

**United States Department of Labor
Employees' Compensation Appeals Board**

M.S., Appellant)

and)

U.S. POSTAL SERVICE, BULK MAIL)
CENTER, Memphis, TN, Employer)

**Docket No. 06-1633
Issued: November 30, 2006**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 11, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 3, 2006 merit decision 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 May 11, 2005 appellant, then a 35-year-old maintenance supervisor, filed an occupational disease claim alleging that he sustained an employment-related emotional condition.¹ He stopped work on October 25, 2004 and returned to his same work assignments on October 30, 2004.

Appellant indicated that in November 2004, he filed an Equal Employment Opportunity (EEO) claim because Andrew Cuccia, a supervisor, proposed to terminate him for not giving him his medical records. He claimed that he was not allowed to have his attorney or union representative present in connection with this matter. Appellant asserted that he was improperly told that management had a statement from him, which indicated that his service-connected injuries prevented him from performing his job. He claimed that in February and March 2005 Mr. Cuccia and other management officials, including Jim Kleber and Anita Armstrong, harassed him by telling him that he would be disciplined if he did not undergo a fitness-for-duty examination. Appellant asserted that Ms. Armstrong improperly criticized him for rescheduling a fitness-for-duty examination and that on March 2, 2005 Mr. Kleber told him that the harassment would not stop even after he underwent a fitness-for-duty examination. Appellant alleged that when he went for a fitness-for-duty examination on March 3, 2005 Ms. Armstrong told the physician that he had to be able to climb ladders for six hours despite the fact that his job description did not contain such a requirement.

Appellant alleged that he sustained stress because on May 16, 2003 Kenneth Gunn, a supervisee, threatened to kill him and another supervisor. He asserted that on July 9, 2003 Elvin Tate, another supervisee, threatened to kill him during a discussion about using work time for personal study by making gestures as though he were pointing a gun and stating: "I can shoot straight and would not miss my ass." Appellant claimed that Ralph Morgan, a supervisor, took his statement regarding the July 9, 2003 incident and that Memphis police officers were summoned to the work site. He indicated that he took leave in July 2003 and that in mid August 2003 Phillip Murphy, a supervisor, told him that he would be fired if he took any more leave and that he could not use family medical leave for the time he took off work.

Appellant asserted that in September 2003 the employing establishment retaliated against him for filing EEO complaints by issuing him a proposed letter of removal and improperly indicated that he could keep working at the employing establishment if he took a reduction in pay grade. He claimed that management refused to honor the work restrictions imposed by his physicians, including the requirements that he not work in a hostile work environment or work with the employee who threatened him. Appellant alleged that when he was transferred to another position in October 2004 Mr. Cuccia threatened to fire him. He asserted that in November 2004 Mr. Cuccia and Mr. Kleber wrongly told him that he was only fit to supervise custodians and that management forced him to perform senseless duties like counting light bulbs.

Appellant submitted numerous documents, including copies of emails between him and supervisors, which mostly concerned disciplinary matters, the assignment of work duties and the

¹ On July 11, 2006 appellant also filed an appeal with the Board in connection with a separate emotional condition claim (file number 062154675). That appeal was docketed as 06-1632.

assessment of his physical ability to work. The record contains documents concerning EEO claims that appellant filed, including a claim filed in connection with a September 22, 2003 notice of proposed removal for failure to meet attendance requirements. The documents indicate that mediation was carried out regarding the removal matter but that no agreement was reached.

The record also contains documents concerning appellant's claim that Mr. Tate threatened him on July 9, 2003. A July 9, 2003 statement, signed by a person with an illegible signature, stated that appellant and Mr. Tate had a discussion about using work time for personal study and that Mr. Tate "got loud" with appellant and refused to go to his office. An unsigned July 9, 2003 statement on the letter head of Mr. Morgan, a supervisor, indicated that appellant reported that Mr. Tate threatened to kill him on that date.

Appellant submitted numerous medical reports describing the treatment of his emotional condition, including reports of Dr. Antoine Jean-Pierre, an attending Board-certified psychiatrist. In several reports, Dr. Jean-Pierre diagnosed adjustment disorder with mixed emotional features, generalized anxiety disorder and passive and aggressive traits.

By decision dated January 3, 2006, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors.

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.² On the other hand, the disability is not covered where 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 environment or to hold a particular position.³

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.⁴ 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.⁵

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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.⁶ 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.⁷

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 the employing establishment improperly subjected him to disciplinary actions, including a proposed termination of his employment in September 2004.⁸ He asserted that management improperly handled his work assignments by not following his physicians' recommendations. Appellant claimed that in February and March 2005 Mr. Cuccia and other management officials, including Mr. Kleber and Ms. Armstrong, improperly attempted to have him undergo a fitness-for-duty examination. He asserted that Ms. Armstrong improperly criticized him for rescheduling a fitness-for-duty examination and attempted to have him evaluated for work duties that his job did not require. Appellant alleged that he was improperly told not to take leave in August 2004 and that he was informed that he would be disciplined if he did so.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave, improperly assigned work duties and unreasonably requested that he undergo medical evaluation, the Board finds that these 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.⁹ Although the handling of disciplinary actions, management of leave requests, assignment of work duties and handling of medical evaluations at work are generally related to the employment, they are administrative

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ Appellant alleged that management improperly indicated that he could keep working at the employing establishment if he took a reduction in pay grade and asserted that he did not have proper representation in connection with the proposed removal action.

⁹ 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).

functions of the employer and not duties of the employee.¹⁰ However, the Board has also found 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.¹¹

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. For example, he asserted that it was improper for the employing establishment to make him undergo a fitness-for-duty examination, but he did not clearly identify his reasoning for this assertion or support it with documentation. He submitted numerous documents, including copies of emails between him and supervisors, which mostly concerned disciplinary matters, the assignment of work duties and the assessment of his physical ability to work. However, none of the documents showed that the employing establishment committed error or abuse with respect to these matters. Appellant filed EEO claims, including a claim filed in connection with the September 2003 proposed removal, but the record does not contain an EEO decision showing that the employing establishment committed error or abuse. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant alleged that he was subjected to harassment from supervisors and coworkers. He asserted that the employing establishment's issuance of disciplinary actions and requests for fitness-for-duty examinations constituted retaliatory actions for his filing of EEO complaints. Appellant alleged that when he was transferred to another position in October 2004 Mr. Cuccia threatened to fire him. He asserted that in November 2004 Mr. Cuccia and Mr. Kleber harassed him by telling him that he was only fit to supervise custodians and that management forced him to perform senseless duties like counting light bulbs. He claimed that on May 16, 2003 Mr. Gunn, a supervisee, threatened to kill him and that on July 9, 2003 Mr. Tate, another supervisee, also threatened to kill him by making gestures as though he were pointing a gun and stating: "I can shoot straight and would not miss my ass."

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹² However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹³ Appellant has not submitted sufficient evidence to establish that he was harassed by his supervisors or coworkers with respect to these matters.¹⁴ Appellant alleged that supervisors and coworkers made statements and engaged in

¹⁰ *Id.*

¹¹ *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹² *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹³ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁴ *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

actions which he believed constituted harassment, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁵ He filed EEO complaints with regard to some of these matters, but the record does not contain an EEO decision showing that harassment or discrimination occurred.

With regard to appellant's claim that his life was threatened by Mr. Gunn and Mr. Tate, the documents of record do not support a finding that such threats occurred. The record contains a July 9, 2003 statement, signed by a person with an illegible signature, which indicated that appellant and Mr. Tate had a discussion about using work time for personal study and that Mr. Tate "got loud" with appellant and refused to go to his office. The statement contains no mention of a threat being made. The record also contains an unsigned July 9, 2003 statement on the letter head of Mr. Morgan, a supervisor, which indicated that appellant reported that Mr. Tate threatened to kill him on that date. However, the statement provides no indication that a threat was directly witnessed by a third party. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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.¹⁶

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.

¹⁵ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁶ 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).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 3, 2006 decision is affirmed.

Issued: November 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board