters "KKK" were scratched on his timecard. In a final employing establishment decision dated August 9, 2005, it dismissed appellant's claim. The employing establishment acknowledged that the April 2, 2005 incident relating to water on the workroom floor and the May 6, 2005 incident, involving the defaced timecard, occurred. However, the employing establishment found that appellant did not suffer any measurable personal harm and, therefore, was not aggrieved by either accepted event. It also concluded that the "KKK" incident did not rise to the level of a credible threat. In an appeal of the employing establishment's decision, appellant alleged that he was wrongly accused of a safety violation. He also contended that "KKK" was a symbol of intolerance and hatred based on race. By decision dated December 28, 2005, the EEO Commission affirmed the dismissal of appellant's claim as to the April 2, 2005 incident, as appellant suffered no harm as a result of the incident. However, the EEO Commission found that the claim was improperly dismissed as to the "KKK" incident, which was sufficiently severe to alter the conditions of employment and state a claim of harassment.

On September 22, 2006 appellant filed an employment discrimination complaint with the U.S. District Court of California, alleging:

> (1) A fellow employee falsely accused him publicly three times of stealing his bible.
>
> (2) His wife was assigned to heavy duties at the employing establishment during her third trimester of pregnancy.
>
> (3) The employment start date and dates of military service were originally recorded incorrectly.
>
> (4) The employing establishment tried to transfer him to a different facility, before recognizing his desire not to be transferred.
>
> (5) His supervisor asked him to forge a legal document relating to a September 17, 2003 on-the-job injury.

(6) In 2003, Mr. Thomas created a hostile environment and threatened him with a monkey wrench. Several days after helping appellant fix a leaky toilet, he angrily reprimanded appellant when he found "a little" water on the floor near the repaired toilet. Mr. Thomas allegedly gripped firmly a monkey wrench, as if he was going to hit appellant and said, "I am an ex-Navy seal." Later, Mr. Thomas allegedly threatened to have appellant escorted out of the building. He indicated that the matter was resolved with the assistance of a union representative.

(7) In 2003, appellant was accused by coworkers of being a terrorist, especially when he wore middle-eastern clothing.

(8) In 2003, supervisor P. Ferguson touched his clothing, flipping them sarcastically, saying, "And what is this supposed to mean?"

The record contains numerous treatment notes for the period June 26 through September 29, 2006, reflecting that appellant received treatment at Kaiser Permanente for high blood pressure. On September 29, 2006 Dr. Neal Lischner, an attending physician, stated that appellant had well-controlled hypertension, but no psychiatric disease. On October 25, 2006 appellant indicated that he did not have hypertension until he sustained an April 17, 2003 work-related injury and reiterated that his condition was caused by stressful conditions in the workplace.

On October 31, 2006 the Office informed appellant that the information submitted was insufficient to establish his claim. It requested details of employment-related incidents that he believed contributed to his illness, including names, dates, locations and witnesses, as well as a medical report providing a diagnosis and a reasoned medical opinion as to the cause of the diagnosed condition.

In a statement dated December 2, 2006, Mr. Naidu indicated that Mr. Ferguson denied touching or making comments to appellant about his clothing. Appellant was never charged with disobeying a lawful order, nor was he accused of stealing a bible, but rather was questioned about it, along with other employees. He indicated that any supervisor who observed an unsafe act or condition was required to report it immediately. Mr. Ferguson also stated that, at the time of the reported "KKK" incident, appellant's supervisor retained his time card and issued it to him each day.[1] Mr. Naidu indicated that supervisors had experienced some conduct problems with appellant, including the September 8, 2006 incident. He stated that appellant was treated in the same manner as all other employees.

By decision dated March 19, 2007, the Office denied appellant's claim on the grounds that he failed to establish any compensable factors of employment. It accepted as factual that someone wrote the letters "KKK" on appellant's time card on May 6, 2005 and that on May 2, 2005 an acting supervisor gave him instructions and reported the existence of excess water on the workroom floor to his group leader. The Office found that, although appellant received a

[1] The Board notes that Mr. Naidu did not deny appellant's allegations that the time card was defaced in the manner alleged.

positive outcome from his EEO complaint, he failed to provide clear corroborative evidence to support error or abuse on the part of the employing establishment.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[4]

To establish his occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[5] Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[6]

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 illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his regular or specially assigned employment duties, or to a requirement imposed by the employing establishment, the disability comes within coverage of the Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of his work, or his fear and anxiety regarding his ability to carry out his duties.[7] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8102(a).

[4] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *Claudio Vazquez*, 52 ECAB 496, 498 (2001).

[6] *Id.*

[7] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[8] Moreover, although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Thus, the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.[9]

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed factors of employment and may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.[10] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.[11] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim but rather must be corroborated by the evidence.[12] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value, and will stand unless refuted by strong or persuasive evidence.[13]

ANALYSIS

Appellant alleged that he sustained stress and aggravated high blood pressure as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

Appellant attributed his emotional condition and associated physical complaints principally to the actions of his supervisors. He alleged that the employing establishment incorrectly recorded his employment start date and dates of military service; tried to transfer him to a different facility before recognizing his desire not to be transferred; asked him to forge a legal document relating to his 2003 on-the-job injury; and assigned his wife to heavy duties at the employing establishment during her third trimester of pregnancy. The Board finds that these

[8] *Id.*, *see also Peter D. Butt, Jr.*, 56 ECAB ___ (Docket No. 04-1255, issued October 13, 2004).

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004); *see also Ernest J. Malagrida*, 51 ECAB 287, 288 (2000).

[10] *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[11] *See Charles D. Edwards*, *supra* note 9.

[12] *Charles E. McAndrews*, *supra* note 4; *see also Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence corroborated such allegations).

[13] *See Thelma Rogers*, 42 ECAB 866 (1991).

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 disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities 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 a compensable employment factor where the 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 it acted reasonably.[16] In this case, appellant has not submitted any evidence to show that the employing establishment committed error or abuse with respect to these matters and has provided no corroborative evidence to support these allegations. An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.[17] Moreover, allegations pertaining to appellant's wife are not relevant to allegations of abuse against him.

Appellant also alleged that he was inappropriately reprimanded by his supervisors. He stated that on April 2, 2005 acting supervisor Ms. Ambeau gave him instructions and reported excess water on the workroom floor to his group leader. However, appellant has provided no evidence of error or abuse. Mr. Naidu explained that supervisors are required to immediately report all unsafe acts or conditions observed. Therefore, the supervisor's act of reporting the presence of water on the workroom floor was not only reasonable, but necessary.

Appellant alleged that in 2003, several days after helping him fix a leaky toilet, Mr. Thomas angrily reprimanded him when he found "a little" water on the floor near the repaired toilet. Mr. Thomas allegedly gripped a monkey wrench firmly, as if he was going to hit appellant and said, "I am an ex-Navy seal." Later, Mr. Thomas allegedly threatened to have appellant escorted out of the building. The Board has recognized the compensability of verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[18] Appellant provided no evidence to corroborate the alleged statements or actions. However, assuming arguendo that the statements were actually made, the Board finds that they do not constitute verbal abuse or harassment. While the statements may have engendered offensive feelings, they did not sufficiently affect the conditions of employment to constitute a compensable factor.[19] Additionally, appellant has not provided any evidence that his supervisor's actions posed any physical threat to him. The Board has recognized the compensability of physical threats in certain situations, but the factual aspects

[14] *See Lori A. Facey*, 55 ECAB 217 (2004). *See also 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.*

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

[17] *Id.*

[18] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[19] *See Denis M. Dupor*, 51 ECAB 482, 486 (2000).

of such claimed threats must be established in order to show a compensable employment factor.[20] The Board finds that appellant's emotional reaction to his supervisor's grip on the monkey wrench must be considered self-generated, in that it resulted from his perceptions regarding his supervisor's actions.[21]

Similarly, administrative actions by appellant's supervisors on September 8, 2006 do not constitute error or abuse. Appellant alleged that he experienced lightheadedness, nervousness and an increase in blood pressure when Mr. Collins denied having seen him "check in" on the date in question. Although statements by the supervisors and coworkers reflected that appellant became angry and shouted, he did not allege, nor did the evidence reflect, that either supervisor acted or spoke in an abusive manner. On the contrary, Ms. McWilliams stated that Mr. Naidu spoke in a low tone and that his demeanor was neither threatening nor disrespectful. Accordingly, appellant has not established a compensable factor of employment with respect to the September 8, 2006 incident. For all of the above reasons, the Board finds that he has not established a compensable employment factor under the Act with respect to administrative matters.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[22] However, for 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.[23] Appellant alleged that coworkers falsely accused him publicly of stealing a bible; accused him of being a terrorist; intentionally drove forklifts too fast, posing a threat to him; ignored safety signs while he was cleaning bathrooms; and intentionally dispersed trash that he had collected. He claimed that a supervisor rolled her eyes at him and grunted and that Mr. Ferguson sarcastically touched his clothes and asked, "What is this supposed to be?" The employing establishment has denied the allegation that Mr. Ferguson touched appellant's clothing or made sarcastic comments to him, and appellant has not submitted any evidence to support the other above-mentioned allegations of harassment.[24] As his representations alone are insufficient to establish a factual basis for his claim,[25] the Board finds that appellant has not established a compensable employment factor under the Act with respect to these above-described allegations.

[20] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

[21] *See David S. Lee*, 56 ECAB ___ (Docket No. 04-2133, issued June 20, 2005).

[22] *See Lori A. Facey*, *supra* note 15. *See also David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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

[24] *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).

[25] *Charles E. McAndrews*, *supra* note 4.

The Office accepted as factual that someone wrote the letters "KKK" on appellant's time card on May 6, 2005. The record contains a copy of appellant's January 12, 2005 time card, reflecting the letters "KKK" etched or written across a picture of appellant's face. In its December 28, 2005 decision, the EEO Commission found that the writing was sufficiently severe to alter the conditions of employment and state a claim of harassment. The Office, however, found that, although he received a positive outcome from his EEO complaint, appellant failed to provide clear corroborative evidence to support error or abuse on the part of the employing establishment and, therefore, there was no compensable factor of employment with respect to the "KKK" writing.[26]

The Board finds that appellant's allegation regarding the "KKK" incident constitutes a compensable employment factor. Racial epithets, disparaging comments concerning national or ethnic origin or sexualized name-calling, jokes or innuendo generally fall outside the Act. However, such instances may give rise to coverage under the Act, when established by the facts in evidence. In *Abe E. Scott*,[27] the Board found that the supervisor's use of the term "apes" toward the claimant was derogatory and constituted harassment. In *Frank J. Muhammad*,[28] the Board found that a "Ku Klux Klan" flier discovered by a claimant in the break room did not constitute a compensable factor of employment. As the claimant had not established that the flier was sent to or directed at him, the Board determined that it was not a compensable factor. The facts of this case are distinguishable from those in *Muhammad*, in that the "KKK" message was directed at appellant. The Board recognizes that the "KKK" symbol evokes serious images of terrorism based on racial discrimination. The Board finds here that the act of defacing appellant's time card by placing "KKK" across his face, clearly directed at appellant, constitutes harassment and establishes a compensable factor of employment within coverage of the Act.

In the present case, appellant has established a compensable employment factor with respect to the defaced time card. The case will be remanded to the Office for preparation of a statement of accepted facts and further development of the medical evidence. After such development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that appellant has established a compensable employment factor which requires an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case

[26] The Board notes that the determination of an employee's rights and remedies under other statutory authority does not establish entitlement to benefits under the Act for disability. Under the Act, for a disability determination, the employee's injury must be shown to be causally related to an accepted injury or factors of employment. For this reason, the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability under the Act. *See Daniel Deparini*, 44 ECAB 657 (1993). Findings made by the Merit Systems Protection Board or EEO Commission may constitute substantial evidence relative to the claim to be considered by the Office and the Board. *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[27] 45 ECAB 164 (1993).

[28] Docket No. 99-951 (issued March 9, 2000).

will be remanded to the Office for this purpose. After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 19, 2007 be set aside and the case be remanded for further proceedings consistent with this decision of the Board.

Issued: December 6, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board