United States Department of Labor
Employees' Compensation Appeals Board

ROBERT J. CLOUGH, Appellant	)	
and	)	**Docket No. 04-2148**
	)	**Issued: April 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Sarasota, FL, Employer	)	

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 1 and August 20, 2004 merit decisions denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On April 30, 2003 appellant, then a 47-year-old electronic technician, filed an occupational disease claim alleging that he sustained an emotional condition due to incidents and

conditions at work.[1] Appellant experienced a panic attack in December 2001 when he was ordered to "perform an unsafe act by using improper equipment for anthrax." He stopped work on April 21, 2003 and indicated that on April 23, 2003 he first became aware that his condition was employment related.

In an attached statement, appellant alleged that he sustained a panic attack on April 21, 2003 when an employing establishment manager, Veta Plummer, ordered his supervisor, Trish Howell, to change his pay from earned sick leave to leave without pay. Appellant also submitted personnel documents relating to various matters including his work duties and work restrictions.

By decision dated May 14, 2003, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors.

Appellant requested a review of the written record by an Office hearing representative and submitted a September 29, 2003 statement further describing the incidents and conditions at work which he believed caused his emotional condition. Appellant alleged that the employing establishment "very lackadaisically" treated the anthrax scare in post offices that occurred after the September 11, 2001 terrorist attacks. He indicated that in October 2001 orders came from Washington, DC for the employing establishment to stop using compressed air for cleaning mail processing machines and to equip all vacuums with high efficiency particulate air (HEPA) filters to protect employees against anthrax dust. Appellant stated that management advised him that the filters were on order and that, due to a number of backorders, there would be a delay in receiving them. On December 3, 2001 a coworker indicated that a supervisor, Jim Holland, had cancelled the order for the filters and asserted that his own supervisor later confirmed that the order had been cancelled. Appellant claimed that he suffered a panic attack and advised his supervisor that he would not vacuum the machines without the proper filters, but that his supervisor ordered him to use the vacuum without the filter.[2] He asserted that on April 23, 2003 he experienced another panic attack when a postal manager wrongly threatened to stop his pay.

Appellant submitted several memoranda dated in October and November 2001 sent by the maintenance technical support center to "all maintenance capable offices." The memoranda stated that the use of blown air for the routine servicing of various bar code sorter machines was eliminated. It further noted, "As an alternative to blown air, appropriate methods of utilizing a HEPA filtered vacuum and brushing must be considered and implemented." Appellant also submitted several medical reports, dated between 2001 and 2003, in which attending physicians discussed his problems with anxiety and back pain.

By decision dated and finalized March 1, 2004, an Office hearing representative affirmed the May 14, 2003 decision.

[1] Appellant suggested that his emotional condition caused him to have high blood pressure and hypertension and that it aggravated a May 7, 2002 back injury. Appellant periodically received partial and total disability compensation due to this back injury, but this matter is not currently before the Board.

[2] The record also contains a December 4, 2001 letter in which appellant provided a similar account of his claim that he was ordered to use a vacuum without an HEPA filter. In October 2003, the record was supplemented to include a June 9, 2003 statement from appellant which was similar to his September 29, 2003 statement.

Appellant submitted a November 29, 2001 settlement agreement of a grievance which he filed concerning management's handling of an unknown substance found in the workplace on October 24, 2001. The agreement indicated that, although the handling of incident was "far from perfect" and additional safety training would be instituted, the grievance was resolved on a "nonprecedent, noncitable basis."[3] He submitted a January 5, 2002 settlement agreement of a grievance which he filed concerning management's handling of an unknown substance found in the workplace on November 19, 2001. The agreement indicated that the grievance was resolved and that management and the union agreed that better communication between management and the union and employees would help to address employee concerns.

Appellant also submitted documents from a grievance, which he filed in October 2001, concerning the use of vacuums without HEPA filters. A January 30, 2002 document indicated that the grievance was resolved and contained the notation, "The HEPA vacuums are being used at this time, more vacuums are on order." He submitted documents from another grievance he filed concerning his claim that he was ordered to use a vacuum without an HEPA filter on December 3, 2001. The grievance was settled in January 2002, with the finding that "management has not violated the National Agreement." In connection with the settlement, appellant received credit for seven days of sick leave and reimbursement of mileage costs for travel to and from his physician and for a $15.00 insurance copayment.

The record contains a December 4, 2003 document in which Ms. Plummer discussed appellant's request for compensation during early to mid 2003. She indicated that appellant could not combine leave and leave without pay while claiming compensation and noted that she sent a document to the Office to reflect the "partial hours" he was entitled to receive.

Appellant requested reconsideration of his claim and argued that the grievance decisions of record established that the employing establishment engaged in wrongdoing.

By decision dated August 20, 2004, the Office affirmed the March 1, 2004 decision.

LEGAL PRECEDENT

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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[4] On the other hand, the disability is not covered where it results from such factors as an

[3] Appellant also submitted numerous documents from the employing establishment which generally described how workers and managers should deal with hazardous materials, including anthrax, in the workplace.

[4] 5 U.S.C. §§ 8101-8193.

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.[5]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[6] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in 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 providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[8] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[9]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that he sustained a panic attack when he was wrongly ordered to use a vacuum without an HEPA filter on December 3, 2001. He asserted that the employing establishment did not follow safety rules designed to prevent contamination from anthrax and other dangerous substances. Appellant also alleged that he sustained a panic attack on April 21, 2003 when Ms. Plummer ordered his leave to be changed from earned sick leave to leave without pay.

Regarding appellant's allegations that the employing establishment improperly implemented safety rules and wrongly misclassified his leave, the Board finds that these

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

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[7] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[9] *Id.*

allegations 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.[10] Although the management of safety rules and leave usage are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] The Board has held that an administrative or personnel matter will be considered to be an 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 the employing establishment acted reasonably.[12]

Appellant has not shown that the employing establishment committed error or abuse in handing safety matters. The record contains a settlement agreement of a grievance, which appellant filed concerning management's handling of an unknown substance found in the workplace on October 24, 2001. Although the agreement indicated that the handling of incident was "far from perfect" and additional safety training would be instituted, the grievance was resolved on a "nonprecedent, noncitable basis" and, therefore, no wrongdoing was found on the part of the employing establishment. A settlement agreement of another grievance filed by appellant concerning a similar incident on November 19, 2001 indicated that better communication between management and the union and employees would be helpful, but it did not find any wrongdoing by the employing establishment.

Appellant also filed a grievance in October 2001, concerning the use of vacuums without HEPA filters. This grievance was resolved in January 2002 without any finding of error or abuse; the resolution of the grievance noted, "The HEPA vacuums are being used at this time, more vacuums are on order." The record also contains documents from a grievance appellant filed concerning his claim that he was ordered to use a vacuum without an HEPA filter on December 3, 2001. The January 2002 settlement of the grievance explicitly found that the employing establishment did not act improperly in this matter by noting that "management has not violated the National Agreement." Although appellant received credit for seven days of sick leave and reimbursement of some healthcare-related costs, there is no indication these acts were instituted as a result of wrongdoing by the employing establishment.

Moreover, the Board notes that there is no evidence that anthrax or any dangerous substance was found at the employing establishment. The record is void of any evidence that appellant ingested, inhaled or in any manner came into direct physical contact with anthrax or any dangerous substances while in the performance of duty. This case can, therefore, be distinguished from those in which the claimant is exposed to an unknown and potentially dangerous substance.[13] The Board thus finds that appellant's reaction was self-generated and was based on his mere perception of events and perceptions and feelings alone are not compensable factors.

[10] *See 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).

[11] *Id.*

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

[13] *See Judy C. Rogers*, 54 ECAB ___ (Docket No. 03-565, issued July 9, 2003).

Appellant also has not shown the employing establishment committed error or abuse in handling leave matters. He did not submit any evidence, such as the results of a grievance, to show that the employing establishment committed wrongdoing with respect to these matters. The record contains a December 4, 2003 document in which Ms. Plummer indicated that appellant's leave status was changed to reflect the fact that he could not combine leave and leave without pay while claiming compensation.[14]

Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

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.[15]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the August 20 and March 1, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[14] Appellant had been receiving disability compensation in connection with a back injury.

[15] 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).