

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL M. BIGGERSTAFF and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, MO

*Docket No. 02-1194; Submitted on the Record;
Issued November 22, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an emotional condition in the performance of his federal duties; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant reconsideration.

The Board finds that appellant did not sustain an emotional condition in the performance of his federal duties.

On June 19, 2000 appellant, then a 50-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging his anxiety disorder was causally related to the performance of his federal duties. Specifically, appellant alleged that his supervisors rearranged his route to make it "awkward," they increased his route to cause him to be late, they counted his mail nine times in one year, his supervisors frequently walked his route with him and they weighed his bag numerous times.

In a November 6, 2000 letter, Linda McClintock responded to appellant's allegations. She denied harassing him, weighing his bag several times or counting his mail inappropriately. Ms. McClintock wrote that appellant had throughout his postal career claimed harassment from his supervisors; that he was frequently found to be "not following directions, cussing out supervisors, having altercations with customers, expanding his route etc."

Ms. McClintock cited an incident on May 4, 1999 while running the carrier workroom floor where she routinely asked carriers under her supervision "how he would be today." According to her, appellant responded that he was sick of management harassing him all the time; that he was not going to answer any questions; and that he was tired of being watched all the time. When Ms. McClintock responded that the floor was not the place to have that discussion, he lifted his arm above his head and slammed the handful of letters onto the case ledge and took three or four steps toward her and continued yelling. Appellant had to be escorted from the building. Ms. McClintock added that appellant would often be observed

talking to other carriers when he was supposed to be casing his mail, he frequently took extended breaks and overtime without authorization.

Regarding walking his route, Ms. McClintock wrote that appellant's route was walked several times because he would do his route in a much shorter time when someone walked with him. She said that "in 1998, I walked with him and the street time for him was 5 hours and 10 minutes.... When nobody is with him ... he takes anywhere from 5 hours [and] 45 minutes to 6 hours and 30 minutes...."

Regarding the allegation that the Office extended appellant's route, Ms. McClintock wrote that the only changes to his route were a reduction in park points which was a requirement for all routes of all post offices in the mid america district. She added that after the change "appellant's route [was] the same size it was when he took 5 hours and 10 minutes to deliver with me evaluating [him]."

The employing establishment also submitted a list of disciplinary actions and memorandums related to their efforts to get appellant to return from his repeated unexcused absences from work.

In a January 11, 2000 letter, the Office wrote appellant that he needed to submit more information regarding his allegations.

In a March 30, 2001 letter, appellant's wife wrote that her husband was under a great deal of stress at the employing establishment and has had trouble finding other work.

In a May 7, 2001 decision, the Office denied appellant's claim finding that he had not alleged any incidents within the performance of duty; nor had he established disparate treatment or abuse on the part of his supervisors.

In a May 23, 2001 letter, appellant requested reconsideration. No new evidence was submitted.

In a June 8, 2001 decision, the Office denied modification, finding that appellant had not established any incidents within the performance of duty; nor had he established abuse on the part of his supervisors.

Appellant requested reconsideration on November 29, 2001 and submitted two medical reports.

In a January 8, 2002 decision, the Office denied reconsideration.

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.¹ 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.²

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.³ 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.⁴

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.⁵ 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.⁶

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated May 7 and June 8, 2001, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. 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 engaged in improper disciplinary actions, improperly assigned work duties and unreasonably monitored his activities at work, 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.⁷ Although the handling of disciplinary actions, evaluations, leave requests,

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 4 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.⁸ 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹ However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁰ 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.¹¹ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.¹² Appellant alleged that supervisors made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹³ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

The Board has recognized the compensability of verbal altercations or abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁴

Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to

⁸ *Id.*

⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² 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).

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁴ See *Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

coverage under the Act.¹⁵ Appellant has not shown how such an isolated comment as the incident of May 4, 1999 would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.¹⁶

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²⁰ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.²¹

The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.²²

In the present case, appellant has not established that the Office abused its discretion in its January 8, 2002 decision, by denying his request for a review on the merits of its May 7, 2001 decision under section 8128(a) of the Act, because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously

¹⁵ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹⁶ *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

¹⁷ 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).

¹⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.606(b)(2).

²⁰ 20 C.F.R. § 10.607(a).

²¹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

²² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

In his November 29, 2001 request for reconsideration, appellant submitted two medical reports. But the critical issue was whether appellant had established either an incident occurring in the performance of his duties or abuse or harassment by his supervisors. Appellant's medical evidence was not relevant to those issues.

The decisions of the Office of Workers' Compensation Programs dated May 7 and June 8, 2001 and January 8, 2002 are affirmed.

Dated, Washington, DC
November 22, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member