U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIMON VANSON and U.S. POSTAL SERVICE,
POST OFFICE, Glendale, Calif.

Docket No. 97-506; Submitted on the Record;
Issued June 9, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on September 25, 1996.

On April 13, 1995 appellant, then a 30-year-old letter carrier, filed a notice of occupational disease alleging that he suffered emotional stress, anxiety and depression in the course of his federal employment.

In support of his claim, appellant completed a statement dated April 8, 1995. Appellant indicated that on March 17, 1994 he was verbally abused and physically threatened by a female coworker. He asserted that the coworker later accused him of sexual harassment, but that management did not believe the charges. Appellant indicated that this incident caused him to become frustrated and depressed. He further stated that his coworkers commented on his race and nationality. Appellant indicated that in October 1994 coworker Robert Reed said, "Hey [appellant], if 187 passed they [will] have to ship you back to Iran." Appellant stated that other carriers then made fun of him to the point that he lost control and left the building. He stated that he requested a transfer to another station which was granted. Appellant stated that on December 14, 1994 his new supervisor, Donna Young, yelled at him over the phone saying, "What is your problem, everyday you are calling in. Why can't you get your job done? I do [not] appreciate you. I hope you know you will not be compensated." Appellant reported that this incident made him feel nervous and tense. He also indicated that on December 19, 1994 Ms. Young questioned him about smoking marijuana. Appellant stated that other employees were not questioned about drug usage and that this made him uncomfortable. He also stated that Ms. Young refused to provide him with a copy of a Form 3996 to request overtime. Appellant stated that a week later Ms. Young also stated, "You want to play hardball, I [am] going to play hardball." He stated that this type of intimidation affected him mentally. Appellant stated that on January 12, 1995 he requested overtime to complete a new route, but that the overtime was

denied despite indications from the regular carrier that overtime would be required to complete the route. Appellant stated that on January 17, 1995 he was singled out by his supervisor and charged as being absent without leave. He indicated that on March 24, 1995 he called in sick. Appellant stated that the following day his supervisor requested medical documentation of his illness. As a result of these incidents, appellant stated that he is constantly worried and depressed. He stated that he is overwhelmed by this stress.

In a statement dated December 16, 1994, appellant indicated that he began a route and called in as instructed to inform his supervisor that the route would require additional time. He stated that when he called in Ms. Young yelled at him saying, "What is your problem, every day you are calling in. Why can't you get the job done?" He also indicated that Ms. Young said she did not appreciate him and that he would not be compensated.

In another statement, appellant indicated that Ms. Young asked him on December 19, 1994 if he smoked marijuana. He stated that he denied drug usage, but that the supervisor indicated that she smelled the odor of marijuana around him a couple of times. Appellant stated that he told her that he would take a drug test.

Appellant submitted a statement dated December 22, 1994. He stated that on that day he turned in two forms and that Ms. Young commented that, "You want to play hard ball, I [am] going to play hardball." He stated that she said this to intimidate him.

In a statement dated February 10, 1995, appellant indicated that he had been discriminated against and unjustifiably accused of smoking marijuana. He stated that he experienced harassment from Ms. Young and that he was targeted for termination. Appellant indicated that he had been devastated, humiliated and embarrassed by Ms. Young.

On March 24, 1995 Dr. R. Weise indicated that appellant received treatment in his office on that same date.

On March 28, 1995 appellant stated that he called in sick on March 24, 1995. He stated that he presented Ms. Young with two doctors slips for physicians he saw on that day. Appellant stated that the supervisor requested medical documentation of a diagnosed illness. He indicated that other carriers did not have to submit such documentation. Appellant stated that this was an example of the discrimination and harassment that he faced.

On April 3, 1995 Dr. Celedonia Yue, a Board-certified family practitioner, indicated that she was treating appellant for anxiety and depression.

On April 5, 1995 Dr. Kathy J. Hickman, a specialist in child and adolescent psychiatry, indicated that she treated appellant for anxiety and depression.

On April 21, 1995 appellant's supervisor, Robert A. Paglione, stated that appellant reported an incident occurring around March 18, 1994 with a fellow employee. Mr. Paglione stated that the two employees provided conflicting accounts of the incident and there were no other witnesses. He stated that he was not working when appellant walked out the office in October 1994.

On April 28, 1995 Ms Young provided a statement. She denied that appellant had been harassed or intimidated. Ms. Young denied yelling at appellant on December 14, 1994 or telling him he was not appreciated or would not be compensated. She stated that she did ask appellant on that dated if he had been regularly calling in and that he asked for assistance. Ms. Young stated that she approved appellant for 45 minutes of overtime on that day. She stated that when appellant arrived on December 19, 1994 she noted the smell of marijuana. Ms. Young stated that Bryon Burdine also said that he smelled marijuana and that he indicated that appellant was recently in the area. She said that Mr. Burdine indicated that he had smelled marijuana on appellant previously and discussed the subject with appellant. Ms. Young stated that she asked appellant if he smoked marijuana and appellant denied the accusation although he had red, glassy eyes. She stated that three other employees noted evidence of marijuana usage. Ms. Young further stated that she did instruct appellant to return to his work station when he requested a Form 3996. She stated that appellant was needed at his work station and that she later provided the form to appellant. Ms. Young indicated that appellant was granted overtime on January 12, 1995 even though it was not required because the mail delivered on the route was already cased. She also denied that appellant was charged as being absent without leave. Ms. Young further indicated that on March 24, 1995 she requested medical documentation for appellant's sick leave on that date pursuant with the employing establishment's policies.

On May 15, 1995 Dr. Yue indicated that she was considering shock treatments for appellant's depression. She stated that she was treating appellant for anxiety and depression and that appellant remained unable to work.

On May 24, 1995 the Office requested additional information from appellant including more detail on the alleged work incidents causing his emotional condition and a comprehensive medical report explaining how the work factors contributed to his emotional condition.

Appellant subsequently indicated that his condition worsened when he worked with Ms. Young. He stated that her treatment towards him contributed to his condition. Appellant stated that his December 14, 1994 conversation with Ms. Young occurred on the phone and that there were no witnesses to it. He indicated that he reported the conversation to Lisa Ball, but nothing was resolved. Appellant restated that Ms. Young asked him if he smoked marijuana on December 19, 1994 and added that other carriers were not asked the same question. He indicated that Ms. Young unreasonably refused to provide him with a Form 3996 to request overtime. Appellant stated that she denied him overtime on January 12, 1995 and that on January 17, 1995 he was charged as absent without leave while other carriers arrived late and were not similarly charged.

On June 15, 1995 Dr. Yue indicated that she was treating appellant for anxiety and severe depression. She stated that appellant was unable to return to work.

On July 6, 1995 Dr. Yue again indicated that she treated appellant for anxiety and depression.

Mr. Paglione issued a second statement on June 25, 1995. He stated that Ted Barker, an acting supervisor, told him that appellant and Angela Cooks had a dispute on March 16, 1994. Mr. Paglione stated that appellant subsequently informed him that Ms. Cooks verbally abused

him and challenged him to a fight. He stated that Carlos Candelario witnessed the altercation, but do not hear the words exchanged. Mr. Paglione stated that he had no knowledge of carriers commenting on appellant's race or nationality. He stated that he was informed that appellant walked off the work site and that appellant later asked for a transfer. Mr. Paglione stated that appellant told him that Mr. Reed made a racial remark, but that Mr. Reed denied doing so.

The employing establishment subsequently submitted a December 19, 1994 memorandum from Ms. Young. She indicated that on that same date she met appellant out on his route and noticed the smell of marijuana. Ms. Young stated that she asked appellant to return to the office and then inquired if he smoked marijuana. She stated that appellant's eyes were red and glassy looking and that he smelled of marijuana. Ms. Young stated that Mr. Burdine told her that appellant always smelled like marijuana. She indicated that appellant offered to take a drug test.

Diana D. Gomez, a customer service supervisor, also provided a statement. She indicated that appellant spoke with her in March 1994 about a confrontation he had with a coworker. She further stated that appellant walked out of the workplace in October 1994. Ms. Gomez indicated that employees informed her that they were joking with appellant about not keeping up with his work when he decided to leave. Mr. Candelario, a carrier, indicated that he could not remember the specifics, but that he recalled that appellant and another worker verbally threatened each other. Mr. Barker, an acting supervisor, indicated that he was told that appellant engaged in a verbal confrontation with coworker Ms. Cooks and that she asked appellant to step outside to settle it.

Appellant subsequently provided a statement indicating that Ms. Young told him that she smelled marijuana on him a couple of times and that he was the only employee questioned about marijuana usage. Appellant stated that Ms. Young told him he would be charged as absent without leave. He refuted that he was provided with a Form 3996. Appellant again stated that he was required to provide medical documentation for sick leave.

On August 1, 1995 Dr. Yue indicated that appellant had been diagnosed with a paranoid disorder. She stated that based on the history that appellant had provided, appellant's condition was aggravated by work-related events. On August 10, 1995 Dr. Yue diagnosed acute anxiety, duodenitis and stress.

Appellant filed a Equal Employment Opportunity Complaint of discrimination in the employing establishment on August 21, 1995. He indicated in the complaint that his supervisor showed favoritism and treated him unfairly. Appellant stated that he was discriminated against on the basis of his national origin. He complaint was dismissed as untimely. Appellant appealed the denial.

On August 24, 1995 Dr. Hickman diagnosed an adjustment disorder with mixed anxiety and depression.

Appellant also submitted witness statements from coworkers indicating that they had never smelled marijuana on appellant and that they had not been questioned about marijuana usage. He also submitted a statement from Juan Bocanegras indicating that on January 12, 1995

he instructed appellant on the time necessary to complete his route and that Ms. Young refused to grant the overtime appellant would need to finish the job. He submitted a statement from Robert Viscansos indicating that he was not charged as absent without leave on January 17, 1995. He also submitted a note from Stan Lake indicating that he was not required to present medical documentation when calling in sick.

On October 25, 1995 the Office referred appellant, along with a statement of accepted facts to Dr. Elliot L. Markoff, a Board-certified psychiatrist, for a second opinion examination.

On November 7, 1995 Dr. Markoff provided his second opinion. Dr. Markoff diagnosed unresolved occupational problems and a resolved adjustment disorder with mixed emotional features. He stated that he could not determine whether appellant's condition was related to factors of employment. Dr. Markoff indicated that appellant fully recovered by July 1995.

By decision dated March 15, 1996, the Office rejected appellant's claim because causal relationship was not established.

On July 15, 1996 appellant requested reconsideration. In support, he submitted a June 26, 1996 report from Dr. Yue. Dr. Yue indicated that she treated appellant for anxiety and depression. She also indicated that Dr. Hickman diagnosed an adjustment disorder with mixed anxiety and depression.

By decision dated September 25, 1996, the Office denied the application for reconsideration because the evidence supported in its support was irrelevant and immaterial.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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 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.[1] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

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

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[3] 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.[4]

In this case, appellant alleged that he suffered depression as a result of verbal abuse and threats from a coworker while working on March 17, 1994. Appellant's allegation were verified by his supervisors and a coworker, and are, therefore, established as factual. Accordingly, this constitutes a compensable factor of employment.[5] Appellant also alleged that his coworkers made fun of him in October 1994 and that this resulted in an emotional condition. Mr. Gomez verified that appellant was made fun of by coworkers on October 1994 while performing his federal duties. This incident is also considered factual and constitutes a compensable factor of employment.[6]

The remaining working conditions alleged by appellant as factors in causing his condition cannot be considered compensable. Appellant alleged that in October 1994 coworkers and specifically, Mr. Reed, made comments directed at his nationality and race. A report from appellant's supervisor, Mr. Paglione, indicated that he had no knowledge of such an event. He also indicated that Mr. Reed denied making any such comments. Appellant has not submitted sufficient evidence to established this event as factual.[7]

Appellant also alleged that he sustained an emotional condition as a result his supervisor yelling at him on the phone on December 14, 1994 and telling him he was not appreciated and would not be compensated. Appellant failed to submit any corroborating evidence that this event occurred and appellant's supervisor, Ms. Young, denied the events took place. This event is therefore not established as factual.[8]

Appellant also indicated that he sustained his emotional condition when his supervisor asked him whether he used marijuana and failed to ask the same question to other employees. Appellant's supervisor indicated that appellant was asked about marijuana usage only because she noticed that his work area smelled like marijuana smoke. She also indicated that another employee reported that appellant smelled like marijuana. Ms. Young therefore indicated that she asked appellant if he smoked marijuana. Investigations into illegal or improper acts are not

[3] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[4] *Id.*

[5] *Gary M. Carlo*, 47 ECAB 299 (1996).

[6] *Id.*

[7] *David W. Shirey*, 42 ECAB 783 (1991).

[8] *Id.*

within an employee's performance of duty.[9] Such administrative functions are compensable only if there is evidence of error or abuse.[10] Because appellant was not singled out, but merely questioned because he smelled like marijuana, appellant has failed to allege a compensable factor of employment.

Appellant further asserted that he suffered an emotional condition because Ms. Young denied him a Form 3996 on which to request overtime. She indicated that she merely told appellant to return to his work station to complete his duties and that she later provided appellant with the requested forms. The processing of forms for overtime work constitutes an administrative function and is not compensable absent evidence of error or abuse.[11] Inasmuch as appellant's supervisor provided a reasonable explanation for her delay in providing the forms, this is no evidence of error or abuse. Consequently, appellant failed to allege a compensable factor of employment.

Appellant further alleged that his emotional condition stemmed from Ms. Young threatening him by stating, "You want to play hardball, I [am] going to play hardball." Ms. Young denied ever threatening appellant and there is no evidence corroborating appellant's assertion of a threat. This incident is therefore not established as factual.

Appellant also stated that he suffered an emotional condition as a result of being denied enough overtime on January 12, 1995 to complete a new mail route. Appellant's coworker Mr. Bocanegras normally completed the mail route and he stated that Ms. Young failed to grant appellant enough overtime to complete the route. She explained, however, that the route was already partially completed because the mail for the route had already been cased. Mr. Bocanegras did not address whether the route was partially complete when appellant began on January 12, 1995. The granting of overtime constitutes an administrative matter and is not compensable absent evidence of error or abuse.[12] Because Ms. Young provided a reasonable explanation for denying some of the overtime appellant requested and her explanation was not contradicted by the statement of Mr. Bocanegras, there is no evidence of error or abuse.

Appellant also contended that his condition resulted from being charged as absent without leave on January 17, 1995 despite the fact that the other coworkers arrived late and were not charged as absent without leave. Ms. Young denied that appellant was charged as absent without leave on that date. Because the record is devoid of any corroborating evidence establishing that appellant was charged as absent without leave on January 17, 1995, this incident is not established as factual.

Finally, appellant alleged that his emotional condition was due to Ms. Young's requirement that he supply medical documentation supporting his absence of work on

[9] *Gary M. Carlo*, *supra* note 5.

[10] *Id.*

[11] *Raul Campell*, 45 ECAB 869 (1994).

[12] *Peggy R. Lee*, 46 ECAB 527 (1995).

March 24, 1995. She indicated that she merely requested medical documentation to support sick leave pursuant to employing establishment policy. Appellant stated that he turned in two doctors slips for that day, but that Ms. Young requested that the documentation address a diagnosed illness. He indicated that other carriers were not required to submit such documentation. Appellant submitted a March 24, 1995 note from Dr. Weise in which he indicated that the doctor treated him on March 24, 1995 and a statement from Stan Lake, a coworker, indicating that he was not required to submit medical documentation when calling in sick. Matters concerning the use of sick leave are administrative functions and are generally not compensable.[13] Ms. Young's request for medical documentation indicating an actual diagnosed condition pursuant to her agency's policy was reasonable and therefore not abusive or in error.[14] Neither Dr. Weise's March 24, 1995 document indicating only that he treated appellant on that date nor Stan Lake's statement that he was not required to present medical documentation for his sick leave demonstrated that Ms. Young acted unreasonably. Accordingly, this failed to constitute a compensable factor of employment.

Appellant, therefore, only established two compensable factors of employment. He established that he was verbally abused and threatened by a coworker on March 17, 1994 and that coworkers joked about his job performance in October 1994. Appellant, however, failed to submit any rationalized medical evidence establishing that his emotional condition was causally related to these compensable factors of employment.[15] Dr. Yue, appellant's treating physician and a Board-certified family practitioner, merely related appellant condition to work-related events without further explanation in her report dated August 1, 1995. Because Dr. Yue failed to provide any rationale for her findings it is entitled to little weight.[16] Moreover, neither Dr. Hickman, a specialist in child and adolescent psychiatry, or Dr. Markoff, a Board-certified psychiatrist, indicated that appellant's emotion condition resulted from factors of employment. Appellant, therefore, failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of his federal employment.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on March 28, 1996.

Under section 8128(a) of the Act,[17] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[18] which provides that a claimant may obtain review of the merits of the claim by --

[13] *Joe L. Wilkerson*, 47 ECAB 604 (1996).

[14] *David G. Joseph*, 47 ECAB 490 (1996).

[15] *Martin Standel*, 47 ECAB 306 (1996).

[16] *Roger Dingess*, 47 ECAB 123 (1995).

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.138(b)(1).

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[19]

In this case, appellant submitted no new argument supporting his claim. He merely submitted a medical opinion from Dr. Yue dated June 26, 1996 in which she recounted that treatment appellant received, but failed to address whether appellant suffered an emotional condition as a result of factors of his federal employment. Dr. Yue's opinion, therefore, is not relevant to establishing whether appellant sustained an emotional condition causally related to his federal employment. The Office, therefore, properly found that this evidence was insufficient to warrant a merit review because it was not relevant.

[19] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated September 25 and March 15, 1996 are affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member