

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEROLD GOTBETER and U.S. POSTAL SERVICE,
POST OFFICE, Charleston, SC

*Docket No. 98-725; Oral Argument Held April 8, 1999;
Issued October 28, 1999*

Appearances: *Angela V. Greene, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

On September 21, 1995 appellant, then a 48-year-old mail handler, filed an occupational disease claim alleging that he sustained an emotional condition which he attributed to being physically attacked by his supervisor, Telis Zecopoulos, on December 2, 1994,¹ being harassed by his supervisors, being stared at by his supervisor, being followed into the restroom by his supervisor and others, being denied a request for a change in schedule on August 14, 1995, being given a 14-day suspension on September 6, 1995 for speaking vulgar language to a supervisor, and being sent home on September 7, 1995 for beating on cages² and being removed from his position.³

In an employing establishment investigative report dated November 2, 1994, an investigative inspector stated that he had interviewed appellant and Mr. Zecopoulos and concluded that Mr. Zecopoulos touched appellant on the arm during a discussion on December 2, 1994.

¹ Appellant alleged that the supervisor screamed at him, waved his arms and hands "wildly," and grabbed his arm to turn appellant around to face toward him. Appellant stated that he feared for his life. He stated that his supervisor was arrested by the local police in January 1995 but charges were dropped after two trial delays.

² Several witnesses and appellant's supervisor indicated that appellant was running around the workroom floor, yelling, singing, clapping his hands and beating on the cages in the mail preparation area.

³ The record shows that appellant was removed from his position for being disrespectful to supervisors on September 7, 1995.

In a statement dated December 2, 1994, a coworker, Edward Green, stated that on that morning Mr. Zecopoulos confronted appellant and, "a heated discussion ensued" and that during the course of the discussion Mr. Zecopoulos grabbed appellant by the upper arm. Mr. Green stated that he was not able to hear the discussion that took place but that it was obvious to him that it was not friendly.

A police report dated January 4, 1995 related appellant's allegation that on December 2, 1994 Mr. Zecopoulos attempted to intimidate appellant and grabbed him by the upper arm and tried to turn him to physically face toward him.

In undated statements, Mr. Zecopoulos, denied that he had assaulted appellant. He also denied that he had harassed or intimidated appellant and that what appellant described as "staring" was no more than normal observation of his work. Mr. Zecopoulos denied that he had ever asked anyone to follow appellant into the restroom or that he had ever done so himself. He denied that he ever screamed or yelled at appellant but acknowledged that he did touch appellant on the arm with his hands on December 2, 1994 to try and give him a directive face to face so that appellant could not say that he had not been told "directly."

In a memorandum dated December 12, 1994, Larry Jensen, the employing establishment plant manager, stated that an investigation showed that Mr. Zecopoulos did not assault appellant on December 2, 1994.

In a March 8, 1995 letter to the local prosecutor, an assistant U.S. district attorney noted that the prosecutor had agreed to defer prosecution of Mr. Zecopoulos for six months and the case would be dismissed after that time if he demonstrated good behavior.

In a form report dated September 21, 1995, Dr. Dennis Fisher, a general practitioner, diagnosed anxiety symptoms and signs and indicated by checking the block marked "yes" that the condition was causally related to factors of his employment.

In a memorandum dated January 17, 1996, F.P. Berger related that Mr. Zecopoulos admitted to touching appellant on the arm on December 2, 1994 in order to get his attention and turned him around to listen to him. He stated that appellant's request for a change in schedule had been denied because there was not enough work available for him at that time of day, because he would have ended his tour before the work was completed and no other employee was available to complete the tasks and because appellant needed close supervision and no supervisor was on duty at the time he wished to begin his tour.

In a memorandum dated January 5, 1996, Mr. Jensen stated that, regarding the December 2, 1994 incident, he had investigated and determined that Mr. Zecopoulos had exercised poor judgment when he physically touched appellant but that there was no intent to harm and no assault. He related that he required Mr. Zecopoulos to apologize to appellant.

In a statement dated January 18, 1996, Mr. Jensen related that when appellant told him on December 2, 1994 that he had been assaulted by Mr. Zecopoulos he appeared angry but not afraid that Mr. Zecopoulos had touched him. He stated that he told Mr. Zecopoulos that supervisors should not make contact with employees and he agreed.

In a report dated January 29, 1996, Dr. Fisher related appellant's complaint that he was having anxiety due to problems at work. He stated, "I would think his stress and anxiety are due to his problems with his supervisors at work."

By decision dated August 1, 1996, the Office of Workers' Compensation Programs denied appellant's claim for an emotional condition.

By letter dated August 12, 1996, appellant requested an oral hearing before an Office hearing representative.

On August 28, 1997 a hearing was held before an Office hearing representative at which time appellant testified.

In a report dated January 22, 1996, Dr. John M. Roberts, a Board-certified psychiatrist and neurologist, related that on December 2, 1994 appellant felt that he was assaulted by a supervisor. He related appellant's allegation that the supervisor was yelling and screaming and waving his hands in appellant's face, grabbed his right arm and jerked him around and that this was witnessed by coworkers who gave statements to that effect. Dr. Roberts related that the supervisor would stare at appellant for 30 minutes at a time making him very uncomfortable and banging mail cages loudly next to him. Dr. Roberts stated:

"[Appellant's] past history and current presentation would support two psychiatric diagnoses. His perceived assault by his supervisor with threat of bodily harm followed by intrusive memories, flashbacks, startle response, anxiety, avoidance behaviors, decreased interest in significant activities, insomnia, angry outbursts and difficulty concentrating would warrant a diagnosis of an acute post-traumatic stress disorder.... Following his perceived persecution in the work setting including the numerous write-ups against him which were denied on appeal and his perceived inequality of treatment, he developed symptoms of anxiety and depression as well as impairment in occupational functioning warranting a diagnosis of [a]djustment [d]isorder with [m]ixed [f]eatures of [a]nxiety and [d]epression...."

In an arbitration decision dated January 14, 1997, Joseph Sickles, the arbitrator, denied appellant's grievance against the employing establishment for removing him from his position on the grounds that he had been disrespectful to supervisors on September 7, 1995.

By decision dated November 6, 1997, the Office hearing representative affirmed the Office's August 1, 1996 decision.

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 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.⁴ 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.⁵

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 employment factors.⁶ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁷

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.⁸ 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.⁹

In this case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment denied a request for a change in schedule, issued a 14-day suspension for speaking disrespectfully to a supervisor, sent him home for beating on cages, and removed him from his position, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁰ Although such

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁷ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁸ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁹ *Id.*

¹⁰ See *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹¹ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹² In this case the evidence of record does not establish that the employing establishment erred or acted abusively in its handling of these administrative or personnel matters. In a memorandum dated January 17, 1996, F.P. Berger stated that appellant's request for a change in schedule had been denied because there was not enough work available for him at that time of day, because he would have ended his tour before the work was completed and no other employee was available to complete the tasks and because appellant needed close supervision and no supervisor was on duty at the time he wished to begin his tour. In an arbitration decision dated January 14, 1997, Mr. Sickles denied appellant's grievance against the employing establishment for removing him from his position on the grounds that he had been disrespectful to supervisors on September 7, 1995. Appellant has provided insufficient evidence that the employing establishment erred or acted abusively regarding these allegations. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. He alleged general harassment and also alleged that he was followed into the restroom by supervisors and was stared at by a supervisor. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹³ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁴ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.¹⁵ Therefore, he has not established a compensable employment factor under the Act in this respect.

Appellant has alleged that his supervisor, Mr. Zecopoulos, attacked him by grabbing his arm on December 2, 1994. The Board has recognized the compensability of physical threats and verbal aggression in certain circumstances.¹⁶ In written statements, Mr. Zecopoulos, denied that he had assaulted appellant on December 2, 1994 or that he had screamed or yelled at appellant.

¹¹ *Id.*

¹² *Id.*

¹³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁵ 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).

¹⁶ See *Alton L. White*, 42 ECAB 666, 669-70 (1991).

He did acknowledge that he touched appellant on the arm with his hands on December 2, 1994 to try and give him a directive face-to-face so that appellant could not say that he had not been told “directly.” In an employing establishment investigative report dated November 2, 1994, an investigative inspector stated that he had interviewed both appellant and Mr. Zecopoulos and concluded that Mr. Zecopoulos touched appellant on the arm during a discussion on December 2, 1994. In a memorandum dated December 12, 1994, Mr. Jensen, the employing establishment plant manager, stated that an investigation showed that Mr. Zecopoulos did not assault appellant on December 2, 1994. In a memorandum dated January 5, 1996, Mr. Jensen stated that he had investigated the December 2, 1994 incident and determined that Mr. Zecopoulos had exercised poor judgment when he physically touched appellant but that there was no intent to harm and no assault. In a statement dated January 18, 1996, Mr. Jensen related that when appellant told him on December 2, 1994 that he had been assaulted by Mr. Zecopoulos he appeared angry but not afraid that Mr. Zecopoulos had touched him. In a memorandum dated January 17, 1996, Mr. Berger related that Mr. Zecopoulos admitted to touching appellant on the arm on December 2, 1994 in order to get his attention and turn him around to listen to him. In a statement dated December 2, 1994, Mr. Green, stated that on that morning Mr. Zecopoulos confronted appellant and, “a heated discussion ensued” and that during the course of the discussion Mr. Zecopoulos grabbed appellant by the upper arm. Mr. Green stated that he was not able to hear the discussion that took place. Although Mr. Green characterized the action of Mr. Zecopoulos as a grabbing rather than a touching, he acknowledged that he was not close enough to the incident to hear what appellant and Mr. Zecopoulos said. Therefore, he may not have been close enough to discern whether Mr. Zecopoulos grabbed appellant’s arm or touched it. In light of the other evidence, the witness statement from Mr. Green is not sufficient to establish that Mr. Zecopoulos grabbed appellant by the arm. The Board finds that the evidence of record establishes that Mr. Zecopoulos touched appellant on December 2, 1994 and that this incident constitutes a compensable factor of employment which, if supported by the medical evidence, could entitle appellant to compensation benefits.

In the present case, appellant has identified a compensable factor of employment with respect to the allegation that Mr. Zecopoulos touched his arm on December 2, 1994. 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.¹⁷

In a form report dated September 21, 1995, Dr. Fisher, a general practitioner, diagnosed anxiety symptoms and signs and indicated by checking the block marked “yes” that the condition was causally related to factors of his employment. However, he failed to identify the specific work incidents which he believed had caused appellant’s condition. Therefore, this report is not sufficient to establish that appellant sustained an emotional condition causally related to his employment.

¹⁷ See *William P. George*, 43 ECAB 1159, 1168 (1992).

In a report dated January 29, 1996, Dr. Fisher related appellant's complaint that he was having anxiety due to problems at work. He stated, "I would think his stress and anxiety are due to his problems with his supervisors at work." However, he did not identify the specific work incidents which he believed had caused appellant's condition and therefore this report does not discharge appellant's burden of proof.

In a report dated January 22, 1996, Dr. Roberts related that on December 2, 1994 appellant felt that he was assaulted by a supervisor. He related appellant's allegation that the supervisor was yelling and screaming and waving his hands in appellant's face, grabbed his right arm and jerked him around and that this was witnessed by coworkers who gave statements to that effect. Dr. Roberts stated that appellant's emotional condition was caused, among other factors, by the assault. However, this report is not based upon a complete and accurate factual background. The evidence of record does not support the description given by appellant of the incident, that Mr. Zecopoulos yelled and screamed, waved his arms around and that he "grabbed" appellant's arm and "jerked" him around. As noted above, the evidence of record indicates that Mr. Zecopoulos touched appellant on the arm but did not grab him and the evidence also does not support appellant's allegations that Mr. Zecopoulos yelled, screamed, waved his arms in appellant's face and jerked him around. As this report is not based upon a complete and accurate factual background, it is not sufficient to establish that appellant sustained an emotional condition causally related to the incident on December 2, 1994.

The November 6, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 28, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member