

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS A. LOPEZ and U.S. POSTAL SERVICE,
Salt Lake City, UT

*Docket No. 03-227; Submitted on the Record;
Issued April 24, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On February 5, 2002 appellant, then a 43-year-old distribution clerk, filed a claim for an occupational disease for anxiety and depression due to harassment by his supervisors.¹ He stopped work on January 23, 2002.

In letters dated February 19, 2002, appellant stated that he was transferred, not at his request, from the General Mail Facility to the Auxiliary Services Facility (ASF) on January 12, 2002. On January 13, 2002 management harassed him by assigning him to work with bags, a dusty area, contrary to his doctor's restrictions. On January 15, 2002 appellant was given a direct order to work in an area from which he was restricted and that he filed grievances on both days. He continued that on January 22, 2002 he spoke with his union steward, who said that the manager of distribution operations warned him a week before appellant's transfer that he would be a problem from the start. In a letter dated March 15, 2002, appellant added that on October 29, 2001 he filed a claim for asthma due to dusty conditions at work. On January 4, 2002 the employing establishment accommodated his medical condition by transferring him to a less dusty facility, but during the first week at the new facility he was "constantly harassed about where I am and am not able to work and management's insistence in my working at a station against my doctor's recommendations and against the agreement I had reached with the Reasonable Accommodations Committee." On January 22, 2002 appellant filed an Equal Employment Opportunity (EEO) complaint. In an attachment to his EEO complaint, he contended that on January 13 and 15, 2002 he was assigned to work in "Utah loose pack" against

¹ Appellant also claimed that his asthma was aggravated by dusty conditions and by the anxiety related to the harassment. His claim for asthma was adjudicated by the Office of Workers' Compensation Programs under a different claim number and is not before the Board on this appeal.

his doctor's restrictions and that he was also harassed when his supervisor considered his CA-17 outlining his work restrictions invalid.

In a letter dated March 14, 2002, the employing establishment's senior manager of distribution operations stated that a reasonable accommodations committee meeting was held on January 3, 2002 concerning reassigning appellant out of the processing and distribution center due to his asthma. Appellant was told at this meeting that the dust levels were virtually identical in all three facilities as shown by recent testing.² After a discussion it was agreed to allow appellant to work at the ASF "if he felt it would help his condition," that management was "not given any indication in written form nor verbally that he could not work in specific locations," and that he was "never given any medical information pertaining to specific tasks that [appellant] could not perform in his new assignment."

In a memorandum dated March 10, 2002, appellant's supervisor stated:

"When [appellant] began working at the ASF on or around January 12, 2002 I had been told he could work on SPBS 1³ or in whatever manual area had the least dust. He and I took a walk through the building to determine from his standpoint where the least dusty work area would be for him. He felt that working on SPBS 1 he would encounter too much dust coming out of the hampers being dumped. His choice was to work in [p]resort. On one of the first nights he was here, I found that there was an excess of mail in the 070 states flats which was another area he preferred. I allowed him to work there on that occasion.

"I was NS [not scheduled] on January 13 [and] 14, 2002. On January 15, 2002 [appellant] was very unhappy and complaining about assignments he had been given. He was NS on January 16 and 17[, 2002]. On January 18[, 2002] he began claiming to have submitted a CA-17 with additional restrictions about his asthma. I had no copy of any CA-17s in his file. I asked him if he had a copy I could see. He said he would have someone at home FAX [facsimile] it over. I later received a copy of a CA-17 which he had acquired somewhere, but not from a [s]upervisor at the [employing establishment]. He had written in his name and he or someone had written some instructions about him working on SPBS 1. I told him that the CA-17 was not filled out properly. He became very angry and began telling me that I did not know what I was talking about. He claimed that this CA-17 was accepted by injury comp[ensation]. I told him I would show him what a properly filled out CA-17 looked like (and did so). I gave him a new CA-17 to take to his [doctor] and instructed him have it filled out properly and then return it so we could submit the CA-17 to injury comp[ensation]. It was shortly thereafter (possibly the next day) that he took off on FMLA [Family Medical Leave Act] stress leave claiming I had harassed him about the CA-17 and caused him to need to seek psychological counseling for stress."

² A report of the results of dust monitoring at the employing establishment's various facilities done on November 12 and December 19, 2001 shows the same levels at all areas tested.

³ SPBS is the employing establishment's acronym for small parcel and bundle sorting.

A series of emails between employing establishment managers was submitted. On January 3, 2002 the senior manager of distribution operations stated that appellant had requested an assignment to ASF “due to asthma and his perception of the dust levels at the GMF [general mail facility],” and that he agreed to this assignment, in which appellant could be used as an SPBS clerk or work the manual racks, presort or 040/070.” On January 16, 2002 appellant’s supervisor stated that appellant visited the ASF on January 11, 2002 to verify where he would be working, that he insisted that he was not able to work in sack operations because sacks were dirty and dusty, that he felt the dust in the hampers being dumped on SPBS 1 would be intolerable, and that keying SPBS 2 was “out of the question because it is a sack operation.” The supervisor continued that she told appellant that she did not have his file but would review his restrictions when she got it, that she told him that all the available work at the ASF except presort and 070 was either on SPBS or working with sacks and that she was unable to find any documentation or job description saying that appellant was unable to work in pouches. On January 16, 2002 the manager of the ASF stated that there was “no work available within the restrictions he is stating,” as 070 was sacks, 040 was allocated to another employee as an accommodation and the only places were pouch and the machine. On January 25, 2002 the manager of distribution operations stated that appellant brought in a CA-17 that night “stating that he cannot have any dust exposure,” and that there was no work for him at the ASF. On January 28, 2002 the manager of the ASF stated that appellant “refuses to work SPBS” and that “we have no work that he can apparently do here at the ASF.”

A copy of appellant’s January 3, 2002 assignment at the ASF states that he would work as “SBPS clerk and other duties as assigned within restrictions” and that his medical restriction was “less dusty environment.”

By decision dated July 30, 2002, the Office found that “it is not accepted that your managers harassed you. The evidence presented does not establish that the managers made decisions involving personnel/administrative matters that were unreasonable or abusive.”

The Board finds that appellant has not established that he sustained an emotional condition 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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act. 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.⁴ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee’s regular or specially assigned work duties, do not fall within coverage of the Federal Employees’ Compensation Act. However, where the evidence demonstrates that the employing

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

establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.⁵

The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Federal Employees' Compensation Act. However, for harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment or discrimination are not compensable under the Federal Employees' Compensation Act.⁶

Appellant's primary contention is that he was assigned to duties that violated his doctor's restrictions based on his asthma condition. Being required to work beyond one's physical limitations may constitute a compensable employment factor if such activity is substantiated by the evidence of record.⁷ Appellant, however, has not submitted sufficient evidence to support this contention. He did not submit the CA-17s that, according to appellant, restricted him from the areas to which he was assigned on January 13 and 15, 2002. He has not submitted the reasonable accommodation committee agreement that resulted in his reassignment on January 3, 2002. Far from showing that he was reassigned to prohibited areas in order to harass him, appellant has not shown that he was assigned duties beyond his doctor's restrictions. Because he did not submit the CA-17 in question, appellant also has not substantiated his contention that this document was wrongfully not accepted by the employing establishment.

As to the manager of distribution operations stating that appellant would be a problem from the start prior to his reassignment, even if this were established as having been said as alleged, it would not be a compensable employment factor, especially as it was not made directly to appellant.⁸ Appellant has not substantiated that there were any compensable employment factors involved in his emotional condition.⁹

⁵ *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁶ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *Diane C. Bernard*, 45 ECAB 223 (1993).

⁸ *See Mary A. Sisneros*, 46 ECAB 155 (1994).

⁹ On appeal, appellant submitted evidence which was not before the Office at the time of the July 30, 2002 decision. The Board may not review this for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

The July 30, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 24, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member