United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 09-558**
	)	**Issued: October 1, 2009**
U.S. POSTAL SERVICE, MADISON SQUARE STATION, New York, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 23, 2008 appellant, through his attorney, filed a timely appeal from July 7 and November 6, 2008 merit decisions of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 16, 2008 appellant, then a 51-year-old customer services manager, filed an occupational disease claim alleging that he sustained insomnia and major depressive disorder due to stress. He related: "My employment has caused me both mental and physical illness. The hostile work environment has created harassment along with stressful conditions which has caused me major depressive disorder, paranoia, stress, insomnia and physical tensions such as

body and headaches." Appellant stopped work on April 24, 2008. In a statement accompanying his claim, he described his current work duties as a manager. Appellant stated:

> "Since April 2007 the [employing establishment] has attempted to reduce my grade/salary for no just cause. A settlement agreement was reached in October 2007 with my voluntary reassignment to the current position I now hold. My emotional reaction is specific to my employment duties as it relates to the collection of mail. The harassment of being treated differently from my peers. The disparate treatment and double standard exhibited by the [employing establishment]."

Appellant related that an October 26, 2007 settlement agreement from the Merit Systems Protection Board (MSPB) established that the employing establishment failed to prove misconduct when it tried to reduce his grade due to failures in collecting mail.[1]

On May 16, 2008 Mitch Sturman, a manager at the employing establishment, controverted appellant's claim. He related that appellant received a proposed reduction in grade on May 1, 2007 from his position as postmaster Executive and Administrative Schedule (EAS) level 24 to manager EAS level 21. Appellant filed a complaint with the MSPB. In an October 26, 2007 settlement agreement, the employing establishment permitted him to voluntarily request a reduction in grade. Appellant received another proposed reduction in grade on April 18, 2008. Mr. Sturman noted that appellant was attributing his condition to disciplinary actions rather than his work duties.

On May 1, 2007 the employing establishment notified appellant of a proposed reduction in grade and pay from a level EAS-24 to a level EAS-21 for failing to acceptably perform his work duties. It asserted that appellant failed to properly verify that collection boxes were properly labeled and failed to properly download collection data. In a letter decision dated May 30, 2007, the employing establishment finalized the proposed reduction in grade and salary.[2]

In an October 26, 2007 MSPB settlement and release agreement, the employing establishment agreed to rescind its May 1, 2007 notice or proposed reduction in grade and pay and the May 30, 2007 letter decision and allow appellant to request a voluntary reassignment and grade and pay reduction to level EAS-21. It also rescinded a September 21, 2007 notice of proposed removal and appellant agreed not to seek a promotion for three years. The agreement stipulated that it was not an admission of wrongdoing by the employing establishment.

On April 18, 2008 appellant received a notice of proposed reduction in grade from a manager, EAS-21, to a supervisor, EAS-17, for failing to properly discharge his assigned duties. The employing establishment found that he failed to document that he tested all collection points.

[1] Appellant also submitted medical evidence in support of his claim.

[2] On July 17, 2007 the employing establishment submitted a response to the MSPB outlining the reasons for its disciplinary action.

In a statement dated May 12, 2008, appellant related that he worked for the employing establishment for 27 years, eventually reaching the position of EAS-24 postmaster in August 2004. In 2005, the employing establishment began treating him disparately allegedly because of his race. Appellant indicated that he received a letter of warning for failing to timely complete a task in June 2006. The action was resolved after mediation. In May 2007, appellant received a proposed reduction in grade and salary and a decision reducing his grade and salary effective June 9, 2007. He filed a grievance with the MSPB on June 12, 2007 alleging discrimination due to race and national origin. On June 19, 2007 appellant interviewed for a position as a postmaster in Virginia. He believed that Sherry Harper, the interviewer, knew of his MSPB grievance. Appellant accepted the offered position of postmaster and relocated to Virginia from New York. He met with Ms. Harper and informed her of his MSPB claim. On August 20, 2007 appellant was discharged from his duties as postmaster and placed on administrative leave. After the October 26, 2007 MSPB settlement, he began working as a manager in New York. On April 21, 2008 appellant received a notice of proposed reduction in grade/salary for failing to perform his assigned duties and a settlement agreement on the same day. He signed the agreement "under duress acknowledging fault along with a one[-]week loss of pay and 14[-]day suspension…." Appellant sought medical treatment for depression, insomnia, paranoia and stress.

By decision dated July 7, 2008, the Office denied appellant's claim on the grounds that he did not establish an emotional condition in the performance of duty. It found that appellant had not established any compensable employment factors.

On August 1, 2008 appellant, through his attorney, requested reconsideration. Counsel argued that his "allegation of mistreatment or harassment occurred in the course of regular work duties, as well as in the performance of requirements imposed as a condition of employment." He contended that the Office accepted the employing establishment's denial or error or abuse in its actions without making an adequate factual investigation. Counsel asserted that all disciplinary matters were resolved in appellant's favor, including the June 2006 letter of warning for failing to timely complete a task and its May 2007 proposed notice of reduction in grade and salary. He alleged that appellant was not represented, as found by the Office, in matters related to the April 21, 2008 notice of proposed reduction in grade. Counsel further argued that the medical evidence was sufficient to establish the claim.

In an October 30, 2008 response, the employing establishment reviewed the disciplinary actions taken and the settlement reached and maintained that appellant had not established either harassment or error or abuse in administrative actions. It submitted a copy of the June 9, 2006 letter of warning issued to appellant for failing to follow instructions by failing to timely complete 3,999 submissions. A November 28, 2006 settlement agreement between appellant and the employing establishment established that the June 6, 2006 letter of warning would be removed from his personnel file as soon as the requested work was completed but no later than April 30, 2007. On November 29, 2007 an administrative law judge with the MSPB found that the parties freely entered into the settlement agreement. The employing establishment also submitted an April 21, 2008 settlement agreement regarding the April 17, 2008 notice of proposed reduction in grade. Appellant admitted to and agreed with the charges and the employing establishment modified the 14-day suspension to 7 days without pay.

By decision dated November 6, 2008, the Office denied modification of its July 7, 2008 decision. It found that appellant had not established either harassment or error or abuse by the employing establishment.

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.[3] 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.[4]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[5] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[6] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[7]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[9] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by

[3] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

[5] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[6] *See William H. Fortner*, 49 ECAB 324 (1998).

[7] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[8] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

supporting his or her allegations with probative and reliable evidence.[10] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish 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.[11]

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.[12] 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.[13]

ANALYSIS

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

Appellant asserted that management harassed and discriminated against him by trying to reduce his grade and salary without any justification and by treating him differently from his coworkers. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[14] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[15] Further, disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, not compensable employment factors.[16] On June 9, 2006 the employing establishment issued appellant a letter of warning for failing to timely complete work duties. A November 28, 2006 settlement agreement provided that the letter of

[10] *See James E. Norris*, 52 ECAB 93 (2000).

[11] *Beverly R. Jones*, 55 ECAB 411 (2004).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[15] *Robert Breeden*, 57 ECAB 622 (2006); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[16] *See Andrew Wolfgang-Masters*, 56 ECAB 411 (2005); *Lori A. Facey*, 55 ECAB 217 (2004).

warning would be removed from his personnel file as soon as the work was completed. On May 30, 2007 it reduced appellant's grade and salary from an EAS-24 to an EAS-21. Appellant filed a grievance with the MSPB. In an October 26, 2007 settlement agreement before the MSPB, the employing establishment rescinded the May 30, 2007 demotion and appellant agreed to voluntarily accept the lower grade and salary. The settlement was obtained without any admission of fault on the part of the employing establishment. The employing establishment issued appellant another proposed reduction in grade on April 18, 2008, which was modified to a 14-day suspension after he admitted to the charges. Appellant has not shown that the disciplinary actions taken against him were erroneous or abusive or the result of harassment or discrimination against him. The Board has held that the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.[17]

On appeal, appellant contends that his emotional and physical condition arose from compensable work factors. He, however, did not attribute his emotional condition to the performance of regular or specially assigned duties but instead to harassment and discrimination by the employing establishment and erroneous disciplinary actions. As discussed, appellant failed to submit any evidence corroborating his allegations of harassment and discrimination. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting appellant's allegations with probative and reliable evidence.[18] Additionally, as noted, reactions to disciplinary matters pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively.[19] Appellant did not submit any evidence supporting that the employing establishment erred or acted abusively in issuing the disciplinary action. Consequently, he has not met his burden of proof.

Appellant's attorney further asserted that, contrary to the Act and Board precedent, the Office took an adversarial approach to the claim and failed to assist in developing the evidence to see that justice was done. Appellant has the burden of proof; however, to establish by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by compensable work factors.[20]

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.[21]

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[17] *Peter D. Butt, Jr.*, 56 ECAB 117 (2004); *Paul L. Stewart*, 54 ECAB 824 (2003).

[18] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

[19] *Joe M. Hagewood*, 56 ECAB 479 (2005).

[20] *See Robert Breeden, supra* note 15.

[21] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 6 and July 7, 2008 are affirmed.

Issued: October 1, 2009
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