

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY R. RYNBRAND and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

*Docket No. 02-2089; Submitted on the Record;
Issued April 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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.

On June 19, 2000 appellant, then a 43-year-old motor vehicle operator, filed an occupational disease claim alleging that he sustained an emotional condition. He alleged that he had been subject to harassment, bias, reverse discrimination and nonrepresentation by union officials "along with management rewriting the contract at their free will." He stated that in the spring of 1998 he called in sick but was later charged with being AWOL (absent without leave). Appellant alleged that he received a letter of warning for failing to be regular in attendance. He attempted to file a grievance but alleged that the union did not file the grievance by the end of the two-week deadline. Appellant alleged that, in the summer of 1998, Percy Towns, a transportation supervisor, wrongfully took away a "hold-down" run (delivery route) by assigning it to another driver. He alleged that in the summer of 1999 he applied for a schedule change because his wife's terminally ill father needed extra care and Mr. Towns approved the request but later changed his mind. Appellant alleged that during the December 15, 1999 yearly bid for runs he was not accorded his seniority status in the bidding process and he later filed an Equal Employment Opportunity (EEO) complaint. Appellant was offered an extension of time to file a grievance if he withdrew the EEO complaint and he accepted the offer but also filed a complaint with the National Labor Relations Board (NLRB) and won the right to re-bid.

In a copy of an EEO settlement agreement dated January 18, 1999, Mr. Towns agreed to extend the time limit for the filing of a grievance and appellant agreed to withdraw his EEO complaint. The settlement agreement stated that management agreed to the contents of the agreement solely in an effort to resolve appellant's allegations and the agreement "should not be construed as an admission of discrimination or wrongdoing on the part of any official of the [employing establishment]."

An undated union document indicates that appellant filed a grievance alleging that during the bid process in December 1999 he was not informed of the availability of certain routes and the routes were offered to employees with less seniority.

On May 31, 2000 appellant filed a complaint with the NLRB alleging that the employing establishment improperly had allowed the union to conduct the bid process and to discriminate against appellant.

In a report dated June 26, 2000, Dr. Ashok B. Rao, a psychiatrist, diagnosed a single episode of major depression and indicated that appellant attributed his condition to job stress.

In a letter dated July 19, 2000, Mr. Towns, supervisor of transportation operations, stated that in the spring of 1998 appellant called to advise his supervisor that he would not be working that day because his neighbor's dog barked all night and he needed to rest. He was charged with being AWOL. A union representative asked management not to suspend appellant for the AWOL charge and management agreed but the AWOL remained and appellant was not allowed to take sick leave for that day. Mr. Towns denied that he wrongfully took away a hold-down run by reassigning it to another driver. He explained that when vehicle operator H. Clark was on sick leave pending retirement, S. Wells was assigned to Mr. Clark's run in accordance with the union contract which provided that unassigned full-time flexible and part-time flexible tractor-trailer and motor vehicle operators could, in seniority order, exercise a preference for an assignment temporarily vacant for an anticipated duration of 10 days or more. Mr. Towns noted that Mr. Wells was the senior part-time flexible employee. He stated that appellant, who was a full-time regular with a bid assignment, wanted Mr. Clark's run because of the Saturday and Sunday off days. Mr. Towns stated that in the summer of 1999 he approved appellant's request for a change in schedule for 30 days to care for his father-in-law but later had to deny the change because he did not have an available run for the requested time. He stated that December 15, 1999, the day for the yearly bid for runs, was a scheduled day off for appellant but he was required to call in at his designated time (determined by seniority) and, when he called in, he informed the union representative that he was not bidding. Mr. Towns stated that appellant was hoping, since there was one more full-time regular/flexible employee than vacancies available, that he would automatically become an unassigned regular employee and was upset to learn that he was requested to bid prior to a full-time flexible being assigned to a run. Mr. Towns stated that a union steward advised appellant that the union contract provided that full-time regular employees would be assigned prior to assigning a full-time flexible employees. Mr. Towns stated that appellant had a history of unscheduled absences coinciding with weekends and he provided a list of dates between 1998 and 2000 when appellant had requested sick leave or emergency annual leave. He stated his opinion that appellant had filed a claim because of pending corrective action related to his attendance record.

By decision dated November 20, 2000, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he had failed to establish that his emotional condition was causally related to compensable factors of his employment.

In a letter dated November 30, 2000, a regional director of the NLRB advised appellant that he was withdrawing appellant's complaint and dismissing the charge after careful investigation and consideration. He stated that the employing establishment had agreed to

“remedy the violation alleged in the charge” by re-bidding the routes and posting a notice advising employees of their rights and assuring them that they would not be discriminated against if they were not members of the union.¹

By letter dated December 13, 2000, appellant requested an oral hearing before an Office hearing representative.

On May 22, 2001 a hearing was held at which time appellant testified.

By decision dated August 1, 2001 and finalized August 3, 2001, an Office hearing representative affirmed the Office’s November 20, 2000 decision.

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.

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.² 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.³

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.⁴ 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.⁵

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

¹ In a letter dated April 19, 2000, a compliance officer for the NLRB advised the local president of the union at the employing establishment that a settlement agreement was approved by the regional director on April 18, 2000 in which the union agreed to post a notice to employees at the employing establishment.

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ See *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ See *Effie O. Morris*, 44 ECAB 470, 473 (1993).

factors of employment and may not be considered.⁶ 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.⁷

In this case, appellant attributed his emotional condition to a number of employment incidents and conditions. The Board must, thus, initially determine whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁸ 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.⁹ In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.¹⁰ Appellant alleged that in the spring of 1998 he was unfairly charged with being AWOL. He alleged that he was wrongfully issued a letter of warning for failing to be regular in attendance. Appellant alleged that, in the summer of 1998, Mr. Towns improperly took away a hold-down run by assigning it to another driver. He alleged that in the summer of 1999 he applied for a schedule change and Mr. Towns approved the request but later changed his mind. Appellant alleged that during the December 15, 1999 yearly bid for runs he was not accorded his seniority status in the bidding process.

These allegations of harassment and discrimination relate to administrative or personnel matters and are unrelated to the employee's regular or specially assigned work duties. Thus, they do not fall within the coverage of the Act.¹¹ Although such matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹² However, the Board has also found that an administrative or personnel matter will be considered

⁶ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

⁷ *Id.*

⁸ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ See *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ 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).

¹¹ See *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹² See *Anne L. Livermore*, 46 ECAB 425, 431-32 (1995); *Richard J. Dube*, 42 ECAB 916-920 (1991).

to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.

In a letter dated July 19, 2000, Mr. Towns stated that in the spring of 1998 appellant called to advise his supervisor that he would not be working that day because his neighbor's dog barked all night and he needed to rest. He was charged with being AWOL. A union representative asked management not to suspend appellant for the AWOL charge and management agreed but the AWOL remained and appellant was not allowed to take sick leave for that day. In a copy of an EEO settlement agreement dated January 18, 1999, Mr. Towns agreed to extend the time limit for the filing of a grievance and appellant agreed to withdraw his EEO complaint. The settlement agreement stated that management agreed to the contents of the agreement solely in an effort to resolve appellant's allegations and the agreement "should not be construed as an admission of discrimination or wrongdoing on the part of any official of the [employing establishment]. As this agreement specifically stated that it should not be construed as an admission of discrimination or wrongdoing, it does not establish error or abuse by the employing establishment. Although appellant alleged that he was wrongfully charged with being AWOL, there is insufficient evidence to establish that the employing establishment erred or acted abusively in the handling of this matter or in giving appellant a letter of warning for failing to be regular in attendance. Therefore, this allegation is not deemed a compensable factor of employment.

Mr. Towns denied that he wrongfully took away a hold-down run by reassigning it to another driver. He explained that, when a vehicle operator went out on sick leave pending retirement, another employee was assigned to the run in accordance with provisions of the union contract. As Mr. Towns stated that he assigned the run in accordance with the union contract and appellant has submitted insufficient evidence to establish error or abuse in this matter, this allegation does not constitute a compensable factor of employment.

Mr. Towns stated that in the summer of 1999 he approved appellant's request for a change in schedule but later had to deny the change because he did not have an available run for the requested time. Appellant has submitted insufficient evidence of error or abuse in this matter and therefore it does not constitute a compensable factor of employment.

Mr. Towns stated that, on December 15, 1999, the day for the yearly bid for runs, appellant called in and informed the union representative that he was not bidding. Mr. Towns stated that appellant was hoping, since there was one more full-time regular/flexible employee than vacancies available, that he would automatically become an unassigned regular employee and was upset to learn that he was requested to bid prior to a full-time flexible being assigned to a run. In a letter dated November 30, 2000, a regional director of the NLRB advised appellant that he was withdrawing appellant's complaint and dismissing the charge. He stated that the employing establishment had agreed to "remedy the violation alleged in the charge" by re-bidding the routes and posting a notice advising employees of their rights and assuring them that they would not be discriminated against if they were not members of the union. However, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹³ The NLRB regional director did not make any findings of error or

¹³ *Id.*

abuse by the employing establishment. He only noted that the employing establishment agreed to remedy the “alleged” violation. Therefore, this allegation is not deemed a compensable employment factor.

As previously noted, disability is not covered where it results from frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁴ Thus, appellant has not established a compensable employment factor under the Act in this respect.

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 while in the performance of duty.¹⁵

The decision of the Office of Workers’ Compensation Programs dated August 3, 2001 is affirmed.

Dated, Washington, DC
April 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ See *Eileen P. Corigliano*, 45 ECAB 581, 583-84 (1994); *Tanya A. Gaines*, 44 ECAB 923, 934 (1993).

¹⁵ Because appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Garry M. Carlo*, 47 ECAB 299, 305 (1996).