U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDY J. PALOUKOS and U.S. POSTAL SERVICE,
POST OFFICE, Salt Lake City, UT

Docket No. 02-1500; Submitted on the Record;
Issued July 15, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

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

On August 6, 2000 appellant, then a 39-year-old flat sorting machine clerk, filed a traumatic injury claim alleging that he sustained a stress-related emotional condition. The date of injury was listed as May 26, 2000. In an attached statement, appellant alleged that the employing establishment had failed to provide him a job within his medical restrictions, which caused him to suffer a "burn out" from stress and seek medical attention from Dr. Ronald France, a psychologist, on May 26, 2000.[1] Appellant spoke to Dr. France of "recurring violent dreams" centered on the employing establishment and certain postal managers. As appellant's attending psychiatrist was out of town, Dr. France subsequently called the employing establishment's medical clinic to speak with Dr. Doug Grose, an employing establishment physician, to recommend that appellant take time off from work. He was not available. Dr. France spoke with a nurse and mentioned appellant's dreams. Appellant alleged that, in response, postal inspectors came to his home on that day to question him about "verbal threats." They advised that he was not to return to postal property until he received a medical clearance.

The record contains a May 26, 2000 letter sent to the employing establishment by Dr. France, stating that he was "writing to express the concern I have that [appellant] *is experiencing a chronic stress reaction and in his current state of mind, may be potentially dangerous to persons with whom he is interacting at the postal service*." (Emphasis added.)

[1] The Office of Workers' Compensation Programs previously accepted that appellant sustained a temporary aggravation of a preexisting depressive condition, as a result of work-related stress on July 31, 1998 and a bilateral repetitive motion disorder of the upper extremities. Appellant was offered a modified distribution clerk position, which the Office deemed to be suitable work. His treating physician approved the position and he accepted the position on May 17, 2000. Appellant's tour of duty was from 3:00 p.m. to 11:30 p.m. and 5:00 p.m. to 1:30 a.m.

Dr. France continued:

> "I am very concerned about the present emotional status of [appellant]. He has related to me the fact that he has had recurring dreams of shooting Gus Chaus and Walter Lujan. [Appellant] has also indicated that he has been looking into ways of getting airfare to Denver, Colorado, so that he could meet with Paula Brietling. My personal experience in working with veterans with [p]ost[-]traumatic [s]tress [d]isorder causes me to be concerned that [appellant's] recurring dreams and waking thoughts about [Ms.] Breitling may be precursors to aggressive acting out on [appellant's] part."

On May 26, 2000 Jerry Johnston, the manager of distributions operations, sent an email to certain postal service staff, stating:

> "[Appellant], an employee that at one time worked at the GMF on tour three and presently works at the AMC has apparently made some type of verbal threat towards a few managers. This information was supplied through the medical community so specifics are not readily available. Although I do n[o]t feel anyone is seriously in danger at this time, everyone should be on alert."
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> "If you see [appellant] on any U[nited] S[tates] P[ostal] S[ervice] property you are to call 911 first and then the [p]ostal [i]nspectors. He is not to be allowed in any of our facilities for any reason until further notice. Action is being taken to assure he fully understands that he is not allowed on postal property at this time, so I doubt you will see him. Please do n[o]t be alarmed by this notice, just be alert and know what to do if he is seen."

A September 29, 2000 memorandum was prepared by Joseph L. Schouten, a postal inspector, with regard to a visit to appellant's home on May 26, 2000. He noted that in response to past violence committed by postal employees, the postal service established a "zero tolerance" policy with protocols to follow when potential acts of violence are brought to the attention of management. Mr. Schouten stated that Dr. France had related that appellant was frustrated with postal managers and an Office claims examiner in Denver. He described an acute stress reaction and sleep disorder and, when asked to rate appellant on a scale of 1 to 10 on a potential for violence, "responded with a number three if he did not go to work and higher if he went to work." Based on this information, Mr. Schouten contacted appellant to arrange an interview to explain the employing establishment's zero tolerance policy. After he arrived and introduced himself, appellant declined to speak with the inspectors until Dr. France arrived. After 20 minutes, he arrived and the parties discussed appellant's statements and the possibility of a shift change. Mr. Schouten indicated that appellant was given paperwork to have completed by his treating physician prior to receiving a clearance to return to work. Mr. Schouten noted that appellant was advised that he was restricted from any postal property until he received such clearance.

In a report dated July 3, 2000, Dr. Michael Smith, appellant's attending Board-certified psychiatrist, indicated that he did not believe appellant was a physical threat to anyone at that time. He was cleared to return to work and it was recommended that he be allowed to work a

shift allowing him to leave no later that 11:30 p.m. Dr. Smith reported that people with mood disorders, such as appellant, were vulnerable to mood exacerbations when sleep was disrupted or inconsistent.

On July 12, 2000 the employing establishment notified appellant that he was being placed on administrative leave, without charge to annual or sick leave or loss of pay. While on leave, appellant was expected to return to work his normal work schedule at any time. Appellant was advised that he should call his work location and talk to the manager each regularly scheduled workday.

In a July 29, 2000 statement to appellant's attorney, Dr. France described that, when he saw appellant on May 26, 2000, he was struck by how distressed appellant appeared, with huge bags under his eyes and complaints of experiencing crippling pain in the chest, shoulders and upper arms. Dr. France related that appellant complained of not being able to get any sleep and "experiencing troubling and recurring dreams," consisting of "him injuring some of his managers." He stated that appellant was under a great deal of stress and was at risk for developing reflex sympathetic dystrophy. Dr. France called the employing establishment to arrange for appellant to take time off to recuperate and get some rest. Because Dr. Grose was not available to accept appellant's call, Dr. France stated that appellant spoke with Joyce Halterman, a nurse, about his dreams. Ms. Halterman inquired whether this was a "Tarasoff warning"[2] and Dr. France stated that it was not. He noted, however, that he later spoke with Dr. Grose and other employing establishment personnel that day and "stated my apprehension that recurring dreams sometimes are acted out by persons who are in extreme distress." Dr. France noted that he was present when the postal inspectors visited appellant's house and reiterated that appellant had not actually made any verbal threats against anyone.

The record indicates that appellant underwent fitness-for-duty examinations on August 3, 2000 with Dr. Roger Stuart, a physiologist; on August 29, 2000 with Nancy Cohn, a clinical psychologist; and on August 30, 2000 with Dr. Jeffrey Kovnick, a psychiatrist. The physicians found that appellant was fit for duty and recommended his return to work.

On September 30, 2000 appellant alleged that on September 1, 2000 Mr. Schouten and another postal inspector came to his home unannounced and harassed him by presenting him a letter and yelling at him.

In a November 9, 2000 statement, Mr. Schouten and Terry Wilson, a fellow postal inspector, indicated that on September 1, 2000 they hand-delivered a letter to appellant at his home.[3] They stated that they reviewed the letter with appellant, asked if he had any further questions and he stated: "No." Mr. Schouten and Mr. Wilson denied any type of verbal altercation took place on that date.

[2] *See Tarasoff v. Regents of University of California*, 17 Cal.3d 425 (1976). The *Tarasoff* decision pertains to the responsibility of a psychotherapist to warn an intended victim of potential violence by a client.

[3] The letter advised appellant as to two postal facilities he was restricted from entering without prior notice.

On October 16, 2000 the Office noted that it was treating appellant's claim as one for occupational disease rather than a traumatic injury. The Office noted that he had alleged additional events after filing the CA-1 form to which he attributed his emotional condition which occurred following the May 26, 2000 incident.

In a February 1, 2001 memorandum, Mr. Johnston stated that postal records established that Dr. France made a telephone call to Dr. Grose on May 26, 2000 concerning appellant's deteriorating condition. As Dr. Grose was not in the office, Dr. France spoke with an occupational nurse. Dr. Grose subsequently spoke with Dr. France regarding appellant and his level of concern about the potential risk toward certain individuals. He was in agreement that the individuals should be contacted for their safety. Mr. Johnston noted that, prior to Dr. France's telephone call; in 11 years at the employing establishment, Dr. Grose had never received a warning from any treating physician reporting a potential risk. Mr. Johnston stated that, whether or not Dr. France intended a Tarasoff warning, the employing establishment's management was obligated to notify key individuals to take precautionary measures, which he did by email that day.

In a February 27, 2001 decision, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an injury while in the performance of duty.

On November 2, 2001 appellant, through counsel, requested reconsideration and submitted argument contending error by the employing establishment and Office. Appellant argued that his emotional injury resulted from events that took place during the course of May 26, 2000 and he was eligible for continuation of pay. He contended that the Office erred by not finding that the employing establishment overreacted to his doctor's report and misrepresented appellant's behavior as making a violent threat, leading to a false email and a threatening visit by postal inspectors to his home on May 26, 2000.

In a February 20, 2002 decision, the Office denied modification of the February 27, 2001 decision.

The Board finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence sufficient to establish compensable employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that a compensable employment factor caused or contributed to the emotional condition.[4]

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 coverage of workers' compensation. When disability results from an employee's emotional reaction to

[4] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act. On the other hand, disability is not covered when 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 work environment or to hold a particular position.[5]

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[6] However the Board has held that coverage under the Act may attach if the factual circumstances surrounding the administrative or personnel action establishes error or abuse by the employing establishment personnel in dealing with a claimant.[7] In determining whether the employing establishment erred or acted abusively, the Board will examine whether the employing establishment has acted reasonably.[8]

Initially, the Board finds that the Office properly adjudicated this claim as one for occupational disease. The Office's implementing federal regulations distinguish claims of traumatic injury from those of occupational disease. A traumatic injury means a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift.[9] An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.[10] In this case, appellant has attributed his emotional condition to various factors of his employment occurring over a period longer than a single day or work shift on May 26, 2000. He alleged that the employing establishment did not accommodate his work restrictions upon his return to work, culminating in appellant's treatment by Dr. France on May 26, 2000, the telephone call by Dr. France to the employing establishment, the agency internal email and visits by postal inspectors to his home on that day and on September 1, 2000. While the core of the allegations pertains to events occurring on May 26, 2000, appellant's allegations of harassment and error both prior to and following that day have demanded consideration of factors beyond a single day or work shift. For this reason, the Office properly adjudicated the claim as one for occupational disease.[11]

Appellant has not attributed his emotional condition to the regular or specially assigned duties required in his employment. Rather, he contended that the employing establishment did

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

[6] *See Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

[7] *See Elizabeth Pinero*, 46 ECAB 123 (1994).

[8] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[9] 20 C.F.R. § 10.5(ee).

[10] 20 C.F.R. § 10.5(q).

[11] For this reason, appellant is not eligible for continuation of pay. *See* 5 U.S.C. § 8118(a); *Carla J. Hereau*, 33 ECAB 1107 (1982).

not accommodate his medical restrictions. The record establishes that the Office accepted that appellant sustained a temporary aggravation of a preexisting depressive condition and bilateral upper extremity pain. Under a suitable job offer, appellant returned to a limited-duty distribution clerk position. On May 17, 2000 Dr. John F. Foley, an attending physician Board-certified in psychiatry and neurology, approved the limited-duty position without additional restrictions. The position required appellant to work Thursday through Monday on tours from 3:00 p.m. to 11:30 p.m. and from 5:00 p.m. to 1:30 a.m. The evidence of record does not establish that the employing establishment failed to accommodate appellant's work restrictions. Appellant recounted that, prior to his appointment with Dr. France of Friday, May 26, 2000, he was in pain and exhausted as he had "worked the previous four nights late." This allegation, however, is not sufficient to establish that the work to which appellant was assigned was outside the physical limitations recommended by his attending physicians. The allegation is somewhat vague, in that appellant's modified position listed Tuesday and Wednesday as nonscheduled days off. Appellant expanded his allegation to contend that the employing establishment disregarded the recommendation of Dr. Smith, that he work on an earlier day shift tour. Dr. Smith stated in an undated addendum that: "I believe that [appellant] is placed at increased risk of relapse as a result of his present work schedule." The Board has held that the possibility of a future injury does not constitute an injury or form a basis for the payment of compensation under the Act.[12] The record indicates that Dr. Smith approved appellant's return to work, but addressed the speculative possibility of future injury. Dr. Smith's narrative reports on this matter are very brief and do no provide a fully rationalized medical opinion for his stated conclusion that appellant work a day shift. The physician did not adequately explain the basis for any sleep deprivation experienced by appellant or how the tour of duty to which he was assigned interfered with his sleep cycle. As such, the evidence merely reflects that the physician was repeating appellant's stated preference for an earlier work shift. The Board finds that appellant has not substantiated his allegations that the employing establishment failed to accommodate his work restrictions or erred in the assignment of his tour of duty. This does not constitute a compensable factor of employment.

It is appellant's contention that the employing establishment overreacted to statements made by Dr. France, which resulted in an inappropriate email and abusive threats and harassment on May 26, 2000, when postal inspectors visited his home. The Board notes that, following examination of appellant on that date, Dr. France initiated contact with the employing establishment's health unit to express concern about comments made by appellant. He mentioned appellant as potentially dangerous following his evaluation and stated in a follow-up letter to Dr. Grose, as follows:

> "I am very concerned about the present emotional status of [appellant]. He has related to me the fa[c]t that, he has had recurring dreams of shooting Gus Chaus and Walter Lujan. [He] has also indicated that he [h]as been looking into ways of getting airfare to Denver, Colorado so that he could meet with Paula Brietling. My personal experience in working with veterans with [p]ost[-]traumatic [s]tress [d]isorder causes me to be concerned that [appellant's] recurring dreams and

[12] *See Gaetan F. Valenza*, 39 ECAB 1349 (1988).

waking thoughts about [Ms.] Brietling may be precursors to aggressive acting out on [appellant's] part."

Based on the information provided by Dr. France, the employing establishment took several administrative actions that day; first, when Mr. Johnston relayed a potential threat by internal email to certain employees and second, when postal inspectors met with appellant at his house. The Board finds that appellant has failed to establish error or abuse by the employing establishment's personnel responding to the information provided by Dr. France. While appellant has taken issue with the characterization by the employing establishment that he made "verbal threats," it is obvious Dr. France became concerned during his examination of appellant about the potential danger he posed to certain postal employees. Mr. Johnston indicated that the employing establishment has a "zero tolerance" policy under which certain protocols are to be followed, when advised about the potential for violence. Part of these procedures included email notification to certain staff members of the information supplied through the medical office. The Board finds that Mr. Johnston's May 26, 2000 email was neither abusive towards appellant nor erroneous in conveying management's concern about the potential threat of aggressive conduct toward postal employees. The comments made in the email relayed pertinent information to those employees, including craft employees situated at strategic locations and roles on the employing establishment's premises. There is no evidence such information was relayed in an attempt to somehow embarrass appellant.[13] Concerns for employee safety were expressed by his attending physician to which management had a duty to respond in order that precautionary measures were taken to adequately safeguard employees. Although Dr. France noted in subsequent statements that he never reported that appellant had "verbally threatened" anyone; the information he conveyed to the employing establishment on May 26, 2000 through several telephone conversations with the health unit and the written note to Dr. Grose evidence concern that appellant was "potentially dangerous." This formed a reasonable factual basis for the actions taken in this case and cannot be characterized as an "overreaction" by postal management. The Board finds that appellant has not substantiated the May 26, 2000 email to be abusive or erroneous and it does not rise to a compensable factor of employment.

Appellant also contends that the actions of the postal inspectors, while at his home were abusive and harassing. The Board finds insufficient evidence of record to substantiate these allegations. The postal inspectors initially met with appellant at his home on May 26, 2000 in response to the information provided by Dr. France. It appears that the inspectors waited until the arrival of Dr. France and then advised appellant that he was not allowed on postal property until further notice. The inspectors delivered papers for appellant to complete and later a paycheck to him as he could not pick it up on his own. Again, while Dr. France reiterated that no verbal threats had actually been made, the record supports that the postal inspectors were acting appropriately under the protocols instituted by the employing establishment in response to potential threats. The statements provided in this case, do not establish error or abuse by the postal inspectors when interviewing appellant on May 26, 2000 or in providing paperwork for him to complete prior to his return to work. Similarly, appellant was provided with a letter on September 1, 2000 which noted that he was restricted from entering only two postal facilities

[13] Appellant's allegations that Mr. Johnston was out to get him or that false rumors were spread at the employing establishment are without merit. *See Anne L. Livermore*, 46 ECAB 425 (1995).

without prior notice to his supervisor. While appellant alleged that the postal inspectors were abusive towards him and that the letter was harassing, the Board finds that the evidence submitted in support of these allegations is insufficient to establish them as factual. Appellant has not established any compensable factor in this regard.

Appellant has alleged that it was harassment to schedule him for three fitness-for-duty examinations prior to his return to work. Requiring these examinations was an administrative function of the employer and absent error or abuse, on its part, coverage will not be afforded.[14] The Board finds no such error or abuse as it was reasonable for the employing establishment to obtain second opinions from psychological experts that appellant was not a threat to the safety of his fellow postal employees. Appellant has not specified how the various medical examinations were abusive in nature.

Mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. There must be evidence sufficient to establish that allegations of harassment did, in fact, occur. The Board finds the factual evidence of record does not substantiate appellant's allegations of harassment in this case. The employing establishment did not act abusively or erroneously in conducting its investigation of this matter. The Board concludes that appellant has failed to establish a compensable factor of employment and his emotional condition did not arise in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated February 20, 2002 is hereby affirmed.

Dated, Washington, DC
July 15, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[14] *Donald E. Ewals*, 45 ECAB 111 (1993).