

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES J. JURY and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 99-1786; Submitted on the Record;
Issued March 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

On December 5, 1997 appellant, then a 39-year-old letter carrier, filed an occupational claim, Form CA-2, alleging that he sustained acute and severe stress, anxiety and depression syndrome at work from stressful situations. In a statement dated December 5, 1997, he stated that he was the subject of harassment in the office and on the street, that he received threats of removal from management and daily intimidation. Appellant alleged that he was told that he was not able to perform his job to the new standards, that he was told that he was unable to follow instructions and that he used excessive street time. He stated that he was also told that his best was "just not acceptable."

By letter dated December 7, 1997, the supervisor of customer services, Douglas W. Shirer, denied that appellant was subject to harassment in the street and in the office. Mr. Shirer stated that appellant's performance was monitored, as was the performance of all employees in the office, and appellant was advised of poor work habits and how to correct them. He stated that appellant was advised that his response that he was "doing his best" was not an acceptable reason for poor performance. Mr. Shirer denied that appellant was ever told to seek another job or had someone standing constantly behind him for two hours while he was casing. Mr. Shirer stated that appellant was monitored at regular intervals on his street performance and that two different postmasters who accompanied him on his route found appellant could not complete his route within eight hours due to improper work habits that he refused to correct. He stated that management issued appellant a letter of warning in order to correctly improve his work performance. The letter of warning, dated November 3, 1997, was issued for appellant's failure to follow instructions and unauthorized extension of work hours.

In an undated statement by Mr. Shirer received by the Office on January 8, 1998, he stated that appellant was offered retraining which he said he did not need. He noted that the minimum requirements for casing mail was 13 pieces per minute and from August to October

1997, appellant's average productivity was 8.7 pieces per minute. He stated that appellant would not comply with instructions in most instances unless he was being observed, which resulted in increased observations and frequency of instruction, a situation "wholly initiated by [appellant] himself, due to his unwillingness to follow instructions."

The record contains "street summaries" of appellant's performance while on route, one of which is dated October 16, 1997 and another, on which a handwritten note states the contents were discussed with appellant on October 30, 1997. This records noted, in part, that appellant was "backtracking" or had an "unnecessary conversation (Personnel)" or he fed the dog or his paces per minute were minimal.

By letter dated December 22, 1997, the Office requested additional information from appellant including corroboration of his claim that he was mistreated or that management acted abusively in their handling of administrative matters.

By letter dated January 7, 1998, the officer-in-charge, Branda E. Harris, stated that appellant was one of their "poorest performers." She stated that the minimum pieces per minute for casing mail was 13. Ms. Harris stated that appellant "deliberately" extended his office time which in turn extended his street time which resulted in overtime. She stated that, since appellant was off work, other carriers who had less familiarity with his route were able to complete it in eight hours. Ms. Harris denied that appellant was threatened with removal. She stated, however, that appellant was told, if he was not able to follow instructions, maybe the job was not for him. Regarding appellant's contention that he was daily intimidated, she stated that they had daily performance evaluations of all their employees.

In a statement dated January 14, 1998, appellant alleged that management's harassment of him was due to the fact he had "blown the whistle" on certain members of management for disclosing a sealed bid for snow plowing. He said his action resulted in the demotions of postmaster, Fred Mott, the supervisor, Floyd Cameron, who was represented on the charges by Mr. Shirer and Linda Jacobus. Appellant stated that he was a union steward, that he was "stone walled" trying to work on problems with management and that he worked under "threats and deceptions." Appellant stated that he also reported another incident of wrongdoing-falsification of documents, time cards and use of hours -- and reported it to a postal inspector who determined, after some investigation, that the allegation was true. Appellant stated that since that incident, his "days at work [had] been hostile with threats (one on one) and intimidation."

In another statement dated January 14, 1998, appellant stated that on October 16, 1998 Ms. Harris called him off to the side as he was leaving for the street and told him that he was not meeting her goals as he was only casing six letters per minute and told him "in an intimidating manner" that he should look for a job soon and a new line of work. Appellant stated that he told her that the numbers of his casing mail were inaccurate.

Appellant submitted numerous statements concerning observation of appellant's route by postal authorities and observation of postal authorities while setting up his route and completing his route.

Appellant also submitted evidence of a grievance he had filed against management for receiving the November 3, 1997 letter of warning which went to arbitration after being appealed from a Step 3 decision on March 11, 1998.

By decision dated May 22, 1998, the Office denied the claim, stating that the evidence of record failed to establish that the claimed emotional condition arose out of or in the course of his federal employment.

Appellant requested an oral hearing before an Office hearing representative, which was held on January 26, 1999. At the hearing, he reiterated that he believed management began harassing him for whistle-blowing regarding the postmaster's and supervisors' disclosure of a sealed bid for the contract of snow removal and the falsification of production figures. Appellant stated that he had problems casing mail but this was because they changed route due to the DPS machine and they changed his labels on his case three times in four months. He also stated that it was a new route and that he had only had it a month. Appellant stated that the others who did his route had more experience than he had. He denied that his performance was poor stating that "every day it was acceptable" and the numbers management came up with of his only casing four letters per minute was "ridiculous" as he usually cased 10 to 16 letters per minute. Appellant reiterated that they told him to transfer out of the office and that he was a poor performer. He also reiterated that he was constantly watched when he was casing mail sometimes with his supervisor standing right behind him and he was followed by his supervisor in different cars on his route.

In a February 3, 1998 report, Ellen H. Jacob, a licensed social worker, found appellant's condition "clearly the result of experiencing the threats to his job."¹

Appellant submitted a report from Dr. T. Cassady, apparently a psychologist, dated February 25, 1999. In the report, Dr. Cassady recorded that appellant stated that his past work environment was almost "like a war zone," and that he became a victim of harassment since 1995 after he turned management personnel in for "apparent embezzlement" and became known as a whistle-blower. He diagnosed dysthmic disorder and/or major depressive disorder. Dr. Cassady stated that there was a direct relationship between appellant's work situation, i.e., harassment and his psychiatric condition which includes depression and anxiety symptoms." He stated that the work environment "was definitely the source of his psychiatric problems."

By decision dated April 8, 1999, finalized on April 13, 1999, the Office hearing representative affirmed the Office's May 22, 1998 decision.

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

¹ Medical evidence submitted by a social worker does not qualify as probative evidence since such a practitioner does not qualify as a "physician." *Debbie J. Hobbs*, 43 ECAB 135 (1991).

Act.² If the Board finds that these allegations are unrelated to the employee's regular- or specially-assigned work duties, they do not fall within the coverage of the Act unless the evidence discloses error or abuse on the part of the employing establishment.³

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the conditions for which he claims compensation were caused or adversely affected by factors of his federal employment.⁴ This burden includes the submission of a detailed description of the employment conditions or factors which appellant believes caused or adversely affected the condition or conditions for which he claims compensation. This burden also includes the submission of rationalized medical opinion evidence, based on a complete factual and medical background of the employee, which shows a causal relationship between the conditions for which compensation is claimed and the implicated employment factors or incidents.⁵

Regarding appellant's allegations of harassment, the Board has stated that the actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.⁶ However, to support a claim based on harassment, there must be some evidence that the harassment did in fact occur. Mere perceptions of harassment alone are not compensable under the Act.⁷

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.⁸ The issue is not whether the claimant has established harassment or discrimination under standards applied by the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.⁹ To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.¹⁰

² *Dinna M. Ramirez*, 48 ECAB 308, 312 (1997); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

³ *Dinna M. Ramirez*, *supra* note 2; *see Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Richard J. Danube*, 42 ECAB 916, 922 (1991).

⁴ *June A. Mesarick*, 41 ECAB 898, 907 (1990); *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Id.*; *see Walter D. Morehead*, 31 ECAB 188, 194 (1979).

⁶ *Michael Ewanichak*, 48 ECAB 364, 365 (1997); *Frederick D. Richardson*, 45 ECAB 454, 463 (1994).

⁷ *Michael Ewanichak*, *supra* note 6; *June A. Mesarick*, *supra* note 4 at 908.

⁸ *Michael Ewanichak*, *supra* note 6 at 366; *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

⁹ *See Martha L. Cook*, 47 ECAB 226, 231-32 (1995).

¹⁰ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

The evidence as shown by several of the witness statements and appellant's testimony establishes that appellant was followed by a supervisor in a car and monitored while casing mail in the office. In his December 7, 1997 statement, Mr. Shirer, the supervisor of customer services, stated that appellant was monitored "at regular intervals" on his street performance and that two different postmasters who accompanied him on his route found that appellant could not complete his route within eight hours. He stated that he found that appellant would not comply with instructions unless he was observed which resulted in increased observations and frequency of instruction, which he felt was brought on by appellant's unwillingness to follow instructions. Mr. Shirer denied that supervisors constantly stood behind appellant while he was casing mail. Management also contended appellant's average productivity in casing mail was 8.7 pieces per minute whereas the minimal requirement was 13, although appellant contended he cased 10 to 16 pieces per minute. In her January 7, 1998 statement, the office-in-charge, Ms. Harris, stated that management gave daily performance evaluations of all employees.

Monitoring of an employee's work is an administrative function of the employing establishment and as such is not compensable unless appellant shows that the employing establishment abused its discretion or acted unreasonably.¹¹ In this case, the employing establishment maintained that monitoring the employee was standard procedure and contended it was particularly necessary in appellant's situation because he was performing below acceptable standards, appellant has not shown management acted abusively in this regard.

Further, the disciplinary actions such as issuing the November 3, 1997 letter of warning and criticizing appellant's work performance are also administrative actions and because management asserted that its criticisms and the issuance of the letter were to correct appellant's work performance, appellant has not shown that management acted abusively.¹² Further, appellant's grievance on the letter of warning was not yet resolved as it had gone to arbitration from a Step 3 decision. Other than his testimony, appellant did not present evidence corroborating that his work performance was acceptable.

Although appellant contended that management threatened him with loss of his job, he did not present evidence to corroborate his contention. In his December 7, 1997 statement and in her January 7, 1998 statement, Mr. Shirer and Ms. Harris, respectively, stated that appellant was not threatened with removal of his job, although Ms. Harris stated that appellant was told if he was not able to follow instructions, "maybe the job was not for him." Ms. Harris' words are not equivalent to a threat. Appellant has therefore not shown he was harassed in this regard.

Appellant has also not presented evidence to show that he was harassed because he was a union steward and for whistle-blowing on management in two instances. He did not show that he requested training and was denied it whereas management claimed he was offered training and refused it. Further, he did not present evidence to show that he had problems with his route because it was a new route and management purposely changed his labels three times in four

¹¹ See *Daryl R. Davis*, 45 ECAB 907, 911 (1994); *Jimmy Gilbreath*, *supra* note 3.

¹² See *Barbara J. Nicholson*, 45 ECAB 803, 809 (1994).

months. Absent evidence corroborating his contentions, appellant cannot establish that he was harassed in this regard.¹³

As appellant has not cited and substantiated any compensable work factors, the Office properly denied his claim without reviewing the medical evidence.¹⁴

The decisions of the Office of Workers' Compensation Programs dated April 8, 1999 and May 22, 1998 are hereby affirmed.

Dated, Washington, DC
March 19, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹³ See *Barbara E. Hamm*, *supra* note 10 at 851 (1994).

¹⁴ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).