U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTY D. HOLMES and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

Docket No. 01-1134; Submitted on the Record;
Issued July 1, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

Appellant, then a 29-year-old mail carrier, filed an occupational disease claim on August 26, 1995 for an emotional condition arising out of his federal employment. The claim was subsequently accepted for major depression with minimal time lost from work between August to September 1995. As of April 1996, appellant's condition was in remission.

Appellant stopped work on December 16, 1996. He timely filed another claim, claim number 09-0424950, for an emotional reaction to his employment beginning December 1996. By decision dated October 27, 1998, the Office accepted the condition of affective disorder as related to work factors accepted as taking place and arising from the performance of duty for dates since September 1995. Intermittent wage loss was paid through October 21, 1998. The medical evidence reflected that appellant's emotional difficulties resolved as of October 21, 1998.

On February 26, 1999 appellant filed another claim, claim number 09-0451462, for an emotional reaction to his employment, which was initially filed as a recurrence of claim number 09-0424950. A new claim number was assigned as appellant identified new factors of his employment believed to have contributed to his emotional condition.[1] By decision dated September 10, 1999, the claim was denied on the basis that appellant failed to demonstrate that he sustained an emotional condition while in the performance of his work duties. By decisions dated March 15, July 13 and November 22, 2000, appellant's requests for modification of the

[1] On September 27, 1999 the Office combined appellant's claim numbers 09-0424950 and 09-451462 under claim number 09-0424950. On August 24, 2000 the Office incorporated claim number A9-406733 into claim number 09-0424950.

initial decision were denied. By decision dated January 23, 2001, the Office denied appellant's application for a review on the grounds that the evidence was irrelevant and immaterial in nature.[2]

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

The Board notes that the Office in developing the scope of this claim, initially under claim number A9-451462, found that the claim covers appellant's contentions of stressful job factors from October 29, 1998 through February 9, 1999. The Office properly noted that appellant was off work in January 1999, for a personal illness and stopped work on February 10, 1999 due to stress. Appellant has not returned to duty. In this case, the factors appellant alleged to have contributed to his emotional condition are: being belittled by his supervisor on the workroom floor October 29 through November 14, 1998; the denial of his requested schedule change for October 30, 1998; desire to have been allowed to come in early and do the work that had already been performed for one and one-half hours on October 30, 1998 by the router; nonadherence to the national contract on October 30, 1998; provocation by his supervisor which caused him to get in trouble on October 30, 1998; denial of one-half hour street assistance requested on October 30, 1998; unjust issuance of a November 18, 1998 notice of a 14-day suspension for unsatisfactory work performance on October 30, 1998; failure of his union to timely file or properly process grievances; nonadherence to the progressive policy regarding the suspension; letter case labeling problems in January 1999; supervisory harassment, intimidation, retaliation and supervisors trying to get him to speed up using the ineffective Delivery Point Sequence (DPS) method; feeling management did whatever necessary to get their own monetary bonuses on the backs of the subordinate workforce; supervisory threats and conspiracy to get him fired; denial of requested union representation; hearing a supervisor berate and verbally abuse a letter carrier on February 2, 1999; dismay that nothing was done to the supervisor; not being given enough time to do his delivery route; a hostile work environment; a dog problem; and instructions received from the employing establishment after his February 10, 1999 work stoppage, including an order he refused on February 11, 1999 to report to work so that he could be sent for a medical evaluation at the contract facility and requirement to submit periodic undated medical reports on his disability status.

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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. On the other hand the disability is not covered where it results from such

[2] The record contains an April 6, 2001 decision, of the Office issued after appellant filed his appeal with the Board on March 5, 2001 which addresses a denial of an oral hearing request. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and the Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

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.[3]

Verbal altercations and difficult relationship with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment.[4] Verbal altercations may constitute harassment, but for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[5]

Appellant has attributed his emotional condition and disability to the alleged actions and intent of others, which he characterizes as harassment, retaliation and intimidation. He has alleged a hostile work environment to being belittled by supervisors, provoked by his supervisors to getting in trouble, unjustified disciplinary actions and to nonadherence of the contract. In a September 10, 1999 letter, the employing establishment advised that appellant's station manager, Don Tucci and Supervisor Judy Mauller stated that appellant had a problem getting along with all the supervisors who have supervised him since they have been at New Market Station. They stated that appellant continuously tells management what he is and is not going to do. Ms. Mauller stated that appellant enjoys taunting her as a supervisor. An example given was appellant's comments made to Ms. Mauller such as: "management is lazy and I'm going to work at my own pace and there is nothing they can do about it. Send me home, I want you to send me home."

Although appellant complained that his supervisors tried to get him to speed up using the DPS method, there is no evidence to indicate that he was pressured to meet unreasonable timeframes or deadlines. Instead, it appears that appellant told his supervisors that he was going to work at his own pace. In an April 11, 1999 statement, Mr. Tucci advised that the DPS system was put in place in their office and across the nation during 1996. He stated that, in the past, the carrier cased this mail in his case and was given time for this process. Mr. Tucci specifically denied that any harassment and intimidation were being used to try to speed appellant up. Appellant's disagreement with the utilization of the DPS method constitutes appellant's desire to work in a different position and is not a compensable factor of employment, as it does not involve appellant's ability to perform his or her regular or specially assigned work duties.[6] Appellant alleged that he was harassed by the supervisors in trying to get him to speed up using, in his estimation the ineffective DPS method, but he provided no corroborating evidence, such as

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

[4] *Christopher Jolicoeur*, 49 ECAB 553, 556 (1998).

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

[6] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

witness statements, to establish that such actions actually occurred.[7] The Board notes that the record contains statements pertaining to the ineffectiveness of the DPS system, the lack of inspections since the installation of the system, along with router and delivery problems, which the employing establishment disputed in its September 10, 1999 letter. However, in this instance, appellant has merely expressed his dissatisfaction with perceived poor management and has not alleged that those problems affected the performance of his regular or specially assigned duties.

Appellant alleged that he was belittled by his supervisors on the workroom floor from October 29 through November 12, 1998, but has presented no evidence to substantiate such allegations. Although it is unclear as to what incident or date Ms. Mauller is referring to in the September 10, 1999 letter, the employing establishment noted that she denied screaming at appellant as Ms. Mauller stated that she would need a megaphone to be heard over the DPS system. Regarding appellant's allegation that he was belittled on the workroom floor, the employing establishment denied that appellant was subject to harassment or discrimination and appellant has not specified with sufficient detail as to how he was belittled nor submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[8]

Inasmuch as appellant has not substantiated his allegations of harassment or intimidation by the employing establishment regarding the claimed belittlement by his supervisors on October 29 through November 14, 1998, supervisory harassment, intimidation and retaliation in trying to get him to speed up using the DPS method, or the claimed events of October 30, 1998, which lead to an issuance of a November 18, 1998 suspension notice, these allegations are not compensable factors of employment.

An employee's complaints concerning the manner in which a supervisor performs his duties or exercises his supervisory discretion falls, as a rule, outside the scope of coverage provided by the Act.[9] This principle recognizes that supervisors or managers in general must be allowed to perform their duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[10]

Appellant has alleged that harassment and intimidation were being used to threaten his job. The employing establishment denied appellant's allegation that management tries to intimidate appellant with discipline. The only disciplinary action issued during the period covered by this claim is the November 18, 1998 notice of a 14-day suspension. The record reflects that this was reduced to a seven-day suspension, which would be removed from appellant's file in one year from the date of issue (May 26, 1999), pending no further cause for

[7] *See William P. George*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[8] *See Joel Parker, Sr.*, 43 ECAB 220 (1991).

[9] *Supra* note 2 at 557.

[10] *See Alfred Arts*, 45 ECAB 530 (1994).

discipline during this time period. Appellant was also paid five days pay at the straight time rate. The Board notes, however, that the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse on the employing establishment's part.[11] Moreover, the step 3 agreement which reduced appellant's suspension did not contain any findings of error on the part of the employing establishment. The record is devoid of a finding of an abuse of discretion on the employing establishment's part for a January 28, 1999 denial of appellant's request for advance sick leave; the denial of his requested schedule change for October 30, 1998; desire to have been allowed to come in early and do the work that had already been performed for one and one-half hours on October 30, 1998 by the router. Accordingly, there is no evidence to show that the administrative functions of the employing establishment was erroneous or abusive or showed an intent on the employing establishment's part that it had conspired or threatened to get rid of or fire appellant, as he so alleged. Appellant's feeling of job insecurity is not a compensable factor of employment under the Act.[12]

The Board notes that the record contains an April 14, 1999 statement of Sherrie L. Bates, president of branch 238, which attests to the atmosphere on the workroom floor and the fact that the postal station was operating on a reduced work force. Ms. Bates alleged that those carriers who were not on the overtime desired list were forced to work over and many times had to come into work on their day off. Although she stated that appellant was directly involved in the turmoil, no specifics relating to appellant's situation or how he was affected were provided. Other than a list of grievances filed, Ms. Bates provided no supportive evidence. In a November 9, 1999 statement, she advised that, through her conversations with appellant and the grievances appellant filed, she was aware of the incidents which caused appellant stress. In a subsequent statement of April 12, 2000, Ms. Bates provides specific dates and incidents, which caused appellant stress. Ms. Bates, however, has no personal knowledge of appellant's claimed incidents as she did not witness them firsthand. Her statements do not establish error or abuse on the part of the employing establishment in regards to appellant's allegations. Although witness statements in the file attest to the conditions on the workroom floor and the perceived environment, the statements are written in a general manner without any specific examples of harassment or belittlement by management with regards to appellant.

Many of appellant's allegations concern administrative or personnel matters of the employing establishment, which are not covered under the Act unless error or abuse is shown. Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.[13] The Board finds that appellant's allegations that the employing establishment denied a requested schedule change for October 30, 1998; denial of a one-half hour street assistance request on October 30, 1998; the issuance of a November 18, 1998 notice of a 14-day

[11] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[12] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[13] *Michael Thomas Plante*, *supra* note 11.

suspension for unsatisfactory work performance on October 30, 1998; appellant's own desire to come in early and do the work already performed by the router; the denial of requested union representation; and a February 11, 1999 order to report to work for a medical evaluation relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[14]

The evidence of file reflects that the February 11, 1999 order for appellant to report to work following a work-related injury was within management requirements and discretion. In his April 11, 1999 statement, Mr. Tucci stated that management was required to take any employee to our contract physician who states they have had an accident or work-related injury. The February 11, 1999 statement from Victoria Snyder, the supervisor who gave appellant the direct order to report to work and undergo an evaluation, supports Mr. Tucci's statement that a postal physician needed to see every injured employee. There is insufficient evidence to support any error or abuse by the employing establishment in the administration of an administrative or personnel matter. Thus, appellant's reaction to the February 11, 1999 order is considered self-generated as it is not related to assigned duties.

Appellant has contended that he was denied union representation, when he requested to talk to a union steward on February 5, 1999. Matters pertaining to union activities are not deemed employment factors.[15] There is no evidence that the employing establishment, in taking the actions it did in regard to denying appellant's immediate request for union representation, erred or acted abusively. In their letter of September 10, 1999, the employing establishment advised that at the time appellant requested a union representative, on February 5, 1999 he was to have a route inspection and time was of the essence. Accordingly, appellant was granted 15 minutes to meet with his union steward on February 9, 1999. The union steward, Gloria Miller, noted that February 9, 1999 approval of appellant to meet with his union steward was in violation of a two-day time frame and asserted that the union was never given opportunity to help appellant as he called in sick February 10, 1999 and went on indefinite stress leave February 11, 1999. Ms. Miller's statement is not enough to show that the employing establishment erred or acted abusively in denying appellant's request for union representative as she did not directly witness the situation whereby appellant requested representation and appellant has not produced any witnesses to refute the employing establishment's position that time was of the essence as appellant was to have a route inspection. Although the union subsequently entered into a February 19, 1999 agreement with the employing establishment, this agreement is not specific to appellant and sets a general standard.

Appellant alleged that he underwent stress by dealing with unsatisfactory case labels and, by not being allowed to correct this mistake, which management created, he had to go through the grievance procedure in order to redo the case labels. Appellant argued that he should not have had to go through the grievance procedure. He further stated that management would verbally abuse him by telling him he was not meeting standard. Although the Board has held

[14] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990).

[15] *Diana M. Ramirez*, 48 ECAB 308 (1997).

that emotional reactions to situations, in which an employee is trying to meet his position requirements are compensable,[16] it appears that appellant is arguing the fact that he was given unsatisfactory case labels and not being allowed to correct the procedure caused him stress as opposed to not meeting his actual assigned duties or increasing the amount of time he had to case. The record is devoid of any showing that appellant did not meet the standards of his job because of the unsatisfactory case labels or was disciplined for needed extra time to case. Nor is there any probative or reliable evidence showing that the employing establishment verbally abused him by telling him that he was not meeting standard. Although a February 19, 1999 agreement between the union and management addressed the relabeling issue, this is not specific to appellant's situation and fails to demonstrate that the employing establishment's past practice concerning relabeling was unreasonable or abusive. As such, appellant's dissatisfaction with management's relabeling techniques constitutes frustration for not being permitted to work in a particular environment and is not compensable under the Act.[17]

Appellant stated that a dog problem had existed on his route for over two years and that management intentionally created stress and intimidated him over this unsafe address by repeatedly trying to force him to deliver to an unsafe mailbox, even threatening discipline. Pertaining to the relevant time period covered in this claim, appellant stated that the new station manager, Don Lowther, told his utility carrier, Yolanda Walker and himself on October 23, 1998 that, the next time the dog attacked someone, mail delivery would be shut off. He alleged that Ms. Walker was attacked on October 26, 1998 by the dog running loose. Appellant stated that Ms. Walker was forced to deliver to the unsafe house with the dog on January 26, 1999 and he was told, on January 27, 1999 to start delivering to that address, which he refused based on safety reasons. Appellant asserted that Mr. Lowther told the union steward on January 28, 1998 that the mailbox had been moved, but appellant stated that Mr. Lowther was not telling the truth as the mailbox was in the same spot. Appellant stated that he discussed the unsafe situation concerning the dog with the Akron office on February 4, 1999. On February 5, 1999 appellant stated that he was told the mailbox had been moved to the street and that he needed to start delivery.

The evidence reflects that on January 29, 1998 appellant was given a direct order to deliver mail to house and, if there was a problem with a dog, then carrier was not to deliver the mail and to immediately call his supervisor. Mr. Tucci's statement, faxed June 20, 2000, advised that appellant's situation with the dog was exaggerated. He advised that the dog never attacked anyone or been loose and came after him. Mr. Tucci advised that appellant did not want to deliver to the house at all and refused to deliver mail to the house. He related that the mailbox was eventually moved to the sidewalk by the request of the safety office in Akron. A statement dated September 20, 2000 from Ms. Walker was later recanted by Ms. Walker in an October 19, 2000 statement, in which she wrote that she did not write the September 20, 2000 statement and that she had no written documentation of dates or incidences, which would support appellant's claim, although she did recall some events.

[16] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

[17] *See Michael Thomas Plante*, *supra* note 11.

The case record supports that a dog problem did exist at the residence in question and other carriers complained that they encountered the loose dog and had informed management. In a January 22, 1998 statement, John Laughlin, a coworker, stated that the dog has charged him from across the street at times in a very threatening manner, Mr. Laughlin had been forced to walk backwards down the street because each time he turned around the dog would charge up behind him to attack. However, as there is no specific dates given regarding the dog attacks, there is no probative evidence to determine whether the address had a dog problem creating an unsafe situation during the period of October 29, 1998 through February 9, 1999, for which appellant is alleging an emotional condition. Thus, there is no showing of error or abuse by an employing establishment supervisor in the exercise of supervisory discretion in the administration of a personnel matter and there is insufficient evidence to show that the supervisor acted unreasonably in issuing appellant an order to deliver mail to the address prior to the Akron office moving the mailbox at the address in question to the street. Moreover, the record is devoid of any showing that appellant was disciplined as a result of his refusal to deliver to the address on the basis that it was an unsafe address.[18]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[19]

The Board further finds that the Office did not abuse its discretion to reopen appellant's case for further consideration of the merits of his claim.

Under section 8128(a) of the Act,[20] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[21] which provides that a

[18] The Board notes that the Office precluded the admission of an audiotape and videotape of the residence in question. However, as such material is not contained in the record before the Board, the Board is precluded from making a determination.

[19] 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).

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b) (1999).

claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[22] If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office will deny the application for reconsideration without reopening the case for review.[23] The submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[24]

In this case, the Office found that appellant had not established any compensable factors of employment and, therefore, did not establish that he sustained an injury in the performance of duty during the period October 29, 1998 through February 9, 1999. In his December 12, 2000 reconsideration request, appellant essentially reargued points previously addressed by the Office and submitted evidence. The Board finds that this evidence is insufficient to require reopening of appellant's case for further review of the merits of his claim as it is either irrelevant, immaterial or duplicative of evidence already in the case record or fails to offer any new information supportive of appellant's claim.

Accordingly, appellant has not established that the Office abused its discretion in its January 23, 2001 decision by denying his request for a review on the merits of its November 22, 2000 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office or failed to submit relevant and pertinent evidence not previously considered by the Office.

[22] 20 C.F.R. § 10.608(b) (1999).

[23] *Id.; John E. Watson*, 44 ECAB 612, 614 (1993).

[24] *Jerome Ginsberg*, 32 ECAB 31 (1980).

Consequently, the January 23, 2001 and November 22 and July 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member