

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE F. THERRIEN and U.S. POSTAL SERVICE,
WESTON STREET POST OFFICE, Hartford, CT

*Docket No. 97-2604; Submitted on the Record;
Issued December 9, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty due to August 21 and 29, 1995 threats made against him by a coworker; and (2) whether appellant has established that he sustained an emotional condition or stress-induced asthma in the performance of duty on February 15, 1996.

Appellant made two separate emotional condition claims, each concerning distinct factors of employment, which the Office of Workers' Compensation Programs doubled into one record. On September 25, 1995 appellant, then a 45-year-old mailhandler and union officer, filed the first claim, a notice of occupational disease alleging that he sustained depression due to threats from Ed Rome, a coworker, whom he had represented in a union arbitration.¹ Appellant noted that Mr. Rome had lost the arbitration and "probably he[l]d [appellant] responsible. [Appellant] was not on official duty [as a union official] at the time the threat was made." This claim was filed as number A01-0333086.²

¹ In a September 11, 1995 investigative memorandum, the employing establishment stated that interviews of several credible witnesses established that Mr. Rome made threatening remarks about appellant on August 21 and 29, 1995. Mr. Rome made the threats in conversations with Ben Fiamma and George Devendorf, two of appellant's coworkers, and not to appellant directly. Mr. Rome allegedly stated that he wanted to kill appellant. In a September 28, 1995 letter, the employing establishment noted that appellant was referred to the employee assistance program (EAP) for counseling on August 30, 1995 when he became upset and agitated by Mr. Rome's threats.

² In a September 25, 1996 note, Dr. Laurinda Santos, an attending internist, noted that appellant related being "threat[ened] at work by irrational worker," and had been diagnosed with depression by a psychologist. Dr. Santos noted that appellant's father had died six months before and that there were subsequent family problems. She related appellant's complaints of irritability, insomnia and "trouble concentrating." She prescribed anti-depressant and sedative medications. In follow-up notes, Dr. Santos stated that appellant was "unable to work October 2, 3, 10, 16, 17 and 18, 1995 due to treatment for depression." In an October 23, 1995 narrative statement, appellant described nonoccupational stressors of the recent death of his father and an aunt, the terminal illness of another aunt and a close friend, and the severe illness of his mother. Appellant stated that Mr. Rome's threats against him aggravated a diagnosed moderate depression.

On February 16, 1996 appellant filed a second claim for an emotional condition and stress-induced asthma pursuant to a February 15, 1996 altercation with William Galligan, an employing establishment supervisor. This claim was filed under number A01-03337190.

By decision dated March 6, 1996, the Office denied Claim No. A01-0333086, pursuant to Mr. Rome's threats, on the grounds that causal relationship was not established. By decision dated April 11, 1996, the Office denied Claim No. A01-03337190, pursuant to the February 15, 1996 altercation, on the grounds that appellant was not in the performance of duty at the time of the incident.

In an April 23, 1996 letter, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review regarding the Office's April 11, 1996 decision, in Claim No. A01-03337190, and did not mention the March 6, 1996 denial. An oral hearing was scheduled for February 27, 1997. While appellant's request for an oral hearing was pending regarding Claim No. A01-03337190, appellant submitted a September 20, 1996 letter requesting reconsideration of the Office's March 6, 1996 decision, denying Claim No. A01-0333086, regarding coworker threats.³ There is no final decision of record pursuant to appellant's September 20, 1996 request for reconsideration of Claim No. A01-0333086.

An oral hearing was held in appellant's case on February 27, 1997. By decision dated July 3, 1997 and finalized July 7, 1997, an Office hearing representative affirmed the Office's April 11, 1996 denial of Claim No. A01-03337190, finding that, although appellant was in the performance of duty at the time of the February 15, 1996 altercation, there was insufficient or conflicting evidence regarding the subject matter of the incident such that appellant had not corroborated his assertions of abuse by Mr. Galligan. The hearing representative did not address Claim No. A01-0333086, the Office's March 6, 1996 decision or appellant's September 20, 1996 request for reconsideration.

Regarding the first issue, the Board finds that the case is not in posture for a decision as it is in an interlocutory state.

Appellant's September 25, 1995 emotional condition claim, Claim No. A01-0333086, was denied by a March 6, 1996 decision, on the grounds that causal relationship was not established. Although appellant timely requested reconsideration by September 20, 1996 letter, the Office failed to issue a final, appealable decision pursuant to this claim, adjudicating appellant's reconsideration request. Thus, Claim No. A01-0333086 remains in an interlocutory posture before the Office.

As the Board and the Office may not have simultaneous jurisdiction over the claim, the case must be remanded to the Office for further action on appellant's September 20, 1996 request for reconsideration.⁴ The Office's inaction regarding appellant's September 20, 1996

³ Appellant also enclosed copies of grievances he filed on behalf of Mr. Rome on January 10, 1995 regarding the employing establishment's actions after Mr. Rome had made threats of violence against coworkers documents indicating that Mr. Rome had stated that he wanted to kill coworkers in June 1994 and incident reports on Mr. Rome regarding his threats of violence.

⁴ See 20 C.F.R. § 501.2(c) which states in pertinent part: "There shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case."

reconsideration request effectively precludes appellant from appealing the last merit decision on this aspect of his claim. Thus, under the circumstances of this case, it is incumbent upon the Office to reopen appellant's case for reconsideration on the merits as appellant is entitled to a final decision made in accordance with the applicable law.⁵

Regarding the second issue, the Board finds that appellant has not established that he sustained an emotional condition or stress-induced asthma in the performance of duty on February 15, 1996.

Under workers' compensation law, when an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Federal Employees' Compensation Act.⁶ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁷ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office can base its decision on an analysis of the medical evidence of record.

Appellant alleged that he sustained an emotional condition and stress-induced asthma on February 15, 1996 precipitated by a verbal altercation at 1:00 p.m. that day with his supervisor, Mr. Galligan. He stopped work on February 20, 1996 and returned to work on February 28, 1996.⁸ The Office denied the claim by an April 11, 1996 decision, on the grounds that appellant was on union business and, therefore, not in the performance of duty on February 15, 1996. By decision dated July 3, 1997 and finalized July 7, 1997, an Office hearing representative affirmed the April 11, 1996 decision, finding that although appellant was in the

⁵ See *Charles H. Compton*, 40 ECAB 1141 (1989); *Ernesto L. Montoya*, 35 ECAB 205(1983).

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁸ In the witness portion of the February 16, 1996 claim form, Clifford R. Aivaz, one of appellant's coworkers, stated that "shortly after 1:00 p.m. on February 15, 1996 [appellant's] breathing was labored," and that he appeared pale and ill as though he were "having a heart attack." In an April 2, 1996 letter, Mr. Devendorf, one of appellant's coworkers, noted that the afternoon of February 15, 1996, appellant appeared "highly agitated" and was having difficulty breathing following his confrontation with Mr. Galligan. Mr. Devendorf did not witness the confrontation itself. Similarly, in an April 2, 1996 letter, Lauren Volonia, one of appellant's coworkers, recalled that appellant appeared ill and agitated the afternoon of February 15, 1996 and that appellant attributed his condition to a confrontation with Mr. Galligan. Ms. Volonia did not witness the confrontation itself.

performance of duty on February 15, 1996, there was insufficient or conflicting evidence regarding the confrontation with Mr. Galligan to establish abuse.⁹

The Board notes that appellant was in the performance of duty at the time of the February 15, 1996 incident. While union activities generally are not compensable under the Act, the Board has held that an employee performing the duties of a union representative while on official time is considered to be in the performance of duty, as the functions of a union official may simultaneously serve the employer's interests.¹⁰ Thus, the Board notes that appellant was in the performance of duty at the time of the February 15, 1996 incident.

The Board further notes, however, that appellant has not established that the February 15, 1996 incident constituted a compensable employment factor. Appellant has alleged that his supervisor, Mr. Galligan, harassed him during a meeting on February 15, 1996. To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹¹ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹²

In their descriptions of the February 15, 1996 incident, appellant and Mr. Galligan both state that appellant was invited by the employing establishment to participate, as a union official, in a February 15, 1996 process management meeting, that appellant did not attend, that the February 15, 1996 verbal altercation occurred at approximately 1:00 p.m. in a private break room at Mr. Galligan's invitation, and that the conversation concerned appellant's nonattendance at the training session. The two accounts are also in agreement that appellant provided reasons for not attending the session and criticized a supervisor participating on the process management team as anti-union and that Mr. Galligan told appellant he would be reassigned to Tour 1 rather than the Tour 2 position which would allow him to participate in process management. Also, both parties recall that appellant then told Mr. Galligan that he would report him for harassment or abuse.

⁹ In the decision dated July 3, 1997 and finalized July 7, 1997, the Office hearing representative found that appellant was in the performance of duty on February 15, 1996 as his participation in process management was at his employer's invitation and served its interests. The hearing representative found that appellant's account of the event varied markedly with Mr. Galligan's recollections. Noting that there were no other witnesses to the altercation itself, the hearing representative found that appellant had not submitted corroborating evidence to support that Mr. Galligan was "abusive, threatening, intimidating, discriminating or otherwise acting improperly during the conversation." Therefore, the hearing representative determined that appellant failed to establish the February 15, 1996 incident as a compensable employment factor.

¹⁰ *Marie Boylan*, 45 ECAB 338 (1994).

¹¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

Appellant provided additional details of the altercation not described by Mr. Galligan in a March 4, 1996 letter and at the February 27, 1997 hearing.¹³ Appellant asserted that on February 12, 1996, he informed Matthew Fitt, the employing establishment official in charge of the effort, that he would not attend the February 15, 1996 session. He accused Mr. Galligan of telling other union officials that appellant had no integrity or courage. Appellant further alleged that Mr. Galligan shouted that he was “just a mailhandler,” stated that he would deal only with Mr. Galligan’s subordinates, and indicated that the next three years of his administration as a union official would be “a living nightmare.” Appellant indicated that he then told Mr. Galligan he had had “enough of his B.S. and got up, walked out and closed the door forcefully behind me.”¹⁴ Also, Mr. Galligan alleged that appellant concluded the conversation with an obscene gesture, which appellant did not include in his statement.¹⁵

In the present case, the employing establishment denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that he was harassed by Mr. Galligan on February 15, 1996.¹⁶ Appellant alleged that Mr. Galligan made statements and engaged in actions which he believed constituted harassment, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁷ Mr. Galligan has admitted that he was “irate during and upon concluding this verbal exchange” on February 15, 1996. Although the Board has recognized the compensability of verbal altercations in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁸ A review of the context of Mr. Galligan’s admitted state of mind on February 15, 1996 shows that his actions did not rise to the level of harassment within the meaning of the Act. Mr. Galligan noted that his state of mind was particularly triggered by the fact that appellant spit in his presence or made a spitting gesture while stating, “This is what I think of you and your managers.” Under such circumstances, the mere fact that Mr. Galligan admitted he was irate, without evidence of any abusive statements or actions on his part, does not show that he engaged

¹³ At the February 27, 1997 hearing, appellant stated that on February 15, 1996 he was acting in his official capacity as a union officer, which the employing establishment recognized by using time code 612 on his time and attendance record for that day. Following the hearing, appellant submitted copies of employing establishment time and attendance records showing that he was in payroll code 612 on February 15, 1996. Appellant explained that code 612 was used to denote that an employee was on “union business.”

¹⁴ In a March 4, 1996 letter, the Office advised appellant of the additional medical and factual evidence needed to establish his claim, including rationalized medical evidence supporting a causal relationship between the claimed conditions and the alleged February 15, 1996 incident.

¹⁵ Mr. Galligan offered his account of events in February 21 and March 25, 1996 statements. In a February 21, 1996 letter, Mr. Galligan noted meeting with appellant on February 15, 1996 “at approximately 12:30 p.m.” in the “MDO office.” He recalled asking appellant for “an explanation as to why he boycotted a training session he had committed to and was scheduled on that day. We went into a private office and a verbal disagreement ensued. [Appellant] exited from one door and [Mr. Galligan] exited from the other door. Our disagreement lasted for several minutes and there were no other parties present.”

¹⁶ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁷ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁸ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994).

in harassment. Thus, appellant has not established a compensable employment factor under the Act with regard to the alleged harassment on February 15, 1996.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁹

The decision of the Office of Workers' Compensation Programs dated July 3, 1997 and finalized July 7, 1997 is affirmed. The case is remanded to the Office for an appropriate decision pursuant to appellant's September 20, 1996 request for reconsideration.

Dated, Washington, D.C.
December 9, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹⁹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).