

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE J. BUTLER and U.S. POSTAL SERVICE,
OAK RIDGE POST OFFICE, Oak Ridge, TN

*Docket No. 01-1731; Submitted on the Record;
Issued August 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has established that he sustained an emotional condition with secondary myocardial infarction in the performance of duty.

On June 22, 1999 appellant, then a 45-year-old postal clerk, filed a notice alleging that he sustained an emotional condition in the performance of duty on or before April 9, 1998. He attributed his condition to being “repeatedly harassed and threatened over [a] two[-]month period” by Roger Asbury, a senior manager,” causing a “subsequent heart attack on [the] workroom floor” on April 24, 1998.¹ Appellant alleged that Mr. Asbury made racist remarks, accusing African-American employees of stealing hubcaps and threatening to tie them “up behind [Mr. Asbury’s] pick-up truck” to get them to complete their mail routes more quickly. He also alleged that “several times,” Mr. Asbury “pulled his pocket knife and poked it toward” him and threatened to “cut [him] in[to] pieces.” Appellant also asserted that he was singled out for a seven-day suspension effective August 6, 1997 for deviating from his route to cash a check, an activity permitted other carriers. Appellant also alleged that he was denied promotions and retaliated against for calling attention to safety violations.

Appellant alleged that, in early 1998, Mr. Asbury called him a “goddamned pussy” for asserting that a particular route could not be completed safely in eight hours.

Appellant alleged that, on March 5, 1998, Mr. Asbury “became irate and cursed [him] on the workroom floor, calling [appellant] a goddamn sonofabitch, made disparaging and humiliating remarks about [appellant’s] facial features and then, threatened to fix [appellant’s] ass again.”

¹ In a June 30, 1999 letter controverting appellant’s claim, the employing establishment stated that Mr. Asbury “was not and apparently never has been [appellant’s] supervisor.”

Appellant recalled that, on April 9, 1998, Mr. Asbury “barged up to [appellant’s] direct supervisor Jack Edson and in a hostile tone told Mr. Edson to ‘f**k him’ while staring intently at [appellant].” Appellant noted that, after the April 9, 1998 incident, he requested employee counseling to deal with the stress of working with Mr. Asbury.

Appellant alleged that, on April 24, 1998, Mr. Asbury stood three to five feet behind him as he cased mail and stated that he would “just have to cut [appellant].” Appellant then began experiencing chest pains and reported his symptoms to supervisor Tom Crandall. Approximately 45 minutes later, appellant experienced a sudden increase in chest pain and reported this to Mr. Crandall, with Mr. Asbury “hovering directly behind [him].” When Mr. Edson did not summon emergency help, appellant then drove himself to the hospital. He was treated and released, worsened overnight, reported to another hospital and underwent emergency triple coronary artery bypass surgery on April 25, 1998.

Appellant submitted reports from Dr. Thomas Gaines, an attending Board-certified cardiologist, who released appellant to restricted duty as of August 25, 1998, with no lifting over 50 pounds, “no undue stress” and no prolonged exposure to heat above 100 degrees.

On August 14, 1998 supervisor Mr. Edson denied appellant light duty as the employing establishment could not comply with Dr. Gaines’ restrictions against the heat and stress exposure restrictions.

Dr. Gaines released appellant to full duty on November 12, 1998. Appellant returned to work on November 14, 1998.

Appellant alleged that, shortly following his return to work, Mr. Asbury toured the carrier cases and “called several employees a sonofabitch” and “remarked loudly that ‘I [have] ... a 44 [m]agnum to take care of that s**t.’” Appellant also learned that Mr. Asbury bragged that in retaliation for filing a safety grievance, he had moved all safety meetings to Saturday.

On November 21, 1998 appellant alleged that, while being observed on his route by supervisor Mike Warnowski, he was menaced at close range by a large, growling dog that had previously attacked other carriers. Appellant alleged that Mr. Warnowski remained at a distance observing appellant and writing notes, but did not attempt to intervene or distract the dog. He also alleged that Mr. Warnowski drove so closely behind him during the observation, he nearly collided with appellant’s vehicle on several occasions.

Appellant asserted that, on December 8, 1998, Mr. Asbury “aggressively barge[d] up beside [him] in the men’s bathroom and beg[a]n animatedly and vigorously washing his hands while [appellant] was finishing washing up at the adjacent sink. His efforts made him appear as if he were shucking corn. Mr. Asbury elbows did repeatedly barely miss me.... This incident occurred immediately prior to an appointment” with an employee assistance program counselor.

In a December 22, 1998 report, Dr. Gaines stated that it was “certainly likely that job-related stress contributed to [appellant’s] cardiac ischemia. Obviously, his cigarette smoking habit contributed as well. Nevertheless, it sounds as if [appellant] was experiencing a fairly precipitous sort of stress around the time of his worst symptoms and just prior to the heart attack

which we treated here. From his report I take it that this stress was largely work related. It is therefore, likely that work-related stress contributed in a significant way to his difficulties.”

Appellant stated that, during a January 8, 1999 grievance interview with Mr. Edson, Mr. Edson admitted witnessing the April 9, 1998 incident and that he denied appellant light duty as he “did [not] know how [appellant] would react to” Mr. Asbury.

In a January 22, 1999 report, Dr. Maria Abercrombie O’Shaughnessy, an attending clinical psychologist, noted treating appellant for “clinically significant anxiety, depression and mental exhaustion related to job stress” beginning on December 10, 1998. She related appellant’s account of workplace stresses. Dr. O’Shaughnessy diagnosed “[m]ajor [d]epressive [d]isorder, [s]ingle [e]pisode, [m]oderate,” noting social stressors of “[o]ccupational problems including discord with supervisor, difficult work conditions, stressful work schedule. She stated that “harassment by the supervisor, unsafe working conditions and emotional and psychological abuse of the employee, aggravated and precipitated a psychological, emotional and physical stress response as evidenced by the myocardial infarction, depression and anxiety.” Dr. O’Shaughnessy explained that harassment at work “created great distress that began to manifest in psychological ... and physiologic changes ... causing depression, anxiety” and “cardiovascular accident.” In periodic reports through June 1999, Dr. O’Shaughnessy noted that appellant’s depression and anxiety had improved, but held appellant off work due to the “stressful work environment.”

Appellant also submitted several statements from his coworkers, describing a general pattern of harassment, physical threats, threats with an open knife, frequent profanity and other unprofessional conduct by Mr. Asbury. These statements do not specify the dates of the alleged incidents or indicate that Mr. Asbury was directing these behaviors toward appellant.

In an undated statement, Randall D. Maikel, one of appellant’s coworkers, noted that Mr. Asbury made frequent profane and abusive remarks toward letter carriers and that the office was “so much more peaceful now without the abuse. The stress level has gone way down.” In a May 10, 1999 statement, Paul Martin, one of appellant’s coworkers, asserted that he had witnessed Mr. Asbury harass, kick and curse postal employees, as well as threatening employees “with an open knife.” In a May 31, 1999 affidavit, Debra G. Rice, one of appellant’s coworkers, testified that Mr. Asbury said “[g]-d damn” and “f**k” on an “almost daily” basis, loud enough to be heard across the workroom floor. Ms. Rice stated that she had seen “Mr. Asbury pull out his knife and gesture towards several ... employees, both black and white. The gesturing is anywhere from just pulling it out of his pocket, to making a stabbing or jabbing motion toward the person.” In a May 31, 1999 affidavit, Wilma Adkins, one of appellant’s coworkers, stated that Mr. Asbury “said to Bob Nichols and myself when Rod Goodwin was to be our 204B that he was leaving his [h]ead [n]igger in charge.” In an undated statement, Ronald Tolliver, one of appellant’s coworkers, stated that Mr. Asbury accused African-American employees of stealing hubcaps, that Mr. Asbury was “volatile” and “hostile” during discussions about overtime in the winter of 1993, that in February 1998 he received a promotion, but refused it because it would have put him under Mr. Asbury’s constant supervision.

In a February 23, 1999 statement, Paul Martin, one of appellant’s coworkers, described a pattern of profanity, racial insults and physical threats, including verbal threats of castration

made while waving an open knife. Mr. Martin asserted that Mr. Asbury retaliated against appellant for having a desirable route assignment due to seniority and remarked that appellant's "nose was so f**king big, he has to be a f**king Arab." Mr. Martin also stated that, after appellant returned to work following his heart attack, Mr. Asbury continued to harass and threaten appellant.

In an April 6, 1999 statement, Sharon J. Ruehle, one of appellant's coworkers, stated that, on February 5, 1999, Mr. Asbury "told Cedric Wood that he was so black that the only time he could see him was in the dark and that Mr. Asbury made frequent racist remarks and demonstrated how "you people' (blacks) use, carries and handles knives."

Appellant filed a March 2, 1999 grievance, alleging that he was denied promotions and cursed at by Mr. Asbury. On March 8, 1999 the employing establishment denied the grievance on the grounds of vagueness. Appellant appealed. At a March 25, 1999 Step B grievance meeting, a dispute resolution team found that there was insufficient evidence to show that the employing establishment violated the National Agreement, noting that many of the alleged events, including the November 21, 1998 dog incident, could not be investigated as the grievance was not timely filed. The team found that PS Forms 1767 were handled incorrectly and directed that management "take steps" to ensure correct handling.

In a July 23, 1999 report, Dr. E.J. Stathacos, an attending psychiatrist, held appellant off work. In an August 22, 1999 report, he noted that "[o]ver the past several months [appellant] has experienced significant anxiety and depression related to his job" and recommended that appellant resign from the employing establishment.

By decision dated December 29, 1999, the Office denied appellant's claim on the grounds that he did not establish that the claimed condition was sustained in the performance of duty. The Office found that appellant failed to establish any compensable factors of employment. The Office found that appellant's fear that Mr. Asbury would harm him was not compensable as Mr. Asbury had not threatened appellant. The Office also found that appellant's "dissatisfaction with not being granted light duty" and not receiving promotions were noncompensable "frustration over not being allowed to work in a particular environment" and that there was no error or abuse shown. The Office further found that there was no evidence that the hand washing incident was "meant to constitute harassment." The Office concluded that there was insufficient evidence to establish that the "'sonofabitch,' 'pussy' and nose comments were made with the intent of abuse or harassment. The 'f**k you' comment was clearly made by [Mr. Asbury] in an angry manner," but that there was insufficient evidence "to establish the comment was meant to constitute abuse or harassment of the employee."

Appellant disagreed with this decision and in a December 20, 2000 letter requested reconsideration. He alleged that Mr. Asbury was "forced to retire" in 1999 instead of being fired. Appellant also noted that, in 1972, Mr. Asbury plead guilty to felony theft for stealing registered letters, then was rehired by his brother, Regional Postmaster E. Ray Asbury. He submitted additional evidence.²

² Appellant also submitted medical reports previously of record.

In a December 18, 1972 affidavit, Mr. Asbury plead guilty to “stealing, abstracting and removing registered letters from a package which had been entrusted to him and which had come into his possession intended to be conveyed by mail, defendant being an employee of the [employing establishment].” Mr. Asbury was sentenced to one[-]year imprisonment.

Appellant submitted chart notes dated April to September 1998 from an Employee Assistance Program (EAP) counselor. These notes do not appear to have been signed or reviewed by a physician or clinical psychologist.

By decision dated March 1, 2001, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision. The Office found that the 1972 indictment was not pertinent to appellant’s claim and that the EAP notes did not establish either that Mr. Asbury threatened or harassed appellant or that the employing establishment committed error or abuse.³

The Board finds that appellant has not established that he sustained an emotional condition with secondary myocardial infarction in the performance of duty.

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.⁴ When working conditions are alleged as factors in causing 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.⁵ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁶

In its December 29, 1999 decision, as affirmed on March 1, 2001, the Office found that appellant had not established that he sustained an emotional condition or secondary myocardial infarction in the performance of duty, chiefly because he had not established any compensable

³ On appeal, in a May 29, 2001 letter to the Board, appellant stated that he had “evidence to be submitted as soon as received.” Although appellant did not submit this new evidence, this does not affect his case as the Board may not consider any evidence for the first time on appeal that was not before the Office on March 1, 2001, the time it issued the final decision in the case; *see* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a). Also, appellant requested that, if the Board denied his appeal, he “wishe[d] to be informed of [his] rights to see an Administrative [Law] Judge.” The Board notes that there is no provision in the Act or its implementing regulations regarding an automatic entitlement to an appearance before an administrative law judge following issuance of the Board’s decision and order.

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *See Barbara Bush*, 38 ECAB 710 (1987).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

factors of employment. While the Board concurs that appellant has not established that he sustained an emotional condition in the performance of duty, the Board also finds that appellant has submitted sufficient evidence to establish two of the alleged incidents as compensable.⁷

Appellant alleged that on March 5, 1998, Mr. Asbury became irate, threatened to “fix his ass,” called him various profane names and made “disparaging and humiliating remarks about [his] facial features.” He submitted a February 23, 1999 statement from coworker Mr. Martin, asserting that Mr. Asbury remarked that appellant’s “nose was so f**king big, he has to be a f**king Arab.” The Board finds that appellant’s account of events, as corroborated by Mr. Martin, is sufficient to establish that, on March 5, 1998, Mr. Asbury made the alleged remarks about appellant’s nose on the workroom floor.

The Board further finds that appellant has submitted sufficient evidence, uncontroverted by the employing establishment, that, on April 9, 1998, Mr. Asbury “barged up to” Mr. Edson, and in a hostile tone told Mr. Edson to ‘f**k him’ while staring intently at [appellant].”

The Board further finds that the other factors and incidents appellant alleged have not been established as compensable.

Several of appellant’s allegations are too general to be substantiated. He alleged that, on several occasions on unspecified dates, Mr. Asbury poked a pocket knife toward him and threatened to cut appellant “in pieces.” These allegations are uncorroborated by witnesses, do not provide a date, time or location where the incidents allegedly occurred and are uncorroborated by witnesses. Similarly, appellant alleged that, sometime in early 1998, Mr. Asbury called him a “goddamn pussy” for asserting that a particular route could not be completed safely in eight hours. Again, he could not recall the date of this incident and did not provide any witness statement corroborating his account of events.

Also, the Board notes that the allegations made by appellant’s coworkers in April and May 1999 statements concerning Mr. Asbury’s allegedly racist behavior, obscene remarks, threats of violence and menacing employees with a knife, are too general to be substantiated. These allegations do not provide the date or time of the alleged incidents or indicate that any of the described behaviors were directed toward appellant. The Board has held that mere allegations, in the absence of factual corroboration, are insufficient to meet a claimant’s burden of proof.⁸ Thus, appellant has failed to establish these allegations as factual.

Appellant also alleged that he was denied promotions and retaliated against for calling attention to safety violations. In a February 23, 1999 statement, Mr. Martin asserted that

⁷ The Board notes that in its December 29, 1999 decision, the Office misinterpreted the employing establishment’s March 25, 1999 grievance settlement memorandum. The Office found that as the dispute resolution team had not found any violations of the “National Agreement,” appellant has not established any of his allegations against Mr. Asbury as factual. However, the Office interpreted the phrase “National Agreement,” referring to a national labor arbitration contract, as a finding that Mr. Asbury did not violate a workplace anti-violence policy. The Office also failed to distinguish that the employing establishment could not consider certain incidents due to a time limitation and did not rule on the merits of appellant’s allegations.

⁸ *Bonnie Goodman*, 50 ECAB 139 (1998).

Mr. Asbury did retaliate against appellant for having a desirable route. However, neither appellant or Mr. Martin specified any act or acts of retaliation by Mr. Asbury. The Board has held that mere perceptions of harassment or retaliation, in the absence of corroborating evidence, do not constitute a compensable factor of employment.⁹ Thus, this allegation has not been substantiated as factual.

Appellant alleged that, on December 8, 1998, Mr. Asbury barged up beside him in the men's room and attempted to elbow appellant while washing his hands in a highly exaggerated manner. He stated that this incident took place immediately before appellant was to meet with an EAP counselor and was designed to fluster and intimidate him. While this allegation does provide a date and identifying information that could be used to determine a time, appellant provided no corroborating evidence to substantiate that this incident occurred as alleged. Therefore, the incident has not been established as a compensable employment factor.

Appellant also alleged that Mr. Asbury singled him out for a seven-day suspension commencing August 6, 1997 for deviating from his route to cash a check, an activity permitted other carriers. However, appellant failed to submit evidence substantiating that the suspension occurred or on what grounds. In addition to a lack of factual corroboration, disciplinary actions, such as suspensions, are not considered compensable employment factors in the absence of error or abuse.¹⁰ In this case, appellant has submitted insufficient evidence to substantiate that he was suspended, much less that there was any error or abuse involved. Thus, appellant has not established that the suspension constituted a compensable factor of employment.

Appellant also alleged that, during a November 21, 1998 observation, supervisor Mr. Warnowski tailgated appellant and did not attempt to intervene when appellant was menaced by a large, vicious dog. Again, appellant submitted no corroboration of these incidents. There is no witness statement of record, and no statement from Mr. Warnowski about the November 21, 1998 observation. The Board notes that route observations are a normal supervisory function of the employing establishment and that appellant has not substantiated any error or abuse by Mr. Warnowski due to a lack of evidence corroborating his account. Thus, appellant has not established that any aspect of the November 21, 1998 observation constituted a compensable factor of employment.¹¹

As the March 5 and April 9, 1998 incidents have been accepted as factual, it must now be determined if they constitute harassment. To establish compensability under the Act, there must be evidence that harassment did in fact occur.¹² In the present case, appellant has submitted sufficient evidence to support the March 5 and April 9, 1998 incidents occurred as alleged. The Board finds that, in the context of this case, as corroborated by Mr. Martin's statement, Mr. Asbury's March 5, 1998 comments regarding appellant's nose were intended to embarrass

⁹ *John Polito*, 50 ECAB 347 (1999).

¹⁰ *James H. Botts*, 50 ECAB 265 (1999).

¹¹ *Sandra Davis*, 50 ECAB 450 (1999).

¹² *Kathleen D. Walker*, 42 ECAB 603 (1991).

appellant in front of his coworkers on the floor. The Board also notes that, in its December 29, 1999 decision, the Office found that Mr. Asbury's April 9, 1998 "comment was clearly made ... in an angry manner." The Board finds that, on April 9, 1998, Mr. Asbury sought to harass appellant by making the profane remark in the manner which he did. Appellant has also submitted numerous statements from coworkers, uncontroverted by the employing establishment, that Mr. Asbury frequently used profane language and verbally and physically threatened appellant and his coworkers. Accordingly, the Board finds that appellant has substantiated his claims of harassment and that the March 5 and April 9, 1998 incidents are compensable factors of employment.¹³

While appellant has established the March 5 and April 9, 1998 incidents as compensable, he did not submit sufficient rationalized evidence to prove a causal relationship between those incidents, the claimed emotional condition or the April 24, 1998 myocardial infarction.

In a December 22, 1998 report, Dr. Gaines, an attending Board-certified cardiologist, supported a causal relationship between "job[-]related stress" and appellant's "cardiac ischemia," but did not mention any employment incidents. In reports from January 22 through June 1999, Dr. O'Shaughnessy, an attending clinical psychologist, diagnosed "[m]ajor [d]epressive [d]isorder, [s]ingle [e]pisode, [m]oderate," attributable to appellant's account of harassment and abuse by Mr. Asbury. However, Dr. O'Shaughnessy did not specifically mention either of the accepted incidents. Similarly, Dr. Stathacos, an attending psychiatrist, submitted July 23 and August 22, 1999 reports noting that appellant experienced job-related anxiety and depression, but did not mention any specific workplace incidents. Without medical rationale explaining the causal relationship between the accepted work factors and the diagnosed conditions, the opinions of Drs. Gaines, O'Shaughnessy and Stathacos are of limited probative value.¹⁴

Consequently, appellant has failed to establish that he sustained an emotional condition or secondary myocardial infarction in the performance of duty, as he submitted insufficient rationalized medical evidence to establish a causal relationship between the accepted work factors and the diagnosed conditions.

¹³ *Angie Brumfield*, 46 ECAB 867 (1995).

¹⁴ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

The decision of the Office of Workers' Compensation Programs dated March 1, 2001 is hereby affirmed as modified.

Dated, Washington, DC
August 14, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member