

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AJIT LAL and U.S. POSTAL SERVICE,
POST OFFICE, San Rafael, CA

*Docket No. 00-2001; Oral Argument Held October 10, 2001;
Issued November 29, 2001*

Appearances: *Linda L. Harper*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an emotional condition while in the performance of his duties.

On May 29, 1998 appellant, then a 47-year-old letter carrier, filed an occupational disease claim asserting that his major depression and anxiety disorder were a result of his federal employment. He implicated the treatment he received by his supervisor and coworkers, including violence, yelling, frightening stares, threats of unnecessary suspension and denial of equal treatment. Appellant also implicated reprisal for his whistle blowing on observed sexual harassment. He stated that he did not file the claim earlier because he feared the loss of his job "and my life."

In a statement dated June 2, 1998, appellant's supervisor responded:

"During my stay here at [the employing establishment], it has never come to my attention that there has been any workplace violence. Furthermore, there have been no frightening stares or yelling by supervisors. Any suspension that has been issued has been within the National Agreement and [the employing establishment] rules and regulations.

"In San Rafael there have been no sexual harassment charges on any employee, and employee whistling has been addressed by each supervisor in his/her section. I have no idea what is actually happening with this employee and, after receiving the Form CA-2, am very concerned about my safety and the safety of other employees in the office. Request a response from injury compensation as soon as possible. Thanks."

On June 26, 1998 the Office of Workers' Compensation Programs requested that appellant provide a detailed chronological statement of each of his allegations together with supporting documentation, such as witness statements, corroborating his allegations.

In a decision dated August 7, 1998, the Office denied appellant's claim on the grounds that he failed to establish fact of injury. The Office found that his allegations were not sufficiently specific and that he submitted no medical evidence to support that he sustained a specific emotional condition.

Appellant requested an oral hearing before an Office hearing representative, which was held on February 22, 1999. He testified that he was a Vietnam veteran who was treated for post-traumatic stress disorder in 1988 but that he had no problems with post-traumatic stress disorder when he began to work at the employing establishment in 1991. Appellant stated that he was not properly trained for the first six months of his employment. He stated that when he made a mistake people used profanity and laughed. Appellant told how one person grabbed his hand and twisted it and how this person twice addressed him using a racial epithet. He testified that his supervisor had a habit of raising his voice to him. Appellant stated that he had a nervous breakdown in 1993. When he came back to work, nobody talked to him; they turned their backs. When they found out he was a Vietnam veteran, they started using the word "crazy," which broke appellant down. They used a lot of curse words. Appellant stated that he developed a twitch. His doctor told him that he went into a depression. Appellant became more and more isolated at work. Appellant told how supervisors tried to entice women and when the women refused them, the supervisors would take it out on appellant.

Appellant testified that he filed several grievances. In both, he stated, there was an agreement to cease and desist the discrimination and harassment against him. His stated that after he filed an Equal Employment Opportunity (EEO) complaint and his workers' compensation claim his supervisors were removed. Another supervisor would stand and stare constantly. One time three supervisors lined up right in front of him and stared at him constantly.

Appellant testified that one carrier, an ex-supervisor, stated, "We [a]re going to get you." Another co-employee came up to appellant, as he was going to load up his vehicle to leave and stared. Appellant became nervous and scared. The man repeated many times, "We [a]re going to get you. [The supervisor's] going to get you."

Appellant described other instances of harassment, including how his supervisor, who had recently come back, stood behind him and used a punching motion with his fist into an open palm. The hearing representative kept the record open for 30 days to allow appellant an opportunity to submit statements from witnesses to corroborate appellant's testimony.

The hearing representative received a March 16, 1999 statement from the San Rafael postmaster, who was not present at the employing establishment and could not speak to anything that occurred during the period in question. The hearing representative also received a March 13, 1999 statement from one of appellant's co-supervisors, who stated that both he and the other supervisor were surprised to receive appellant's claim for compensation. The co-supervisor stated that he never saw any inappropriate behavior toward appellant by the other

supervisor and that the other supervisor had never brought up appellant's name in conversation. Appellant and his wife submitted declarations. He also submitted copies of two grievances that were resolved at Step 2. In one, management agreed "to cease and desist from disparate treatment when requiring carriers to provide documentation for EAL due to funeral services." In the other, it was mutually agreed that "one day count will not be used as harassment against letter carriers."

In a decision dated May 20, 1999, the hearing representative affirmed the denial of appellant's claim. The hearing representative noted that the file contained only appellant's word, which was controverted by the employing establishment. Further, appellant provided virtually no medical opinion evidence to support his claim.

Appellant requested reconsideration. He submitted documents that were already of record, but also submitted new evidence. A March 26, 1999 letter confirms that appellant was admitted into the National Center for Post-Traumatic Stress Disorder relating to combat trauma in November 1985 and completed the program in March 1986. An April 28, 1998 medical evaluation summary related appellant's complaints, history and mental status. The principal diagnosis was reported as occupational stress; anxiety disorder, not otherwise specified; and post-traumatic stress disorder with panic symptoms. A disability certificate that same date indicated that appellant had a serious health condition requiring absence from work and treatment. Appellant was released to return to unrestricted full duty on May 14, 1998. Appellant submitted patient progress notes from April 29, 1998 to February 23, 1999. An October 1, 1998 note from Dr. Jeffrey Kahn, a psychiatrist, states: "[Appellant] has been under my care for the treatment of anxiety and depression. He reports that being on call for jury duty is causing undue stress."

Appellant also submitted a final agency decision dated October 15, 1998 in the matter of his EEO complaint. In the complaint, appellant alleged discrimination based on national origin and mental disability when, on April 28, 1998, he was medically removed from duty. He also alleged a continuing violation of a hostile work environment since 1993, including the requirement of providing documentation for one day off and being subjected to verbal and physical threats and being called a racial epithet. The decision determined that appellant failed to respond to the employing establishment's written request to provide relevant information in order to proceed with the complaint. Appellant's case was closed for failure to proceed and failure to cooperate.

Appellant also submitted a March 6, 1999 statement from a coworker. She stated that the supervisor continually stared at appellant, usually standing with his arms folded six feet away from appellant's case. She stated that she saw the supervisor walk back and forth staring at appellant trying to pressure appellant to work faster. She saw him with his hand over his mouth saying, "No, no" while walking back and forth and looking at her and appellant. She witnessed three supervisors all standing together staring at appellant and whispering. She stated that they were trying to pressure him and stress him out.

The Office also received an August 22, 1999 statement from appellant describing specific incidents that occurred on July 13 and August 13, 1999. Appellant asserted that someone tried to hit him with his postal vehicle. This person stared at him and accosted him in a threatening

voice and with foul language. This same person later stared at him, again used profanity and threatened to kill appellant. Appellant related an earlier incident of physical and verbal assault.

In a decision dated November 3, 1999, the Office reviewed the merits of appellant's and denied modification of the hearing representative's decision. The Office found that appellant's allegations were not supported by reliable, probative, evidence.

The Board has considered appellant's allegations together with the evidence of record and finds that appellant has not met his burden of proof to establish that he sustained an emotional condition while in the performance of his duties.

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.¹ This burden includes the submission of a detailed description of the employment factors or conditions that appellant believes caused or adversely affected the condition for which he claims compensation.²

As the Board observed in the case of *Lillian Cutler*,³ workers' compensation law does not cover each and every illness that is somehow related to the employment. When an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.

An employee's emotional reaction to an administrative or personnel matter is generally not covered. Thus, the Board has held that an oral reprimand generally does not constitute a compensable factor of employment,⁴ neither do disciplinary matters consisting of counseling

¹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

² *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

³ 28 ECAB 125 (1976).

⁴ *Joseph F. McHale*, 45 ECAB 669 (1994).

sessions, discussion or letters of warning for conduct;⁵ investigations;⁶ determinations concerning promotions and the work environment;⁷ discussions about an SF-171;⁸ reassignment and subsequent denial of requests for transfer;⁹ discussion about the employee's relationship with other supervisors;¹⁰ or the monitoring of work by a supervisor.¹¹

Nonetheless, the Board has held that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.¹²

Perceptions alone, however, are not sufficient to establish entitlement to compensation. To discharge his burden of proof, appellant must establish a factual basis for his claim by supporting his allegations with probative and reliable evidence.¹³

To the extent that appellant attributes his major depression and anxiety disorder to administrative or personnel actions taken by his supervisors, his claim lies outside the scope of coverage unless he submits probative and reliable evidence showing error or abuse or unreasonable conduct in such matters. The record on appeal contains no such evidence. The Board has carefully reviewed the two grievance agreements and finds that they are in the nature of a settlement; they do not represent admissions of specific error against appellant so much as assurances of future conduct toward carriers in general given for the purpose of resolving the complaint. The final agency decision in appellant's EEO case similarly fails to establish as a matter of fact error or abuse or unreasonable conduct on the part of appellant's supervisors.

Appellant has alleged harassment and discrimination by supervisors and coworkers. To the extent that incidents alleged as constituting harassment and discrimination are established as occurring and arising from appellant's performance of his regular duties, such incidents can constitute compensable employment factors.¹⁴ But for harassment and discrimination to give

⁵ *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994).

⁷ *Merriett J. Kauffman*, 45 ECAB 696 (1994).

⁸ *Lorna R. Strong*, 45 ECAB 470 (1994).

⁹ *James W. Griffin*, 45 ECAB 774 (1994).

¹⁰ *Raul Campbell*, 45 ECAB 869 (1994).

¹¹ *Daryl R. Davis*, 45 ECAB 907 (1994).

¹² *Margreat Lublin*, 44 ECAB 945 (1993). See generally *Thomas D. McEuen*, 42 ECAB 566 (1991), reaffirming *Thomas D. McEuen*, 41 ECAB 387 (1990).

¹³ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁴ *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

rise to a compensable disability, there must be evidence that harassment or discrimination did in fact occur. Once again, mere perceptions of harassment or discrimination are not compensable.¹⁵

The employing establishment responded to appellant's allegations with surprise and denial. For his part, appellant has submitted the statement of a coworker, who supports that supervisors stared at appellant. The Board is not prepared to hold that looking a certain way at an employee, with or without folded arms, will rise to the level of error or abuse, and the coworker's perception of the intent of the supervisors must be considered speculative.

Appellant has offered no other evidence from coworkers to support his allegations of physical or verbal abuse. There is no statement from a witness supporting the twisting of his hand or the threats of physical violence or the use of profanity or racial epithets. Appellant has the burden of proof in his claim for compensation which can be established only by reliable and probative evidence.

Because appellant has failed to establish a factual basis for his claim by supporting his allegations with reliable and probative evidence, he has not met his burden of proof.

The November 3, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 29, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

¹⁵ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).