

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES W. BLACKMAN and U.S. POSTAL SERVICE,  
POST OFFICE, Mission Veigo, Calif.

*Docket No. 96-1193; Submitted on the Record;  
Issued August 19, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

On May 25, 1994 appellant, then a customer service supervisor, filed a claim for an occupational disease (Form CA-2) assigned A13-1049336 alleging that he first became aware that his condition was caused or aggravated by his employment on May 9, 1994.<sup>1</sup>

By decision dated June 23, 1995, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition caused by factors of his federal employment. In an accompanying memorandum, the Office found that the employing establishment's September 29, 1993 reorganization constituted an employment factor because the Merit Systems Protection Board (MSPB) determined that the reorganization was a reduction-in-force and that proper procedures were not followed by the employing establishment. The Office accepted that the following incidents occurred, but found that they did not constitute employment factors: (1) appellant's commute of 29 miles from his home to the employing establishment in his reassigned position; (2) claimant's return to work after being out due to a back condition because the employing establishment failed to adhere to the work restrictions of appellant's physician; (3) a change of appellant's work schedule after May 9, 1994

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<sup>1</sup> Previously, on November 5, 1993, appellant filed a Form CA-2 assigned A13-1028224 alleging that he sustained an emotional condition causally related to factors of his federal employment. By decision dated April 20, 1994, the Office of Workers' Compensation Programs denied appellant's claim. In a letter dated May 25, 1994, appellant requested reconsideration of the Office's decision. By decision dated June 20, 1994, the Office denied appellant's request for modification.

when the employing establishment offered appellant light-duty work; (4) appellant's light-duty work counting mail in the middle of the workroom floor, shredding paper and pencil sharpening; (5) the employing establishment's accommodation of appellant's changed work restrictions; (6) appellant's departure from work on May 13, 1994 after filing a stress claim and the employing establishment's change of appellant's status from absence without leave to sick leave subsequent to the filing of a MSPB action; (7) the June 3, 1994 telephone call by the postmaster advising appellant that the medical evidence submitted was insufficient; and (8) appellant's Equal Employment Opportunity Commission (EEOC) complaints. Further, the Office found that appellant's allegation of being "goaded and baited" by the postmaster, and that he was given no office, no training and no equipment did not occur.

In an August 4, 1995 letter, appellant requested reconsideration of the Office's June 23, 1995 decision. By decision dated December 13, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

In a January 12, 1996 letter, appellant requested reconsideration of the Office's decision. By decision dated January 31, 1996, the Office denied appellant's request for reconsideration without a merit review of the claim on the grounds that the evidence submitted was irrelevant and immaterial, and thus insufficient to warrant a review of the prior decision.

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 factors of his federal employment. To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>2</sup>

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>3</sup>

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<sup>2</sup> *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

<sup>3</sup> *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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.<sup>4</sup> Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.<sup>5</sup>

Appellant's allegation that his emotional condition was caused by a commute over 29 miles to work on the busiest freeway in the United States does not constitute a compensable employment factor. The Board has held that the stress and strain of highway travel experienced by an employee commuting to work can be characterized as self-generated and arising from the hazards of the journey shared in common by all travelers.<sup>6</sup>

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.<sup>7</sup> However, the Board has held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.<sup>8</sup> Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The incidents and allegations made by appellant that fall into this category of administrative or personnel actions include appellant's telephone conversation with the postmaster's secretary, Ms. Loftin, regarding pay problems, appellant's assignment to light-duty work, being ordered to undergo a fitness-for-duty examination, denial of appellant's request for different jobs,<sup>9</sup> the denial and designation of sick and annual leave, and being placed in a leave-

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<sup>4</sup> *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 3.

<sup>5</sup> *Donald E. Ewals*, 45 ECAB 111 (1993).

<sup>6</sup> *Adele Garafolo*, 43 ECAB 169 (1991).

<sup>7</sup> *See Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>8</sup> *See Richard J. Dube*, 42 ECAB 916 (1991).

<sup>9</sup> *See Michael Thomas Plante*, 44 ECAB 510 (1993).

without-pay and absence-without-leave status,<sup>10</sup> denial of request for a transfer,<sup>11</sup> and reprimands.<sup>12</sup>

The Board finds that appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions and therefore they are not compensable under the Act. Regarding the assignment of light-duty work by the employing establishment, the record revealed that the employing establishment provided appellant with light-duty work that accommodated the change in his work restrictions and that appellant was allowed to select his assignment. The record revealed that appellant was ordered to undergo a fitness-for-duty examination to clarify his continued inability to perform his regular work duties.

Appellant has alleged that harassment and discrimination by the employing establishment caused his emotional condition. Specifically, appellant has alleged that Gus Henggeler, an employing establishment postmaster, humiliated, intimidated and abused him when Mr. Henggeler instructed him to submit medical documentation, shred paper, sharpen pencils, count mail, and respond to his telephone calls by intercom rather than in person. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.<sup>13</sup> Mere perceptions of harassment and discrimination are not compensable under the Act.<sup>14</sup> To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.<sup>15</sup>

In this case, appellant has failed to provide any such probative and reliable evidence to support his allegations of harassment. In a June 9, 1995 response, Mr. Henggeler denied appellant's allegations. Mr. Henggeler stated that appellant was treated with dignity and respect by his staff and himself despite appellant's contempt for his co-workers, noting the incident where appellant stated that he could be called your highness in response to a supervisor's question as to what name appellant wished to be called by her. Mr. Henggeler's request for medical documentation involves an administrative matter<sup>16</sup> and appellant has failed to establish that Mr. Henggeler committed error or abuse in handling this matter. Mr. Henggeler stated that management needed to be kept informed of his medical condition, so that it could ensure that appellant was assigned duties that would not aggravate his condition. Regarding the pencil sharpening incident, Mr. Henggeler stated in his December 13, 1994 investigative affidavit that

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<sup>10</sup> See *Diane C. Bernard*, 45 ECAB 223 (1993); *Sharon R. Bowman*, 45 ECAB 187 (1993); see also *Sheila Arbour*, 43 ECAB 779 (1992).

<sup>11</sup> *Goldie K. Behymer*, 45 ECAB 508, 511 (1994); *Thomas D. McEuen*, *supra* note 7.

<sup>12</sup> *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

<sup>13</sup> *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990); *Pamela R. Rice*, 38 ECAB 838, 843 (1987).

<sup>14</sup> *Wanda G. Bailey*, *supra* note 2; *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>15</sup> *Ruthie M. Evans*, *supra* note 14.

<sup>16</sup> See *Thomas D. McEuen*, *supra* note 7.

he needed the pencils sharpened because he was training carriers and that Mr. Marshall and Brian Bailey, appellant's supervisors, sharpened pencils along with himself and appellant. Mr. Henggeler also stated that on May 9, 1994, he had appellant paged to an intercom by a secretary and that when appellant came to his office, he told appellant that he just wanted to ask him a question and that appellant could save himself some steps by just picking up the intercom rather than walking all over the building. Mr. Henggeler further stated that the counting of mail took place on May 13, 1994 and not May 11, 1994 as alleged by appellant. Mr. Henggeler then stated in response to appellant's comment that performing quality control of Mylanta samples was not in the supervisor's guidelines, that other supervisors performed the same task, appellant raised his voice. Mr. Henggeler explained that he asked appellant to refrain from using that type of voice with him. Additionally, Mr. Henggeler stated that neither appellant's physical condition or EEOC complaint were factors in the way that he dealt with appellant.

Appellant's allegation that he was goaded and baited by Mr. Henggeler and Mike Thompson, appellant's supervisor, that Mr. Bailey made seething remarks about his accomplishments, and that Mr. Thompson balked at him during a telephone conversation regarding acceptance of a position while he was visiting his terminally ill sister in the hospital, are not substantiated by the record. Similarly, appellant's allegation that he was harassed when Mr. Bailey raised his voice during a conversation with him concerning the proper time to clock in is not substantiated by the record. Appellant has not submitted any witness statements corroborating these incidents.

In response to appellant's allegation that he was singled out as the only supervisor who had different start times, Mr. Henggeler stated in a December 13, 1994 statement that appellant started work at his desired time and that appellant stated that he had no problem with the start times. Inasmuch as appellant has failed to substantiate his allegations of harassment and discrimination, the Board finds that he has not established a compensable employment factor.

Appellant has alleged that Mr. Bailey did not provide any concise or concrete explanation as to why certain actions were being performed, and that he received no training concerning the operation of equipment, no office and that there was no mention about any adequate tools to perform his duties. An employing establishment's refusal to give an employee required training is an administrative action which is not covered by the Act unless error or abuse is shown.<sup>17</sup> Regarding the lack of training, Mr. Henggeler stated in his June 9, 1994 letter that he instructed Mr. Bailey to train appellant. Mr. Henggeler also stated that on-the-job training was provided to appellant by a former supervisor of the operation, but that appellant did not complete the training because he stopped work. Mr. Bailey submitted a May 14, 1994 narrative statement revealing the training that appellant received from the employing establishment. Inasmuch as appellant has failed to establish that the employing establishment committed error or abuse, the Board finds that he has not established a compensable employment factor.

Further, Mr. Henggeler stated that appellant was informed that any supplies or equipment needed to perform his duties would be furnished by the employing establishment. There is no evidence of record to support appellant's allegation that he did not receive an office. Inasmuch

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<sup>17</sup> See *Lorraine E. Shroeder*, 44 ECAB 323 (1992).

as appellant has failed to substantiate these allegations, the Board finds that he has failed to establish a compensable employment factor.

The September 29, 1993 reorganization of the employing establishment, in itself, does not constitute a compensable factor of employment as it is unrelated to appellant's assigned job duties.<sup>18</sup> The Board finds that the employing establishment's September 29, 1993 reorganization relates to administrative matters.<sup>19</sup> In this case, however, the MSPB found in its December 8, 1993 decision that the employing establishment erred in instituting a reduction-in-force without following proper procedures. Inasmuch as the September 29, 1993 reorganization is established as having occurred by evidence present in the case record, and by its nature, it arises out of and in the course of appellant's assigned duties, the Board finds that the Office properly found that it constituted a compensable factor of appellant's employment. However, appellant's burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.<sup>20</sup>

The medical evidence of record in this case fails to establish that appellant's emotional condition was caused by the September 29, 1993 reorganization. A May 16, 1994 disability certificate of Dr. Honorata Oktay, an internist, indicated that appellant was disabled from May 14 through June 13, 1994. Dr. Oktay's October 21, 1993 medical report revealed that appellant had moderately severe multi-level degenerative disc disease involving the lumbar spine, that appellant had an acute attack in February 1993 and appellant's physical restrictions. The April 11, 1994 disability certificate of Dr. Charn-Jiuan Huang, a Board-certified physiatrist, provided a diagnosis of lumbar pain and appellant's physical restrictions. Dr. Huang's April 20, 1994 medical report indicating a diagnosis of low back pain with radiation to the right lower extremity, that appellant's prognosis was fair pending reevaluation after a computerized axial tomography scan and appellant's physical restrictions. Dr. Huang's May 12, 1994 disability certificate revealed a diagnosis of bulging discs with spinal stenosis and appellant's physical restrictions. An April 20, 1994 supplemental medical report of Dr. Steven M. Ma, a Board-certified orthopedic surgeon, indicated that appellant had a moderate amount of degenerative arthritis of the back, a history of appellant's employment with the employing establishment and that appellant was able to perform the work duties of a customer service supervisor. The disability certificates and medical reports of Drs. Oktay and Huang, as well as, Dr. Ma's medical report are insufficient to establish appellant's burden inasmuch as they failed to address whether appellant's emotional condition was caused by the employing establishment's September 29, 1993 reorganization.

Appellant also submitted an August 4, 1994 report from Guy L. Bacon, a psychiatric social worker, revealing appellant's emotional condition was work related and his July 5, 1994

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<sup>18</sup> *Id.*

<sup>19</sup> *James W. Griffin*, 45 ECAB 774 (1994).

<sup>20</sup> *William P. George*, *supra* note 14.

disability certificate revealing that appellant was disabled from June 6 until July 17, 1994. Mr. Bacon's report and disability certificate do not constitute competent medical evidence inasmuch as he is not a physician under the Act.<sup>21</sup>

Further, appellant submitted July 26, 1995 medical report of Dr. Jean R. Schwartz, a Board-certified psychiatrist, revealing that she supported the diagnosis of Mr. Bacon that appellant had occupational problem V62.20 and adjustment disorder with mixed emotional features, 309.28. Dr. Schwartz' report was attached to Mr. Bacon's August 4, 1994 report. Dr. Schwartz' report is insufficient to establish appellant's burden because she did not provide any medical rationale for her confirmation of Mr. Bacon's opinion that appellant's emotional condition was caused by his employment.

The December 5, 1995 medical report of Dr. Eric Marcus, a Board-certified psychiatrist and second opinion physician revealed a history of appellant's employment, medical treatment, and personal and social life. Dr. Marcus indicated his findings on psychological testing, responses to questionnaires, and mental and physical examination. Dr. Marcus also indicated a review of appellant's medical records. Dr. Marcus opined that appellant had no emotional condition causally related to factors of his employment and provided detailed medical rationale in support of his opinion. The Board finds that Dr. Marcus' report constitutes the weight of the medical evidence as it well rationalized and based on an accurate factual background.

The January 31, 1996, and December 13 and June 23, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
August 19, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>21</sup> See 5 U.S.C. § 8101(2).