United States Department of Labor
Employees' Compensation Appeals Board

A.P., Appellant **and** **U.S. POSTAL SERIVCE, PROCESSING & DISTRIBUTION CENTER, Santa Clarita, CA, Employer**	)))))))))	**Docket No. 09-273** **Issued: August 12, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2008 appellant filed a timely appeal from December 6, 2007 and August 4, 2008 merit decisions of the Office of Workers' Compensation Programs denying his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an aggravation of an employment-related back condition due to factors of his federal employment; and (2) whether he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On September 6, 2007 appellant, then a 52-year-old mail processing clerk, filed an occupational disease claim alleging that he sustained aggravation of a prior work injury because he was forced to work outside his restrictions. He attributed the aggravation to management forcing him to train a female employee and move and lift items in the plan supply room from

June 26 to August 7, 2007. Appellant described his symptoms as pain and numbness through the legs, fatigue, headaches, dizziness, sleep disturbances, neck strain, pain and numbness in the arms and depression. Jeff Ward, a supervisor, related that appellant worked in a rehabilitation job until offered another position with less duties but also different hours and nonscheduled days. The Office assigned the claim file number xxxxxx424.

The record indicates that appellant sustained lumbar strain, cervical strain and a permanent aggravation of preexisting degenerative disc disease of the cervical spine at C3-4, C4-5 and C5-6 and of the lumbar spine at L3-4, L4-5 and L5-S1 on January 19, 2001 in the performance of duty, assigned file number xxxxxx016. Following his injury, appellant worked modified duty as a mail processor in the supply room.[1]

By letter dated September 6, 2007, the employing establishment controverted the claim.[2] The employing establishment related that appellant received assistance from other clerks to do his supply room job. Management believed that he "should be given a job within his medical restrictions that he could do without taking another employee away from his own job to assist [him]." Appellant stopped work when he received the new job offer.

On October 10, 2007 Mr. Ward related that appellant worked without incident or complaint as a supply clerk since 2001. He stated:

> "In fact, one day during September 2007 I had a conversation with [appellant] regarding his ability to safely perform his duties as [s]upply clerk. I wanted to make sure he was working within the guidelines of his physical restrictions. [Appellant] specifically stated to me that he asks for help from fellow employees anytime he has needed assistance with lifting, carrying, pushing, pulling, bending or stooping. He specifically stated to me, in the presence of another supervisor[,] Edward Moore, that he has no problem performing the task of [s]upply clerk."

Mr. Ward maintained that appellant did not work outside his restrictions as he asked for help in moving and lifting boxes. He indicated that the duties of the position mostly required the use of a computer and telephone. Mr. Ward related that appellant did not cooperate in training a new supply clerk, Patsy Mannie, who performed all the moving and lifting of boxes while appellant watched. Mr. Ward offered appellant a new position on August 10, 2007 with a change in work

[1] In a report dated April 12, 2007, Dr. Glenn K. Takei, a Board-certified orthopedic surgeon, selected to resolve a conflict over whether appellant had any continuing disability in file number xxxxxx016, found that appellant continued to experience residuals from his work injury. He found appellant was unable to resume his regular job but could continue to work in his modified position in plant supply and procurement. Dr. Takei noted that it "seems to be working out well and he has no problems with performing these job duties. It would therefore be my recommendation that he continue with this job position." Dr. Takei listed work restrictions of no lifting over five pounds.

[2] In a report dated July 31, 2007, Dr. Nimish Shah, an attending Board-certified anesthesiologist, diagnosed a permanent aggravation of degenerative cervical and lumbar disc disease, bilateral cervical facet pain and lumbosacral radicular and lumbar facet pain. He opined that appellant could perform his current modified work duties. On August 30, 2007 Dr. Shah determined that appellant continued "on temporary total disability as his modified work restrictions were not honored. [Appellant] was training another employee for two weeks and required excessive movement, prolonged sitting and standing and developed flare-up of back and neck pain."

hours. Appellant was not happy with the offer and asserted that he did not have difficulty performing the duties of a supply clerk. He stopped work when he received the offer of a new position and did not return.

In a statement dated October 12, 2007, Tony Gethers, a manager, related that he asked appellant to train Ms. Mannie on purchasing and ordering supplies. Ms. Mannie complained that appellant did not train her but instead had her clean the supply room. Mr. Gethers asserted that he did not ask appellant to work outside any restrictions but instead instructed him to train Ms. Mannie "on how to order and purchase supplies that were needed to support mail processing operations. Based on several conversations I had with [Ms. Mannie] after she initially went into the supply room it was she who was doing all of the physical work."

In an undated statement received October 17, 2007, Ms. Mannie described her assignment to work in the supply room with appellant. She related that initially he refused to allow her in the room. Ms. Mannie related, "When I was told to report back to the room a few days later, he had me lifting heavy boxes the entire [hour and a half] that I was there…. [Appellant] instructed me on what boxes to put in the containers and on the top shelves. He stood and watched the entire time." She twice complained to management about appellant's failure to adequately provide training.

On October 23, 2007 appellant indicated that he worked from January 19, 2001 to August 10, 2007 in a modified position in plant supply.[3] He asserted that management forced him to train an employee 45 to 90 minutes each day and to assist in moving, lifting and placing objects weighing 20 to 45 pounds "in the plant supply room within the inventory shelves and floor. The worsening of [the] condition gradually started to take place between June 26, 2007 and August 7, 2007." Appellant related that he had to move items that exceeded his restrictions because the trainee was a female and thus unable to move the items. He indicated that he became very depressed due to low back pain radiating into his legs.

By decision dated December 6, 2007, the Office denied appellant's claim on the grounds that he did not establish fact of injury. It determined that he did not establish the identified factors.

On December 28, 2007 appellant requested an oral hearing. At the hearing held on June 3, 2008, he described his January 19, 2001 work injury. Appellant related that he moved boxes weighing 25 pounds in his position as supply clerk. He denied failing to train Ms. Mannie and alleged that they both moved boxes. Appellant indicated that management offered him a position as a security guard. He had previously tried to do the position a few years earlier but

[3] In a report dated October 1, 2007, Dr. Julie Goalwin, a clinical psychologist, diagnosed a depressive disorder not otherwise specified and a pain disorder due to both psychological factors and a general medical condition. She described appellant's history of a work injury to his neck and back in January 2001 and a reinjury after he worked beyond his limitations training an employee. Appellant experienced chronic pain and felt depressed. His pain increased when he trained a new employee from July 26 to August 10, 2007. Dr. Goalwin noted, "[Appellant] reports that he reinjured himself when he was training the new employee as a result of having to lift and move heavy products that went against his medical restrictions of no heavy lifting. She determined that his emotional condition was due to his work injuries.

could not perform the duties. Appellant related that he was depressed because of his pain. The employing establishment refused to approve his sick leave and terminated his employment.

By decision dated August 4, 2008, the hearing representative affirmed the December 6, 2007 decision. He noted that file number xxxxxx424 had been doubled into master file number xxxxxx016. The hearing representative determined that appellant had not established that he sustained an aggravation of a preexisting physical condition because he had not established that he worked outside his restrictions training Ms. Mannie from June 26 to August 7, 2007. He noted that at the hearing appellant attributed his condition to work factors since 2001 but found that there was no evidence that he exceeded his work restrictions at any time. The hearing representative further concluded that the medical evidence was insufficient to show that work activities caused or aggravated a back condition. The hearing representative determined that appellant did not establish an emotional condition due to working outside his restrictions. He noted that, if appellant believed that he had a consequential injury due to pain from his accepted back condition, he should file a claim under file number xxxxxx016.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[7] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[8] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9]

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[4] 5 U.S.C. §§ 8101-8193.

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[7] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[8] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[9] *Beverly A. Spencer*, 55 ECAB 501 (2004).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar strain, cervical strain and a permanent aggravation of cervical and lumbar spine degenerative disease due to a January 19, 2001 employment injury, assigned file number xxxxxx016. On September 6, 2007 appellant filed an occupational disease claim alleging that he sustained an aggravation of his accepted back condition due to training an employee from June 26 to August 7, 2007. He asserted that he had to lift and move items from the inventory shelves weighing in excess of his five-pound lifting limitation.

Appellant has the burden to establish the occurrence of the employment factors to which he attributes his condition.[10] The Board finds that he has not demonstrated that he was forced to work outside his restrictions. In a statement dated October 23, 2007, appellant related that management forced him to train an employee and help her lift and move items weighting 20 to 45 pounds. He maintained that he had to exceed his restrictions in assisting the trainee because she was female. The employing establishment controverted appellant's allegations, noting that he had worked in the position since 2001 and obtained assistance from coworkers to comply with his lifting limitations. Appellant's supervisor, Mr. Ward, maintained that he did not cooperate in training Ms. Mannie and that she performed all of the lifting and moving of boxes. He noted that appellant stopped working when he received an offer of a new position. Mr. Gethers, a manager, related that he instructed appellant to train Ms. Mannie on how to order supplies and did not require him to perform any work outside his restrictions. In a statement dated October 17, 2007, Ms. Mannie asserted that appellant initially refused to train her and then had her lifting heavy boxes during her training time. She maintained that he watched her move the boxes without providing any assistance. Appellant has not established by the weight of the evidence that he performed work outside his restrictions while training Ms. Mannie from June 26 to August 7, 2007. As he has not established the occurrence of the claimed factors to which he attributed his condition, he has not met his burden of proof to show that he sustained an occupational disease.[11]

On appeal, appellant raised allegations regarding the fairness of the hearing proceedings. The Board's jurisdiction, however, extends only to the review of final decisions of the Office.[12] He further denied speaking to Mr. Ward about his job and alleged that the fact that the trainee continued training with him for such a long period shows that he was providing training. The issue, however, is whether appellant has established that he worked outside his restrictions for the period in question. He has not submitted such evidence and thus the Office properly denied his claim.

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[10] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

[11] *See M.W.*, 57 ECAB 710 (2006).

[12] 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 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 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 Act.[13] 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.[14]

ANALYSIS -- ISSUE 2

Appellant alleged that he experienced increased pain and depression from working outside his restrictions while training a new employee. The Board has held that being required to work beyond one's physical limitations may constitute a compensable employment factor if the record substantiated such activity.[15] As previously discussed, however, appellant's supervisor denied that he worked outside his limitations and he has not submitted any evidence corroborating his assertion. Thus, he has not established the required factual basis for his allegation.[16] As appellant has not established a compensable work factor, the Board will not consider the medical evidence.[17]

CONCLUSION

The Board finds that appellant has not established that he sustained an aggravation of an employment-related back condition due to factors of his federal employment.[18] The Board further finds that he has not established that he sustained an emotional condition in the performance of duty.

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[13] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[14] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[15] *David C. Lindsey*, *Jr.*, 56 ECAB 263 (2005).

[16] Allegations alone are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence. *Pamela D. Casey*, 57 ECAB 260 (2005).

[17] *Richard Yadron*, 57 ECAB 207 (2005).

[18] Appellant submitted new evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and requested reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4, 2008 and December 6, 2007 are affirmed.

Issued: August 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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