

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. POWELL and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

*Docket No. 02-204; Submitted on the Record;
Issued August 9, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

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

On November 18, 1998 appellant, then a 51-year-old motor vehicle operator, filed an occupational disease claim alleging that his supervisor threatened him on November 6, 1998 and caused him to develop a stress condition. Appellant asserted that Manuel Fernandez, his supervisor, threatened him during a conversation at work concerning appellant's driving practices of a postal vehicle, and that, following a verbal exchange, appellant's supervisor stated that appellant was "on thin ice." Appellant indicated that following this conversation he became upset and felt that he could no longer work and sought medical treatment. He returned to work on November 16, 1998, and filed his claim for compensation. Appellant thereafter stopped work for 21 days in accordance with a policy of the employing establishment regarding work following a claim of stress. Appellant subsequently received medical treatment from Dr. Robert Withrow, an attending physician, who determined that appellant was disabled from work until May 3, 1999. Appellant returned to work on that date.

By decision dated August 19, 1999, the Office of Workers' Compensation Programs denied appellant's emotional condition claim on the grounds that the evidence was insufficient to establish that the claimed work incident arose out of and in the course of the performance of duty. On September 15, 1999 appellant requested a hearing with the Branch of Hearings and Review.

A hearing was held on April 24, 2000. On June 30, 2000 an Office hearing representative affirmed the prior decision finding that the evidence of record was insufficient to establish that appellant's claimed emotional condition arose in the performance of duty.

On June 28, 2001 appellant through his representative requested reconsideration of the hearing representative's decision dated June 30, 2000 and submitted new evidence. Appellant submitted further argument asserting that the conversation with his supervisor, which allegedly

caused his claimed condition, occurred in the performance of duty. Appellant further submitted medical evidence in support of the claim.

By decision dated July 17, 2001, the Office, after conducting a merit review, denied modification of its prior order, finding the evidence presented in support of the application insufficient to warrant modification.

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

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.²

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.³ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁴ An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.⁵ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² *Victor J. Woodhams*, 41 ECAB 345 (1989).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

⁵ *William P. George*, 43 ECAB 1159 (1992).

⁶ See *Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

In the instant case, appellant has not established a compensable factor of employment. Appellant alleged that on November 6, 1998 Mr. Fernandez, his supervisor, threatened him during a conversation at work concerning his driving practices of a postal vehicle. Appellant asserted that Mr. Fernandez indicated that he had observed him driving a postal vehicle past some overhead tree branches and counseled him that instead of driving into the branches, he should drive in the middle lane or take an alternative route. Mr. Fernandez allegedly noted that two other drivers had had accidents that resulted from branches knocking the mirrors off postal vehicles and that the office had posted a notice about avoiding this hazardous situation in plain view. Appellant indicated that he could not by state law drive in the middle lane and that he was unaware of any office policy, which would allow him to take an alternative route. Appellant then alleged that Mr. Fernandez responded that appellant was “tempting fate” or “on thin ice.” Appellant stated that he replied to his supervisor that “this” was the reason he was considering getting a new job and Mr. Fernandez allegedly responded that “maybe he should.”

In his June 28, 2001 reconsideration request, appellant contended that, because he was on the clock on November 6, 1998, when his supervisor threatened him and also because he could have been disciplined had he not obeyed his supervisor’s order, his resulting stress condition occurred in the performance of duty.

The Board finds that appellant being counseled by his supervisor about taking steps to avoid on-the-job accidents was an administrative function. Unless there is evidence of error or abuse on the part of the employing establishment, administrative or personnel matters will not constitute compensable employment factors. The record reflects that appellant had been involved in at least three motor vehicle accidents during the course of his federal employment and consequently in an Accident Repeater Program. The Board finds that the employing establishment did not err or act abusively in handling this administrative matter by counseling appellant on alternative methods to avoid future accidents.

Appellant indicated that Mr. Fernandez was threatening him physically or his job security by stating that he was on thin ice or was tempting fate. The record does not factually support appellant’s allegation that his supervisor threatened him. In a letter dated November 19, 1998, the employing establishment provided that Mr. Fernandez asked appellant during their conversation why he would tempt fate; however, he only did so after appellant had indicated that he was a good enough driver that he would not hit the trees. 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.⁷

Appellant has not carried his burden of proof to establish an employment factor in establishing his claim for an emotional condition.⁸

⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁸ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The decision of the Office of Workers' Compensation Programs dated July 17, 2001 is affirmed.

Dated, Washington, DC
August 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member