United States Department of Labor
Employees' Compensation Appeals Board

G.F., Appellant	)	
and	)	**Docket No. 10-363**
	)	**Issued: November 12, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Corona, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2009 appellant filed a timely appeal of the November 5, 2009 decision of the Office of Workers' Compensation Programs denying appellant's emotional condition claim. Under 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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 13, 2008 appellant, then a 44-year-old city carrier supervisor, filed an occupational disease claim alleging an emotional condition arising from stress and discrimination in his federal employment.[1] His employer controverted the claim.

[1] Appellant filed a claim for 420 hours of leave without pay from May 5 to August 13, 2008.

In statements to the record, appellant recounted that he was taken ill and sustained a stroke in April 2007 for which he underwent surgery on July 17, 2007. Following his return to work in September 2007, he alleged a pattern of abusive behavior by his managers, Jan Leger, the manager of customer services, and Robin Hirabayashi, the postmaster, which he attributed to an effort to get him to retire. Appellant noted having requested accommodation by being limited to work four hours a day, not in the early morning; not having face-to-face transactions with customers due to a speech impediment; and not having to make mail counts in the back of long life vehicles (LLV) due to the lack of air circulation and motion sickness.

Appellant alleged that Ms. Hirabayashi put pressure on him to retire in order to hire someone else. Ms. Hirabayashi called him an "invalid" and stated that if he did not retire she would give him a "unit." She called him at home while he was sick and told him to return to work at the main office. In October 2007, Ms. Hirabayashi assigned him to window duties despite the fact that he had problems talking in public. In November 2007, she stated that his "brain was not sharp enough to be able to run a unit" and that appellant was responsible for the failure of an operation because he placed a city carrier in a different operation for one hour. Appellant noted that he was accused of being too slow in completing a project and that his supervisors did not appreciate the extra work he performed on the project. On November 30, 2007 Ms. Hirabayashi directed him to give a safety talk. Appellant asked to use an enclosed environment, like the conference room, to address the carriers. Ms. Hirabayashi told him that she was previously unaware of any speech impairment. In February 2008, several mail carriers were still out on their routes past 6:00 p.m. Ms. Hirabayashi called appellant and told him that if that happened again he was "toast."

In February 2008, Ms. Leger told appellant that he failed to respond to her page. Appellant noted that he did not hear the page and Ms. Leger told him that when she paged him she expected him to drop everything and respond. On March 7, 2008 his manager questioned his mail volume recording in front of a city carrier. Appellant was also issued a memorandum that day pertaining to an investigative interview into why he had failed to follow instructions from February 12 through March 3, 2008. He subsequently received a letter of warning. Appellant denied that he had failed to follow instructions. He alleged that Ms. Leger started giving him written instructions so that if he failed to complete a task she would have it in writing and could issue another letter of warning. On March 19, 2008 appellant had a discussion with Ms. Leger with regard to paperwork on the workroom floor and that she told him in a demeaning manner that they would not discuss the issue there and that she would speak to him later. Later that day, while delivering a tray of mail, Ms. Leger called him to discuss a report on variances. Appellant told his manager that he was going to file a complaint of discrimination if she did not stop harassing him.[2] Ms. Leger informed appellant that she intended to issue a letter of warning.

Appellant also alleged that Ms. Leger assigned extra duties to him that other supervisors did not have to do, such as counting mail, completing forms on carrier swing time, talking to carriers about their performance, instructed as to how the morning papers were to be arranged and maintaining a call log. Ms. Leger interrupted his work sequence to observe everything he did. Appellant stated that his manager required him to give a stand up to the rural carriers that should have been a rural supervisor's responsibility. He contended that Ms. Leger held him to a

[2] The record contains materials from an interview with appellant pertaining to his Equal Employment Opportunity (EEO) complaints.

higher standard and ordered him to not take authorized lunches. Appellant received a letter of warning on April 18, 2008 for failure to follow instructions. He reiterated that he was disciplined differently from other supervisors and the action was posted on the internet for everyone to see. On May 21, 2008 there was some miscommunication with regard to leave for employees and on May 31, 2008, certain e-travel was not approved. Appellant noted that management asked for medical documentation to establish that he was unable to work and listing his work restrictions. In an August 14, 2008 letter from Ms. Leger, appellant was advised that his medical restrictions cleared him for work four hours a day but did not address whether he could not talk to people in a face-to-face situation or state that he would become dizzy when riding in a back of an LLV.[3] Appellant was advised to submit additional medical evidence to support his requested accommodations. If not submitted by August 28, 2008, he would be placed in an absent without leave status for his uncovered period of time.

The record reflects that statements were obtained as part of the EEO investigation into appellant's allegations of discrimination and retaliation. On August 6, 2008 Daniel Segura, a letter carrier, noted that appellant was his supervisor. Appellant mentioned to him of being treated in an unfair manner because his superiors constantly scrutinized his performance. Mr. Segura stated that appellant felt that he was being treated in a disparate manner. He noted that he never witnessed appellant being harassed, but noted that appellant was often called over the intercom to Ms. Leger's office, following which appellant would appear to be in a very nervous or intimidated manner. On August 7, 2008 Marvin V. Balucanag, a carrier technician, noted that appellant was his immediate supervisor since early 2008 and never complained of being subjected to harassment by his superiors. He stated that he did not witness any acts of harassment by management towards appellant.

In a March 5, 2009 decision, the Office denied appellant's claim for an emotional condition. It found that he did not establish any compensable factor of employment.

On March 16, 2009 appellant requested an oral hearing that was held on August 26, 2009. He reiterated that, after returning to work following his stroke, his managers sought his retirement and harassed him. Following the hearing, appellant submitted a copy of a settlement agreement pertaining to his EEO complaint.[4]

By decision dated November 5, 2009, an Office hearing representative affirmed the March 5, 2009 denial of appellant's claim.

LEGAL PRECEDENT

To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) medical evidence establishing that he has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing

[3] The record contains a May 5, 2008 letter from Ms. Leger to appellant concerning the need for his physician to document his work restrictions and need for accommodation.

[4] It is not apparent from the copy of record that the agreement was executed as there were no signatures to the document and it is undated.

that the identified compensable employment factors are causally related to his stress-related condition.[5]

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 or her 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.[6] 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.[7]

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.[8] 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.[9] 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.[10]

For discrimination to give rise to a compensable disability, 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 action occurred. A claimant must establish a factual basis for his or her allegations that discrimination occurred with probative and reliable evidence.[11] Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[12] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[13] 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

[5] *G.S.*, 61 ECAB ___ (Docket No. 09-764, issued December 18, 2009).

[6] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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

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

[11] *James E. Norris*, 52 ECAB 92 (2000).

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

[13] *See James E. Norris*, *supra* note 11.

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.[14]

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.[15] 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.[16]

ANALYSIS

Appellant alleged that he sustained an emotional condition after his return to work in September 2007 following treatment for a stroke. The Office denied his claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether the alleged incidents or conditions of employment are compensable factors under the Act.

With regard to his regular or special assignment duties, appellant alleged generally that he was given tasks to perform that were responsibilities of other supervisors in addition to his own. The record documents that he sought to work four hours a day in the late morning or afternoon, not be assigned to face-to-face activities with customers or work in the back of large vehicles, where he would be subjected to poor circulating air. Appellant's managers advised him on several occasions that, while his accommodation for four hours of work a day would be allowed, the medical evidence did not address restrictions pertaining to face-to-face activities or work in larger vehicles. The evidence of record is not sufficient to establish a compensable employment factor under *Cutler* as appellant's allegations are not sufficiently detailed as to the time, place or manner of the regular or specially assigned duties he was required to perform or of his inability to perform his work as assigned. Appellant alleged that he was accused of working to slow and that his managers did not appreciate the extra work he performed on a project. This allegation is not specific as to the nature of the project assignment or the extra work performed. It appears from the record that he was asked on several occasions to address groups of carriers in his capacity as a supervisor, for example as requested by Ms. Leger on November 30, 2007 to give a safety talk. However, appellant's allegation noted only his request to do so in an enclosed space and the fact that she informed him that day that she was previously unaware of any problem concerning his speech. His statements do not detail how the performance of his duties gave rise to his emotional condition; rather he addressed what he alleged was interference with his job by management.

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

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

[16] *Id.*

The focus of appellant's allegations is primarily on administrative and personnel matters. He noted he was transferred to a different station, called at home while ill and informed of his duty station assignment, informed of the requirement to submit additional medical documentation with regard to his work restrictions, directed to take a late lunch, observed and monitored in the performance of his work and generally held to a higher standard than other supervisors. These are matters that do no pertain to his regular or specially assigned work duties and do not fall under the coverage of the Act.[17] While appellant alleged harassment and retaliation on the part of his managers in these matters, the evidence of record is not sufficient to establish error or abuse by his supervisor or the postmaster. The statements of appellant's coworkers, submitted in the EEO complaint process, are not adequate to establish administrative error or abuse. Both Mr. Segura and Mr. Balucanag denied ever witnessing any specific instance of harassment. Mr. Segura noted only that appellant was called over the intercom and would leave Ms. Leger's office in a nervous or intimidated manner. This evidence does not support the statements appellant attributed to his superiors, such as being called an invalid or any verbal abuse or error by his manager. The Board has held that grievances and EEO complaints, by themselves, do not establish workplace harassment or unfair treatment.[18]

The record establishes that Ms. Leger investigated appellant for his failure to follow instructions from February 12 through March 3, 2008 and that she subsequently issued a letter of warning on April 18, 2008. The Board has noted that, although the handling of disciplinary actions and the monitoring or work activities are generally related to the employment, they are administrative functions of the employer and do not pertain to the work duties of the employee.[19] Although appellant alleged that a disciplinary matter was posted on the Internet, there is no evidence to support his allegation. There is no evidence that the employing establishment acted unreasonably with regard to the investigation or discipline. The copy of the settlement agreement does not appear to have been executed as there are no dates or signatories to the document.

Harassment and discrimination by supervisors or coworkers may constitute a compensable work factor.[20] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[21] As noted, appellant alleged that Ms. Leger called him an "invalid," told him that his "brain was not sharp enough to be able to run a unit." He also alleged incidents where he was treated in a demeaning manner on the main floor, criticized for improperly assigning work and for working too slow. Appellant was told after he failed to respond to a page that he should drop everything, a comment which he deemed to be unprofessional. The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by the Act.[22] The statement of record, as noted, do not substantiate that any of the comments alleged were

[17] *V.W.*, 58 ECAB 428 (2007).

[18] *See David C. Lindsey*, 56 ECAB 263 (2005).

[19] *See Debora L. Hanna*, 54 ECAB 548 (2003).

[20] *Dorethea M. Belnavis*, 57 ECAB 311 (2006).

[21] *Robert Breeden*, 57 ECAB 622 (2006).

[22] *David C. Lindsey, Jr., supra* note 18; *see also Marguerite J. Toland*, 52 ECAB 294 (2001).

made. Mr. Balucanag did not witness any harassment and Mr. Segura recalled without detail, an incident when a person treated appellant as if he was incapable of performing his job. This statement is inadequate to establish harassment or verbal abuse. Mr. Segura noted that appellant stated that he felt intimidated by his supervisor but this is insufficient to establish a compensable factor.[23] The Board finds that appellant's emotional reaction must be considered self-generated, in that it resulted from his perceptions regarding his supervisor's actions.[24]

CONCLUSION

The Board finds that appellant did not establish that he sustained an emotional condition arising in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[23] *V.W.*, *supra* note 17.

[24] *See David S. Lee*, 56 ECAB 602 (2005).