United States Department of Labor
Employees' Compensation Appeals Board

ROBERT CORDOVA, Appellant	)	
and	)	**Docket No. 03-2181**
	)	**Issued: February 26, 2004**
U.S. POSTAL SERVICE, BELMONT STATION, Pueblo, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 22, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' August 5, 2003 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has *de novo* jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On June 28, 2001 appellant, then a 47-year-old carrier, filed a notice of occupational disease alleging that he developed major depression due to factors of his federal employment. Appellant stopped work on February 10, 2001. He submitted medical evidence and a detailed narrative statement in support of his claim.

The Office requested additional factual and medical evidence in a letter dated July 27, 2001. Appellant's supervisors submitted narrative statements responding to his

allegations. Appellant submitted additional evidence including witness statements on October 11 and November 16, 2001.

By decision dated August 19, 2002, the Office reviewed appellant's allegations and denied his claim finding that he failed to substantiate a compensable factor of employment.

Appellant, through his attorney, requested an oral hearing on August 22, 2002. Appellant testified at his oral hearing on May 1, 2003.

By decision dated August 5, 2003, the hearing representative affirmed the Office's August 19, 2002 decision, finding that appellant had not established a compensable factor of employment.

LEGAL PRECEDENT

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1] Rationalized medical opinion evidence is medical evidence which 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. The opinion of the physician 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 the claimant.[2]

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 of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an 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.[3]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors causing a condition or disability, the Office, 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

[1] *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[2] *Id.*

[3] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[4] In the present case, the Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Federal Employees' Compensation Act.

ANALYSIS

Appellant attributed his emotional condition to actions Sal D. Piscitelli, supervisor of customer services; Shelby A. Broadway, supervisor of customer services; Robert Podio, postmaster; Anthony Ramirez, station manager and Stacey Phillips, acting supervisor. He alleged that he improperly received discipline and was denied requested schedule changes, that Ms. Phillips improperly conducted an inspection and spied on him, that he was denied a request for extra time due to machine breakage, that the employing establishment failed to award him his bid position, that the employing establishment acted improperly after being alerted by medical personnel of "threats" by appellant, that he was improperly instructed on sick leave usage, and that Ms. Phillips improperly disposed of his request for assistance.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly addressed leave, improperly assigned work duties and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters unrelated to his regular or specially assigned work duties and do not fall within the coverage of the Act.[5] As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[6]

Mr. Ramirez stated that appellant received a letter of warning for poor attendance which began prior to his accepted employment injury. Mr. Podio stated that appellant received several disciplinary actions since 1991 due to his failure to be in regular attendance. He added that appellant received a 14-day suspension in August 2000 which was withdrawn due to a clerical error in the grievance procedure. However, Mr. Podio correctly noted that the resolution stated that appellant was not absolved of his responsibility to be regular in attendance. The mere fact that personnel actions are later modified or rescinded does not in and of itself establish error or abuse.[7] Appellant has not submitted evidence that the employing establishment erred in issuing discipline and therefore has not established error or abuse on the part of the employing establishment in this action.

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[4] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[5] 5 U.S.C. §§ 8101-8193; *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gates*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-57 (1988).

[6] *Martha L. Watson*, 46 ECAB 407 (1995).

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

Appellant submitted a statement from Mike Conea, a coworker, that Ms. Broadway was not at appellant's route for most of the morning of the inspection and that he had to go get her for appellant. Mr. Ramirez stated that the corrections provided appellant as a result of the route inspection were correct and that he was responsible for instituting the changes as instructed. Although appellant has submitted evidence that Ms. Broadway was not present during the entire time that he was performing his postal route, he has not submitted evidence to establish that this was required. Furthermore, Mr. Ramirez stated that the changes required by Ms. Broadway were appropriate to improve appellant's performance. As appellant has not substantiated his allegation of error or abuse with probative evidence, he has not established that the employing establishment acted unreasonably in the method used for inspecting his route.

Appellant alleged that the employing establishment improperly held a meeting in which it informed all employees that he had made threats against supervisors. The employing establishment noted that appellant had informed Diane Benevides, a nurse, of violent dreams in which he choked and slashed his postal supervisors. Dr. Matthew M. Hine stated that Ms. Benevides contacted the employing establishment because appellant had identified specific potential targets of violence, indicated that he had the means to perform the violence and Ms. Benevides was concerned that he either had the intention to commit violence or was potentially unable to prevent himself from committing violence. Mr. Ramirez stated that he received a "duty to warn" call from the hospital noting that appellant specifically mentioned "cutting and slashing" him and other supervisors at the employing establishment. He stated that security measures were taken at the employing establishment, that other employees had to be informed of the measures and the reason for the added security and that, during the meeting scheduled for this purpose, the employees felt that they were entitled to know the name of the person involved for their own safety. Mr. Ramirez submitted witness statements in support of assertions that the employing establishment disclosed appellant's name in response to inquiries from employees and due to concerns for their physical safety.

The employing establishment received evidence of a credible threat from medical personnel as made by appellant against his supervisors.[8] The employing establishment acted reasonably in taking steps to ensure the safety of the threatened supervisors and other employees. While the employing establishment does have a duty to preserve appellant's privacy regarding his medical condition, the evidence establishes that appellant's medical providers believed that he had the means to commit the violence described and the intent or the inability to prevent himself from carrying out the actions he described. Therefore, the employing establishment acted reasonably in providing information regarding the source of the threat, in this case appellant's name, to his coworkers to ensure their safety and that of the threatened supervisors. As the employing establishment acted reasonably, there was no error or abuse in this action.

Appellant alleged that Ms. Phillips instructed him to utilize his lunch hour for doctor's appointments. Ms. Phillips stated that she did not instruct appellant to use his lunch break for medical reasons, but that she attempted to schedule appellant's work assignments around his

[8] *See Andy J. Paloukos*, 54 ECAB ___ (Docket No. 02-1500, issued July 15, 2003) citing *Tarasoff v. Regents of University of California*, 17 Cal. 3D 425 (1976) pertaining to the responsibility of a psychotherapist to warn intended victims of potential violence.

appointments. Mr. Ramirez denied that this conversation occurred. Appellant has not submitted any evidence establishing error or abuse regarding leave usage by the employing establishment.

In regard to appellant's allegation that the employing establishment failed to assign his awarded position, Mr. Ramirez stated that medical certification that appellant could perform the duties of the position within six months was required. He further stated the employing establishment was attempting to protect appellant from dog bites with the use of an empty satchel. Ms. Broadway stated that she attempted to discern exactly what appellant's restrictions were and that appellant did not want to carry any satchel, but eventually agreed to carry an empty satchel over his shoulder and was awarded the route. Mr. Podio stated that the employing establishment followed the national agreement in granting appellant his route. Appellant has not established that the employing establishment erred in not granting him this position until the medical evidence established that he could fully perform the position.

Appellant stated that Mr. Piscitelli accused him of intentionally leaving mail at the employing establishment. Mr. Piscitelli denied that he was working on the date in question. Ms. Broadway noted that appellant was assigned a bump which he did not take out and stated, "When he returned to the office I questioned him about it. [Appellant] told [Mr. Piscitelli] he was not aware of it, and produced a sticky note with his assignments. It appeared to be in Mr. Piscitelli's handwriting and did not include that bump." Appellant did not receive discipline regarding this action and has not submitted any evidence that the employing establishment acted unreasonably in investigating whether appellant failed to deliver assigned mail. Therefore he has not established error or abuse on the part of the employing establishment in this administrative function.[9]

Appellant alleged that Ms. Phillips improperly placed his request for assistance form in the trash. Mr. Ramirez stated that supervisors were required to keep all such forms on file. He stated that this form should not be discarded unless it was improperly filled out and appellant would then have been instructed to fill out a duplicate form. Ms. Phillips stated that she retained appellant's form but denied his request. Geraldine Martinez, a shop steward, stated that she personally observed Ms. Phillips throw appellant's request for assistance form in the trash. Ms. Martinez alleged that Ms. Phillips asserted that this practice was directed by her trainer. While appellant has submitted evidence in support of his allegation that Ms. Phillips improperly disposed of his request for assistance in violation of employing establishment policy, she denied this allegation and stated that the form in question had been retained. Appellant did not submit a copy of the form that he alleged had been thrown in the trash, and there is no way to establish whether appellant's records was properly maintained by Ms. Phillips. As appellant has failed to submit sufficient evidence regarding this administrative matter, he has failed to establish error or abuse on the part of the employing establishment.

Appellant alleged that Ms. Phillips improperly called him at home on May 5, 2002 when he was using sick leave. Ms. Phillips acknowledged that she called appellant as he was on the overtime desired list and she needed to notify him to come in early due to a heavy mail volume. Appellant also alleged that Ms. Phillips hid behind a case to watch him work and planned to

[9] *See Larry J. Thomas,* 44 ECAB 291, 300 (1992).

watch appellant at his home on May 5, 2002. Appellant submitted a witness statement from Delia Achilegue asserting that Ms. Phillips and Mr. Piscitelli stated that they were going to appellant's house to see if he was there on May 5, 2000. However, she stated that they had the wrong address. Appellant has alleged that these actions were error or abuse. However, Ms. Phillips offered a reasonable explanation for her call to appellant and appellant has not submitted the evidence sufficient to establish that the telephone calls were inappropriate or abusive. Ms. Phillips also denied watching appellant inappropriately at work. Although appellant alleged that Ms. Phillips and Mr. Piscitelli planned to visit him at his home while he was using sick leave, a statement from appellant's daughter indicates that the supervisors did not, in fact, visit appellant's home. Appellant has not established this constitutes a compensable factor of employment.

Appellant stated that on June 16, 2002 he was accosted by Mr. Piscitelli while talking to a customer. Appellant stated that, as a customer asked him a question, Mr. Piscitelli drove up and in the presence of the customer, asked appellant why he was wasting time and began yelling at him. Appellant submitted a statement from Orlando Virgil, a customer, stating that in June 2000 he approached appellant with a question and they spoke for about five minutes. Mr. Virgil further stated, "At that time a truck drove in front of the mail truck and an angry man jumped out and started hollering at [appellant], I was embarrassed for appellant and I left." He stated that he believed that the actions of the other gentleman were inappropriate. Mr. Piscitelli submitted a statement on July 27, 2001 and asserted that on June 19, 2000 he responded to appellant's request for assistance and witnessed appellant converse with a customer for approximately 15 minutes. Mr. Piscitelli stated that he then pulled up after the customer had left and asked appellant what the problem was and why the conversation took so long.

The evidence establishes that Mr. Piscitelli overestimated the amount of time involved in appellant's conversation with Mr. Virgil and that he inappropriately raised his voice and chastised appellant in Mr. Virgil's presence. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the coverage of the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties, that employees will at times dislike actions taken, but that mere disagreement or dislike of supervisory or management action will not be actionable, absent evidence of error or abuse.[10] Furthermore, an oral reprimand does not usually constitute a compensable factor employment because it involves the employing establishment's administration of personnel matters.[11] In this case, however, there is evidence of error on the part of Mr. Piscitelli. Mr. Virgil and appellant stated that the conversation lasted approximately five minutes and Mr. Virgil's statement corroborates appellant's allegation that Mr. Piscitelli approached them during the conversation and inappropriately raised his voice at appellant in front of Mr. Virgil. Appellant has established error and abuse on the part of Mr. Piscitelli in this verbal reprimand.

Appellant alleged that he was treated differently experiencing harassment and discrimination. For harassment or discrimination to give rise to a compensable disability under

[10] *Marguerite J. Toland*, 52 ECAB 294, 299 (2001).

[11] *Carolyn S. Philpott*, 51 ECAB 175, 179 (1999).

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[12]

In support of this allegation, he submitted a statement from Ms. Martinez that she had observed his disparate treatment. James F. McCleary, a coworker, stated that he had observed appellant being treated in a discriminatory fashion and unfavorably compared with other carriers. These statements lack the necessary specificity to support appellant's claim for an emotional condition due to harassment or discrimination.

Appellant stated that Mr. Piscitelli told him not to talk to coworkers. Mr. Piscitelli stated that he routinely instructed employees to get back to work and be productive if he noticed that they were away from their work assignments and were not on break. In regard to appellant's allegation that he was singled out for no cell phone use, Mr. Ramirez, manager of customer service, stated that appellant was not singled out and that cell phone usage was limited station wide. Ms. Broadway stated that she had instructed all employees to leave their cell phones turned off while at work. Appellant has not established discrimination or harassment through these requests.

Appellant also alleged that Mr. Piscitelli called him a "cry baby" and verbally harassed him during a meeting. Mr. Piscitelli denied these allegations. Appellant did not submit any evidence substantiating his allegation that Mr. Piscitelli in fact made these statements and has not established harassment or discrimination.

In regard to appellant's allegation that he was not allowed to return to work at a different station were work was available, Mr. Ramirez stated that appellant's restrictions could be met at the employing establishment and that appellant removed himself from duty. Denials by an employing establishment of a request for a different job are not compensable factors of employment as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[13]

Appellant alleged that due to his injury it was necessary for him to put his delivery vehicle in park and set the parking break for every delivery. His supervisors disagreed and instructed appellant that maintaining his foot on the brake was sufficient. Ms. Broadway stated that appellant received instructions from her, the driver instructor and an on-the-job instructor. Mr. Podio stated that the required method of delivery was safe. Fred Gremial, driver training instructor, informed appellant that as long as he maintained his foot on the brake pedal it was not necessary to place the vehicle in park and set the brake. Appellant's dissatisfaction with these

[12] *Alice M. Washington*, 46 ECAB 382 (1994).

[13] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

management instructions constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable.[14]

Appellant stated that Mr. Ramirez and Mr. Piscitelli ordered him to exceed his work restrictions. Mr. Piscitelli denied this allegation, asserting that he required coworkers to load appellant's vehicle and limit the weight of appellant's trays to ensure that appellant's physical restrictions were met. Mr. Ramirez stated that he never requested that appellant exceed his doctor's restrictions. Being required to work beyond one's physical limitations may constitute a compensable employment factor if such activity is substantiated by the record;[15] however, appellant has not submitted any evidence substantiating his allegation that he was required to work beyond his physical restrictions. Therefore, he has not established this as a compensable factor of employment.

Appellant attributed his emotional condition to overwork.[16] Appellant alleged that, when he bid on Route 166, he was allowed to use a push cart. Appellant stated that, when management removed the push cart, he was forced to overload his satchel as well as to go back and forth to existing relay boxes to deliver the mail. He then requested additional relay boxes in order to complete his route in a timely manner. Appellant alleged that the employing establishment failed to provide him with an adequate number of relay boxes and delayed providing the limited number of relay boxes granted. He asserted that he was unable to safely perform his work duties due to these actions which resulted in his accepted employment injury of October 16, 1999 as well as contributing to his current emotional condition due to the excess work required to complete his route in the time allotted. In support of his claim, appellant submitted a statement from Fred McCleary, a carrier, asserting that he was unable to carry this "walk out" route without injury and that, following appellant's injury, the employing establishment allowed vehicle delivery for appellant's route. Appellant also submitted a statement from Dennis Beltran stating that once the vehicle was removed from Route 166 it was unsafe and that his shoulders ached after delivering the route.

The employing establishment responded to appellant's allegation of overwork by noting that carriers are required to use a satchel when delivering mail on foot. The employing establishment further noted that appellant's satchel was weighed when he complained and was less than 35 pounds. The employing establishment confirmed that appellant's initial request for relay boxes was denied, but asserted that once it was determined that the boxes were necessary the boxes were ordered and placed as soon as possible.

[14] *See Michael Thomas Plante*, *supra* 7 note at 515.

[15] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

[16] Appellant attributed his emotional condition in part to his accepted employment injury of neck and shoulder strain occurring on October 26, 1999. The Office has not addressed appellant's alleged consequential injury in the decisions before the Board. As the Office has not issued a final decision on this claim in the record before the Board, the Board may not address this aspect of appellant's claim for the first time on appeal. 20 C.F.R. § 501.2(c).

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.[17] An unusually heavy workload and imposition of unreasonable deadlines can be compensable if substantiated. In this case, appellant has alleged that he had an unusually heavy workload requiring additional relay boxes to complete his route in a timely manner. The employing establishment noted that, although appellant's request for relay boxes was initially denied, it was later determined that these were necessary for the timely completion of appellant's route. Therefore, the evidence in the record establishes that, once appellant's push cart was removed in accordance with employing establishment regulations, his workload was such that he required additional forms of assistance to complete his assigned tasks. Appellant has established overworked for the period between the removal of his push cart and the installation of the additional relay boxes on his route. In regard to appellant's allegation that the employing establishment failed to provide adequate relay boxes, there is not sufficient evidence to establish that appellant continued to be overworked after the employing establishment determined the number of boxes needed to complete appellant's route.

Appellant has substantiated two compensable factors of employment overwork and error and abuse on the part of Mr. Piscitelli regarding the June 16, 2000 conversation with Mr. Virgil. However, appellant's burden of proof is not discharged by the fact that he has established employment factors which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical opinion evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the compensable factors.

Appellant submitted medical evidence from Dr. James Sewell, a psychiatrist, dated February 23, 2001 diagnosing major depression. Dr. Sewell attributed appellant's emotional condition to constant pain which reminded appellant of his inability to function in his job. He did not mention the employment factors of overwork or the abusive June 16, 2000 verbal reprimand. Dr. Sewell completed progress notes in May 2000 describing appellant's emotional condition and alleged employment factors of inability to obtain an appropriate position and harassment. These were not substantiated as compensable employment factors.

As there is no rationalized medical opinion evidence describing the accepted compensable factors of employment and attributing appellant's diagnosed conditions of major depression and adjustment disorder to these factors of overwork and abusive verbal reprimand, appellant has failed to meet his burden of proof in establishing an emotional condition due to his federal employment.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment as he failed to submit rationalized medical opinion evidence establishing a causal relationship between his diagnosed condition and the compensable employment factors established.

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

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified.

Issued: February 26, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member