

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

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F.D., claiming as widow of S.D., Appellant )

and )

U.S. POSTAL SERVICE, POST, OFFICE, )  
Spring Valley, CA, Employer )

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**Docket No. 07-1857  
Issued: March 26, 2008**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument January 8, 2008

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 6, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated April 20, 2007 denying her claim for death benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

**ISSUES**

The issues are: (1) whether appellant has established a compensable factor of retaliation and harassment; and (2) whether appellant has met her burden of proof to establish that the employee's death was causally related to factors of his federal employment.

## **FACTUAL HISTORY**

This case is before the Board for the third time. In a January 24, 2000 decision,<sup>1</sup> the Board found that the factual evidence established a compensable factor under *Cutler*.<sup>2</sup> The employee's postal route required more than eight hours to prepare and complete. The Board remanded the case to the Office for further development of the claim. On remand, the Office accepted the claim August 13, 2001 for adjustment disorder with mixed anxiety and depressed mood. It authorized compensation for the period July 12 to October 23, 1997, the date the emotional condition was found to have resolved. In a March 9, 2007 decision, the Board set aside a nonmerit decision dated June 2, 2006.<sup>3</sup> The Board found that the Office improperly denied appellant's request for reconsideration as she had submitted relevant new factual evidence. The facts and circumstances of the case are set forth in the Board's prior decisions and are hereby incorporated by reference.<sup>4</sup> The facts and the circumstances relevant to the current appeal are set forth below.

The relevant medical evidence includes reports dated June 20, 2003 and April 30, 2004 by Dr. Paul Rosch, a Board-certified internist. On June 20, 2003 Dr. Rosch reviewed the employee's medical records and factual evidence from his occupational disease claim. He opined that the employee "was subjected to severe and persistent stress at work. Dr. Rosch stated that, "[a]lthough not easy to prove, it is" also my opinion that job stress contributed to the development and fairly rapid downhill course of his colon cancer." He noted that stress had been shown to accelerate the spread and growth of malignant tumors and emotional stress had been shown to depress natural killer cells and other immune system components responsible for resistance to carcinogens. Dr. Rosch noted caveats in attributing the employee's cancer to stress, but concluded they could be dismissed in the employee's case "because of the well-documented harassment at work he was subject to, the temporal relationship with his symptoms of colon cancer and the absence of other competent contributing causes." He opined that the severe and persistent emotional stress at work "was not only responsible for his emotional breakdown but also contributed to the development and unusually rapid downhill course of his colon cancer." On April 30, 2004 Dr. Rosch reported that the employee's inability to complete his work duties in eight hours "created an atmosphere of severe and persistent stress." He opined: "that this type of stress, particularly when associated with 'overwork and fatigue,' can weaken immune system resistance to cancer."

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<sup>1</sup> Docket No. 99-1439 (issued January 24, 2000). On May 26, 1998 the Office denied the employee's emotional condition claim on the basis that he failed to establish a compensable factor of employment. An Office hearing representative affirmed the denial of his claim on December 31, 1998. On January 24, 2000 the Board adopted the decision of the hearing representative to find that the employee had not substantiated his allegations of harassment or discrimination.

<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> Docket No.06-1937 (issued March 9, 2007).

<sup>4</sup> The employee died on April 12, 2001 and appellant, the employee's widow, filed a claim for survivor's benefits (Form CA-5) on September 3, 2003 alleging that the employee's death was causally related to his accepted employment injury.

On August 16, 2004 the Office received a report from Dr. Suresh B. Katakkar, a second opinion Board-certified internist with a subspecialty in medical oncology. Dr. Katakkar reviewed the employee's medical records and statement of accepted facts. He opined that he did not believe that the employee's stress had induced the cancer. Dr. Katakkar agreed with Dr. Rosch in that stress can cause a problem over a period of time. On September 7, 2004 Dr. Katakkar stated that the employee's colon cancer was unrelated to the accepted mixed anxiety disorder or adjustment disorder. He opined that he did not believe that depression caused or induced any cancer in the employee.

On March 14, 2005 the Office received a report from Dr. Bernard S. Siegel, a Board-certified surgeon. After reviewing the employee's medical records and work history, Dr. Siegel agreed with the findings of Dr. Rosch. Dr. Siegel determined that the work stress the employee was under contributed to the rapid progression of his disease.

The relevant factual evidence includes a copy of the transcript before Administrative Judge Dennis Carter in the employee's Equal Employment Opportunity Commission (EEOC) claim, two pages of an April 24, 2002 decision and an April 3, 2006 letter from Bruce Lane, Manager of Human Resources at the employing establishment. Judge Carter found the following:

“I find the evidence established that the RMOS were not completely truthful, but I do not find that the preponderance of the evidence established their lies were retaliation for EEO activity. After a thorough review of the record and assessing the credibility of the RMOS, I find that PM Kelley was the driving force behind the close monitoring of the [c]omplainant's work performance because she was retaliating against the complainant because of his aggressive role in Project Hope, which made her look bad to higher management in the District. I further find that Project Hope was the origin of the retaliatory actions the [c]omplainant identified as continuing harassment rendering his work environment hostile and abusive. The RMOS used the [c]omplainant as an example of what happens when an employee speaks out against management actions, *i.e.*, his work performance became closely monitored, his requests for help were continuously scrutinized and criticized and when he spoke up at standups he was ignored. Notwithstanding this finding, the [c]omplainant failed to establish that Project Hope involved Title VII, ADA [Americans with Disabilities Act], EPA [Environmental Protection Act] or Rehab Act issues. In fact, the preponderance of the evidence did not show that the [c]omplainant engaged in protected EEO[C] activity known to the RMOs until after he filed the EEO[C] complaint that served as the basis for this hearing. Accordingly, I find that even though the [a]gency's articulated reasons for its actions were retaliatory linked to the [c]omplainant's active involvement with Project Hope, the preponderance of the evidence did not establish that Project Hope involved EEO[C] issues. Thus, since the [c]omplainant was not engaged in opposition to discriminatory practices, he cannot recover for the [a]gency's retaliatory actions in this forum.”

On April 3, 2006 Mr. Lane noted that the employing establishment “regrets that the relationship between your husband and local management officials was characterized by friction during his final years of service” and that it was unfortunate that this situation caused stress for your husband.

In an April 20, 2007 decision, the Office found the record insufficient to establish any additional compensable factors. The Office noted that it was not to make a decision on the significance of the redacted two-page EEOC decision and that EEOC determinations were not binding on it. The medical evidence was found insufficient to support that the employee’s death was causally related to the accepted employment factor, relying on the referral opinion of Dr. Katakkar.

### **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees’ Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> It is well established, however, that there are disabilities having some kind of causal connection with the employment that are not covered under workers’ compensation, such as when disability results from 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.<sup>6</sup>

Workers’ compensation law does not cover an emotional reaction to administrative or personnel actions unless the evidence shows error or abuse on the part of the employing establishment.<sup>7</sup> The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. Generally, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>8</sup> Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.<sup>9</sup> The primary reason for requiring factual evidence from the claimant in support of his allegations of stress in the workplace is to establish

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Lillian Cutler*, *supra* note 2.

<sup>7</sup> *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991), *reaff’d on recon.*, 41 ECAB 387 (1990).

<sup>8</sup> *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant’s allegations of unfair treatment to determine if the evidence corroborated such allegations).

<sup>9</sup> *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board previously found a compensable work factor under *Cutler*. Appellant contends that the Office should have also accepted as compensable the fact that the employee was subjected to harassment and retaliation prior to his death. The issue to be resolved is whether appellant has submitted sufficient evidence to establish the allegations of harassment and retaliation.

Mr. Lane's April 3, 2006 letter is insufficient to establish the allegations of harassment. While he expressed regret that there was friction between her husband and employing establishment management, there was no admission of any wrongdoing on the part of the employing establishment.

There was, however, evidence submitted with respect to a claim of harassment and retaliation regarding the actions of Ms. Kelley. Although the entire decision is not of record, the April 4, 2002 decision of the EEOC administrative judge appears to include a finding of harassment, retaliation and hostile work environment. The Office acknowledged the relevance of the April 4, 2002 EEOC administrative judge's decision, but stated it was unable to make a finding on this evidence as the decision was incomplete and redacted. It is well established that, while the findings of other federal agencies are not dispositive with regard to questions arising under the Act, such evidence may be given weight by the Office and the Board.<sup>11</sup> Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>12</sup>

On return of the case record, the Office should secure a complete copy of the administrative judge's EEOC decision and make an appropriate finding with respect to the alleged work factor.<sup>13</sup> After such further development as the Office deems necessary, it should issue an appropriate decision.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant's case is not in posture for a decision on the issue of whether she established compensable factors of harassment and retaliation.

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<sup>10</sup> *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, M., concurring).

<sup>11</sup> *See Michael A. Deas*, 53 ECAB 208 (2001).

<sup>12</sup> *Rebecca O. Bolte*, 57 ECAB \_\_\_\_ (Docket No. 05-495, issued July 20, 2006).

<sup>13</sup> *See Pamela D. Casey*, 57 ECAB \_\_\_\_ (Docket No. 05-1768, issued December 13, 2005) (the Board remanded the case for the Office to secure a complete copy of the administrative judge's decision and make an appropriate finding with respect to the alleged work factor).

<sup>14</sup> In light of the disposition of issue 1, the Board will not review the medical evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 20, 2007 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 26, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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