

FACTUAL HISTORY

On March 16, 2004 appellant, then a 49-year-old modified carrier, filed an occupational disease claim (Form CA-2) alleging harassment by his supervisor. Appellant alleged that, over a period of nine years, he had been crucified, dehumanized and denigrated, harassed, ignored and lied to by the postmaster and that he had unpaid bills related to his condition. Appellant submitted treatment notes from a licensed clinical social worker, who, on March 12, 2004, indicated that he was being treated by the Department of Veterans Affairs for severe depression. A statement dated May 8, 1997 from Rose Manzanares a coworker noted: "Heard Gil Boerela call [appellant] the words 'a worthless piece of s--t.'"

In April 29, 2004 Dr. Robert E. Vadnal, a Board-certified psychiatrist, noted that appellant was being treated for major depression. Due to the severity of his symptoms, appellant was totally disabled from work. On April 30, 2004 Dr. Vadnal stated that appellant's major depression was recurrent and that he was totally disabled for a minimum of 12 months.

On April 30, 2004 the employing establishment controverted appellant's claim.

By decision dated June 3, 2004, the Office denied appellant's claim, finding that the evidence submitted failed to establish any compensable factors of employment.

On June 28, 2004 appellant requested reconsideration of the June 3, 2004 decision. He submitted a June 25, 2004 psychiatric summary from Dr. Vadnal, which reported a diagnosis of recurrent major depression. He related that appellant claimed his condition was due to harassment at work and that others called him "fat and lazy."

Appellant provided a statement in support of his reconsideration request. He alleged that "around April of 2002" he contracted a mysterious rash all over his body and had to lift his shirt to show his supervisor to get leave to seek medical attention. When he returned to work, he was locked out of his computer and his light-duty job was taken away, his telephone was changed, things were removed from a closet, his supplies were gone, his file cabinet had been broken into, his assigned parking space was gone and his assigned duties were taken away. Appellant claimed that he had to get the union to intervene to get some of his assignments back. It took almost a month for him to get a new password and he was bypassed because he could not bid out of that position. Appellant was required to drive but could not because he was taking Vicodin, which made him sleepy and lacked a valid driver's license. Appellant claimed that other employees would make fun of him, that lunches were removed from his desk and that he was made to walk all day on his injured ankle, which required more pain medication. He alleged that Kevin Romero would comment about him using profanity and that he was called a safety hazard. Appellant claimed that he was directed to go back to carrying mail, that he would have to clerk for two hours then carry mail for two hours, case mail and then do office work. The postmaster took away his modified-duty position and made him work as a limited-duty carrier, which constituted harassment.

In an April 2, 2004 statement, Geraldine Martinez, a coworker, claimed that appellant endured verbal abuse from management. She claimed that appellant was made to work outside his physical restrictions and had been called lazy, a slob, stupid and told to quit.

The employing establishment denied appellant's allegations of noting that no factual evidence had been submitted. It provided explanations that many of appellant's allegations were due to directions, updates or codes from Denver, that his telephone was not his and that his cabinet supplies and the keys were office material and were needed by other employees when he was not there. The employing establishment noted that his parking space was still his but that it was used by others when he was not at work. His duties were changed but not his modified job offer and the schedule changes were an administrative function.

In a statement of September 15, 2004, appellant reiterated his allegations and addressed leave procedures. He contended that management invaded his privacy as the cabinet broken into contained secure information and that he was required to stay off his feet yet was given tasks involving walking. Appellant stated that, when the modified carriers were changed to limited-duty carriers, walking was required, which he claimed he could not do. Appellant alleged that coworkers answered the telephone referring to workers with disabilities as the sick, lame, lazy or walking wounded.

On March 9, 2004 the Office accepted appellant's claim for bilateral plantar fasciitis and for temporary aggravation of degenerative arthritis of the left ankle.

In a decision dated October 1, 2004, the Office denied appellant's claim for an emotional condition. It found several incidents which occurred were not compensable factors of employment, including being locked out of his computer, his cordless telephone being removed from his office, removal office supplies, his assigned duties being taken away and that his parking space was used when he was not at work. The Office noted that appellant had no driver's license and could not drive and that, if an employing establishment job required a valid driver's license, it was appellant's responsibility. The Office noted that appellant's feeling like he was being bypassed, was factual but noncompensable in that he had never filed a formal application for the position that was offered. It noted that appellant's left ankle complaints and time lost were not compensable because only a claim for his right ankle in 1994 had been accepted at that time. The Office further noted that appellant's complaints and problems with the Office, although factual, were not compensable factors of employment. Appellant's changes in duty were administrative decisions and were based on the newest medical evidence and activity limitations and hence not compensable. The incidents that the Office found did not occur as alleged included appellant's rash and request to seek for medical treatment, being assigned walking duties, his claim of abuse after sleeping on the job due to medication, his modified-duty assignments were changed and general allegation of harassment, which were not established as factual.

Appellant requested reconsideration, through his representative, by letter dated October 8, 2004. He contended that the changes regarding appellant's duties was harassment and reprisal. Appellant submitted a July 1, 1997 modified carrier job description that he had accepted and an affidavit that Debra Archibeque, a coworker, stated that he had informed her that he was being harassed and pushed by management. She noted that appellant claimed that he had been asked by his employer to change his medication. In an affidavit, Ms Manzanares, stated that she had witnessed belittling treatment and harassment of appellant, particularly by manager Romero, regarding ankle pain and medication. She claimed that supervisors were advised but did nothing. Appellant also submitted an affidavit from Geraldine Martinez, a

coworker, who discussed general events and appellant's absence in June 2003. She stated that appellant was called names behind his back and that Mr. Romero was unprofessional with appellant. She indicated that appellant became depressed in December 2003. Ms. Martinez reviewed appellant's working restrictions and claimed that they were not being followed "around March 2004." Counsel for appellant argued that the affidavits demonstrated harassment by management and that the medical evidence demonstrated that appellant had physical and emotional conditions and had worked outside of his medical restrictions.

By decision dated February 17, 2005, the Office declined appellant's request for review of his case on its merits under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

To establish that he has sustained an emotional condition in the performance of duty, a claimant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion 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 employee.³

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. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁴ Conversely, where a disability 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 environment or to hold a particular position, the emotional condition is not covered under the Act. Disabling emotional conditions resulting from

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Id.*

⁴ *Donna Faye Cardwell*, *supra* note 2; see also *Lillian Cutler*, 28 ECAB 125 (1976).

an employee's feelings of job insecurity or from the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.⁵ Noncompensable factors of employment generally include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁶ Absent evidence of error or abuse, administrative actions or personnel matters generally pertain to procedures and requirements of the employer and do not bear a direct relationship to the work required of the employee.⁷ They are hence, not compensable factors of employment.⁸

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment 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.⁹ When an employee fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If an employee does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, an employee must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹⁰ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹¹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the employee's emotional condition, then the medical evidence of record need not be considered.¹²

Regarding appellant's allegations of harassment, it is well established that, for harassment to give rise to a compensable disability under the Act, there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.¹³

⁵ *Lillian Cutler*, *supra* note 4 at 129-31.

⁶ *See Joseph Dedenato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁷ *See Edward C. Heinz*, 51 ECAB 652 (2000); *Richard J. Dube*, 42 ECAB 916 (1991). The Board has found that an administrative or personnel matter may be a compensable factor of employment where the evidence discloses error or abuse by the employing establishment. *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁸ *Thomas D. McEuen*, 42 ECAB 566 (1991) and cases cited therein.

⁹ *See Barbara Bush*, 38 ECAB 710 (1987).

¹⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹¹ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹² *See supra* note 4.

¹³ *Donna Faye Cardwell*, *supra* note 2.

Leave and attendance matters are generally related to the employment and are functions of the employer and not duties of the employee.¹⁴ Assignment of work is an administrative matter and, absent error or abuse, appellant's reaction to such falls outside the scope of the Act.¹⁵ Matters pertaining to grievances and the handling of workers' compensation claims are administrative in nature and do not pertain to appellant's assigned employment duties.¹⁶ Denial by the employing establishment of a request for a different job, promotion or transfer is an administrative decision, which does not directly involve an employee's ability to perform work duties, but rather constitutes an employee's desire to work in a different position, is not compensable.¹⁷

In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁸ The fact that an Equal Employment Opportunity complaint or grievance was filed does not establish the allegations underlying the claim.

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that his emotional condition arose from a compensable factor of his employment.

Appellant alleged that he was harassed, passed over for promotion and called names by coworkers and management personnel at the employing establishment. However, appellant failed to submit sufficient evidence to substantiated his allegations. The statements from various coworkers did not describe specific incidents or verbal encounters, but were statements of what they had been told by appellant or became aware of generally after the fact. Those statements did not document specific times, places or parties involved pertaining to appellant's allegations. Appellant made multiple general allegations but none of them were specific as to date and time and persons involved, including actions that allegedly occurred but were not witnessed. The most specific statement mentioned a month and year but did not identify the parties or note that the coworkers witnessed specific conduct or statements directed at appellant.

Appellant's supervisor did not act abusively as to appellant's medical leave requests. Appellant claimed that, when he returned after being absent, his telephone was gone, codes were changed, a closet was broken into, supplies were missing and his parking space was being used. The employing establishment noted that the regional office ordered password and code changes, which took time, that the closet was actually a general supply closet with supplies needed by staff and keys to open other office doors and drawers and not appellant's personal cabinet. Appellant had used the telephone for personal reasons and therefore it was restricted in use and that the parking space was used by another person who needed it while appellant was gone.

¹⁴ *James P. Guinan*, 51 ECAB 604 (2000).

¹⁵ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁶ *Robert W. Johns*, 51 ECAB 137 (1999).

¹⁷ *Ernest J. Malagrida*, 51 ECAB 287 (2000).

¹⁸ *Myrna Parayno*, 53 ECAB 593 (2002).

Duties were changed as the office was being updated and rearranged. Appellant has failed to establish administrative error or abuse pertaining to these matters.

Appellant alleged that he was bypassed for a promotion. The Board notes that the evidence of record establishes that appellant never completed the paperwork to apply. He alleged that he was asked to drive, which was a general requirement for work at the employing establishment but appellant explained that his medication prevented him from driving. This was not harassment by management but merely an attempt to realign duties as warranted. His allegations about his medication issues were not supported by any factual evidence or witness statements. Appellant alleged that he had favorable results from a grievance but no relevant findings were submitted to the record.¹⁹ Appellant alleged that he had to walk to do some of his duties. The medical record does not demonstrate that the walking required was in excess of his physical restrictions. He failed to establish that the amount of walking required with some of his duties was over his tolerance within the modified-duty position and his medical limitation. Management also changed some of appellant's duties because he was sleeping on the job due to medication. This is not a compensable factor as administrative error or abuse has not been established.²⁰

Appellant alleged various comments and aspersions were made. As noted, there is insufficient evidence to establish that the alleged comments were made or directed at appellant. Appellant made many allegations but submitted insufficient evidence to support that these claimed actions occurred as alleged. As no compensable factor was established, the medical evidence need not be addressed.

CONCLUSION

Appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to any specific compensable factor of his employment.

¹⁹ See *Robert W. Johns*, *supra* note 17.

²⁰ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act²¹ does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation.²² Section 8128(a) of the Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”²³

Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128,²⁴ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant’s request for reconsideration. The Office has stated that it will reopen a claimant’s case and review the case on the merits under 5 U.S.C. § 8128(a) upon request by the claimant whenever the claimant’s application for review meets the specific requirements as set forth in section 10.606, which provides:

“(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the Office] in the final decision.

“(b) The application for reconsideration, including all supporting documents, must--

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
 - (i) Shows that [the Office] erroneously applied or interpreted a point of law;
 - (ii) Advances a relevant legal argument not previously considered by [the Office]; or

²¹ 5 U.S.C. § 8101 *et seq.*; see 5 U.S.C. § 8128(a).

²² Compare 5 U.S.C. § 8124(b)(1) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

²³ 5 U.S.C. § 8128(a).

²⁴ See *Charles E. White*, 24 ECAB 85, 86 (1972).

(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.²⁵

The submission of evidence previously considered does not constitute a basis for reopening a claim.²⁶ Evidence which does not address the particular issue involved,²⁷ or evidence which is repetitive or cumulative of that already in the record,²⁸ does not constitute a basis for reopening a case.

ANALYSIS -- ISSUE 2

In this case, the Office performed a limited examination of the arguments and evidence submitted in support of the reconsideration request and determined that the evidence was repetitive, duplicative and irrelevant.

Appellant’s representative provided a brief seeking reconsideration of the October 1, 2004 decision, arguing that the medical evidence was not considered, that the coworker statements were not properly considered and that appellant had submitted substantial evidence, which established his claim. He submitted duplicative statements from coworkers, a duplicative medical report from Dr. Vadnal, left ankle injury information, office material and correspondence, a duplicate 1997 rehabilitation job offer, statements by appellant and grievance material. None of this evidences addressed the issue at hand, which was whether or not a compensable factor of employment was established. As the evidence is duplicative or repetitive of that previously of record and previously reviewed by the Office, it was insufficient to warrant reopening the case for further merit review.

The Office properly performed a limited review of this evidence to determine that it was repetitive, duplicative and irrelevant and determined that the evidence was insufficient to warrant reopening appellant’s claim for further review on its merits under 5 U.S.C. § 8128(a).

CONCLUSION -- ISSUE 2

As appellant failed to submit sufficient evidence to warrant reopening his claim for a merit reconsideration under 20 C.F.R. § 10.606(b)(2), the Office properly declined further review of the case on its merits.

²⁵ 20 C.F.R. § 10.608(b).

²⁶ *W.H. Van Kirk*, 28 ECAB 542 (1997).

²⁷ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

²⁸ *Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 17, 2005 and October 1, 2004 are affirmed.

Issued: January 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board