

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DUANE W. MEAD and U.S. POSTAL SERVICE,
PUEBLO POST OFFICE, Pueblo, CO

*Docket No. 03-442; Submitted on the Record;
Issued April 7, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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

On May 4, 2001 appellant, then a 53-year-old modified custodian, filed a claim for an acute exacerbation of preexisting occupationally-related anxiety disorder and obsessive-compulsive disorder.¹ Appellant had been off work since 1990 due to these conditions. Following a rehabilitation effort, he returned to work for four hours a day at the employing establishment on February 20, 2001, in a data entry position. Appellant's limited-duty assignment as a modified custodian involved "computer input and output work in the maintenance area ... inputting maintenance work orders, time cards, work order completion, ordering supplies, filing, paying maintenance bills, answering telephones and taking requests from customers for lock changes." The employing establishment noted that all of these duties were within appellant's physical restrictions, due to an occupationally-related lumbar condition, of lifting less than 10 pounds and allowing for changes of position as needed.

Appellant attributed his condition to confrontations on March 6 and 7, 2001 with his supervisor, Charles Keen, a pattern of harassment and "spying" by Mr. Keen,² anxiety regarding his ability to perform his assigned duties and anxiety over being denied training necessary for him to perform his assigned duties. Appellant also alleged that the modified custodian position was not suitable work as it violated work restrictions related to his generalized anxiety disorder and obsessive-compulsive disorder.

¹ Appellant noted three claim numbers in his correspondence: 12-2002415, the May 2001 claim; 12-0078483 accepted for generalized anxiety disorder related to an April 3, 1985 date of injury; and 12-0163024 relating to an unknown claim. The only claim before the Board on the present appeal is 12-2002415.

² Appellant explained that in a January 26, 2001 meeting with Postmaster Robert L. Podio and rehabilitation counselor Tony Bird, Mr. Podio assured appellant that "he would not be harassed or intimidated by a supervisor standing over him."

Appellant alleged that, during his second week of work, Mr. Keen was “peeking around corners and watching me” and he walked by the break room at least three times while appellant was there and walked by him several times after he punched out. He recalled that on March 6, 2001, while “in the front offices to make copies for lock box changes,” he asked coworker Nancy Meyer “a question about paying the bills,” another of his assigned duties. Appellant alleged that Mr. Keen confronted him and ordered him back to his desk. When appellant showed Mr. Keen a copy of his job description and explained that he was trying to get information necessary to do his bill paying duties, Mr. Keen again ordered appellant back to his workstation. He also alleged that on March 7, 2001 he was trying to locate an employee whose “PM card” would not process, “again, part of [his] job description.” Appellant asserted that, as he stepped out of his office, Mr. Keen approached him and ordered him back inside. He approached Mr. Podio, who was standing nearby, who stated he would speak with Mr. Keen. Mr. Podio returned half an hour later and told appellant “Mr. Keen was looking out for [appellant’s] benefit. He did not want to over work me.” Appellant then experienced severe stress, stopped work effective March 8, 2001 and did not return.³

In April 19, May 7 and July 2, 2001 letters, the employing establishment controverted appellant’s claim.

In April 19 and July 2, 2001 letters, Mr. Keen denied any confrontation with appellant on March 6, 2001. He recalled that on March 7, 2001 appellant told him “that he wanted to learn more about his job” although he had not completed that day’s route card input. Mr. Keen then told appellant “that he needed to complete what he had been assigned and then ... he could learn more parts of the job. [Appellant] became very angry” and went to see Postmaster Podio on the workroom floor. He called in sick on March 8, 2001 and presented a medical excuse on March 9, 2001. Mr. Keen asserted that he did not “peek” at appellant as alleged, as appellant “was not performing a task that required constant supervision.” He denied watching appellant in the break room and did not recall if he watched him after he had clocked out.

In a May 7, 2001 letter, Postmaster Podio confirmed appellant’s account of the January 26, 2001 meeting to discuss his return to work.⁴ Mr. Podio stated that appellant was concerned about harassment at the Pueblo station as supervisory harassment has led to his generalized anxiety disorder in April 1985. He noted that, after appellant returned to work, Mr. Keen expressed to Mr. Podio “numerous times that [appellant] was doing a good job and would need some time to improve on his performance.” Mr. Podio stated that on March 6, 2001 Mr. Keen denied appellant requested training as he was still on a limited-duty schedule.

³ In a May 30, 2001 letter, the Office of Workers’ Compensation Programs advised appellant of the type of additional medical and factual evidence needed to establish his claim, including a detailed statement describing the alleged incidents of harassment and a statement from his attending physician explaining how and why those incidents would cause the claimed emotional condition.

⁴ In a June 25, 2001 letter, Mr. Bird also confirmed appellant’s version of events. He stated that, prior to the January 26, 2001 meeting with Mr. Podio and appellant, he was aware of appellant’s sleep disturbances and thus managed to have start time changed from 7:00 a.m. to 8:00 a.m. “A key theme in our meeting with Mr. Podio was the issue of harassment. Mr. Podio said he understood that harassment was an issue for [appellant] in the past and he said he would ensure that harassment would not be a problem for [appellant] now. This was thoroughly discussed and was important to the meeting.”

Mr. Podio recalled that on March 7, 2001 Mr. Keen and appellant approached him regarding appellant's desire to perform additional duties. Mr. Podio confirmed that appellant was denied requested training as it would be "outside of his restrictions and that Mr. Keen was looking out for his well being." Mr. Podio denied that Mr. Keen ordered appellant back to his station.

In a May 8, 2001 letter, the employing establishment admitted that "Mr. Keen, at times, does project his voice in a manner that can be considered yelling when he gets excited...." Mr. Podio "agreed to remind Mr. Keen about the negative impact experienced when his voice is elevated" and to have a union steward present "whenever he discusses items of importance with those individuals under his direction."

In a May 8, 2001 statement regarding the March 7, 2001 incident, Diane Chavez, a coworker of appellant's, assigned to train him in data entry, stated that on March 7, 2001 appellant and Mr. Keen "had a discussion about getting some training on paying bills." When training was denied, appellant and Mr. Keen "stepped out ... to speak to Mr. Podio. When they returned they said [appellant] would not" be trained until "further notice."⁵

In a June 18, 2001 statement, Joe E. Medina, one of appellant's coworkers, recalled that in March 2001 Mr. Keen "peek[e]d around the corner of the break room window and look[ed]" at appellant while he ate. Mr. Medina stated that Mr. Keen did this frequently "to intimidate his workers.... He hides behind carrier cases, mail cages, wall pillars, anywhere he can so he can try and catch you talking to someone."

In a June 20, 2001 statement, Ken Laughlin, a coworker of appellant's, stated that, while having lunch with appellant in the break room, Mr. Keen "was passing by peeking into the lunchroom and looking around the corner." Mr. Laughlin alleged that Mr. Keen did this frequently to "intimidate his employees." He also recalled an incident where he entered the room in which appellant worked to obtain information about a "PM card." When Mr. Laughlin began speaking to appellant, "we noticed Mr. Keen peeking around a steel pillar watching us."

In a July 2, 2001 statement, Nancy Meyer, a coworker of appellant's, stated that she did not witness any confrontation concerning Mr. Keen and appellant on March 6, 2001 and that appellant did not ask her a question that day about bill paying methodology.

Appellant also submitted medical evidence in support of his claim.

In a March 28, 2001 report, Dr. Annette Long, an attending clinical psychologist, stated that appellant experienced "insomnia, anxiety and a return of his obsessive-compulsive disorder" due to harassment at work. Dr. Long found appellant totally disabled for work. He submitted treatment notes dated June to December 2001 noting continued anxiety, insomnia gastric complaints related in part to his experiences with Mr. Keen.

⁵ In a July 7, 2001 letter, appellant asserted that Ms. Chavez expressed "resentment and frustration" when training him, as she was "excessed from the position" for which she trained him. He characterized Mr. Keen's and Mr. Podio's statements as false and misleading. Appellant noted that one of his coworkers had an emotional condition claim accepted for harassment by Mr. Keen and that other workers used "months of sick leave" to escape his abuse.

In a May 4, 2001 report, Dr. James Sewell, an attending Board-certified psychiatrist, noted treating appellant for generalized anxiety disorder and obsessive-compulsive disorder for many years. Dr. Sewell stated that appellant's "ability to function in the Pueblo Post Office is nonexistent due to the high level of stress involved in this facility. It is, therefore, recommended that he remain off work indefinitely."

In an August 2, 2001 letter, Dr. Sewell stated that Mr. Keen's watching appellant and ordering him to stay at his desk exacerbated his symptoms, causing "extreme agitation to the point of paranoia," gastric distress and difficulty functioning. A vocational rehabilitation counselor was alarmed when the mention of Mr. Keen's name "elicited an extreme emotional response almost to the point of violence." Appellant believed that certain clothing was "unlucky," performed rituals "of having to do things in threes" and was so consumed with these rituals that he was unable to do anything else. Dr. Sewell found appellant "severely disabled" due in part to "severe, work-related stress" and other stressors. He opined that appellant's experiences at the employing establishment had done "permanent damage to [his] ability to function...."

By decision dated January 25, 2002, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that the March 7, 2001 incident occurred at the time and place alleged, but that it constituted an administrative discussion concerning management and monitoring of work duties. The Office, therefore, found that this incident did not constitute a compensable factor of employment. The Office also found that appellant failed to substantiate his claims of harassment by Mr. Keen.

Appellant disagreed with this decision and, in a February 4, 2002 letter, requested a hearing before a representative of the Office's Branch of Hearings and Review, held July 30, 2002. He submitted additional evidence.

In a February 5, 2002 letter, the Office stated that it had "restored compensation benefits to the level of payment prior to February 2001 and [would] pay any balance due retroactive to May 2001." The Office further found that the February 2001 job offer was not suitable work as it "did not consider restrictions cited by [appellant's] other doctors."

In a February 16, 2002 letter, Gil Trujillo, a union official, requested that Mr. Podio investigate Mr. Keen, whose outbursts, bullying and intimidation of his subordinates was a "threat to the safety and welfare of all employees in the Pueblo [P]ost [O]ffice." Mr. Trujillo alleged that Mr. Keen had frequent outbursts on the workroom floor, with sarcastic, "humiliating comments and intimidating actions to other employees."

At the hearing, appellant asserted that he had emotional stress in carrying out his assigned duties and "fear and anxiety" regarding his ability to carry out those duties. Appellant asserted that the employing establishment failed to consider his preexisting emotional condition in formulating his return to work and that the modified custodian position was beyond his medical limitations. Appellant alleged that Mr. Keen was unaware of his duties and could not train him as to how to process a "PM card." He noted that Mr. Keen had since been removed due to his

“problems with many individuals” at the employing establishment. Appellant alleged inadequate computer training as many machines had been moved to other branches due to restructuring.⁶

By decision dated and finalized October 29, 2002, the Office hearing representative affirmed the January 25, 2002 decision of the Office. The hearing representative found that appellant did not submit sufficient evidence to substantiate his claims of abuse, wrongdoing, error, harassment, retaliation or discrimination by Mr. Keen or any other employing establishment official. The hearing representative noted that appellant did not submit witness statements supporting his allegations. The hearing representative found that the medical record need not be examined as appellant had not established a compensable factor of employment.

The Board finds that the case is not in posture for a decision.

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 or has fear and anxiety regarding his or her ability to carry out his or her duties 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.⁷

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.⁸ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁹

In this case, the Office did not find any compensable factors of employment. However, the Board finds that appellant has submitted sufficient evidence to establish that he was made to work outside of his medical restrictions and that he experienced anxiety as to whether he would be able to perform his assigned duties, in part due to Mr. Keen’s denial of training needed for appellant to function adequately in the position.

Appellant attributed his condition, in part, to feelings of anxiety over not being able to perform the requirements of his position due to inadequate training. The provision or denial of training is a personnel matter not considered to be within the performance of duty absent error or abuse.¹⁰ However, appellant does not allege that his emotional condition was due to frustration

⁶ Appellant stated that he also filed an occupational disease claim on May 4, 2001, as incidents over a two-week period led up to the March 7, 2001 incident. This claim is not of record. However, the Board notes that the Office has developed the May 4, 2001 claim as an occupational disease claim.

⁷ *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *See Barbara Bush*, 38 ECAB 710 (1987).

⁹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹⁰ *Brian H. Derrick*, 51 ECAB 417 (2000).

over being denied training, but to the feelings of anxiety over not being able to perform his assigned duties as he lacked necessary information which the requested training would have provided.

Appellant submitted two statements corroborating his allegations of being denied training necessary to perform his assigned duties. In a May 7, 2001 letter, Postmaster Podio confirmed that Mr. Keen denied appellant's requested training regarding performance of his assigned duties. In a May 8, 2001 statement, Ms. Chavez, one of appellant's coworkers, confirmed that on March 7, 2001, Mr. Keen denied appellant the opportunity to obtain information necessary to pay bills, one of his assigned duties. The Board has held that an employee's emotional reaction to being made to perform duties without adequate training is compensable.¹¹ Thus, appellant has established a compensable factor of employment in this regard.

Appellant also alleged that his claimed emotional condition was due in part to being made to work outside of his restrictions. The Board has held that being made to work beyond one's physical limitations or prescribed restrictions may be a compensable factor of employment.¹² The Office admitted, in a February 5, 2002 letter, that appellant's full restrictions were not considered in preparing the modified clerk job offer, that his psychiatrists were not consulted in its preparation and that the position was, therefore, not determined to be suitable work. Therefore, appellant has also established a compensable factor of employment on this issue.

Appellant has also alleged a pattern of harassment by his supervisor, Mr. Keen. In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur.¹³ Appellant has submitted two coworker statements corroborating his account of Mr. Keen peeking into the break room window to observe him eating lunch and hiding behind objects to observe him performing his duties. In a June 18, 2001 statement, Mr. Medina confirmed that, in March 2001, Mr. Keen would peek through the break room window to observe appellant eating lunch and was known to hide behind equipment to intimidate his workers. In a June 20, 2001 statement, Mr. Laughlin confirmed that Mr. Keen would peek into the lunchroom to observe appellant. He also confirmed that Mr. Keen peeked around a steel pillar to watch appellant discuss processing of PM cards.

However, appellant has not submitted sufficient evidence to establish that Mr. Keen's scrutiny of him was not part of his normal supervisory functions, which would include visually observing his subordinates. An employee's complaints about the manner in which supervisors perform supervisory duties or the manner, in which a supervisor exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his or her duties and that employees will at times dislike actions taken. For example, the Board has held that discussions of job performance do not fall

¹¹ *Donna J. Dibernardo*, 47 ECAB 700 (1996).

¹² *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

¹³ *Kathleen D. Walker*, 42 ECAB 603 (1991).

under coverage of the Act absent a showing of error or abuse.¹⁴ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹⁶ In this case, appellant submitted no evidence indicating that Mr. Keen's observations constituted error or abuse. He has thus failed to establish a compensable factor of employment in this respect.

The Board notes that, in a May 8, 2001 letter, the employing establishment admitted that Mr. Keen was known to yell at his employees, producing a "negative impact." Also, in a February 16, 2002 letter, Mr. Trujillo, a union official, alleged that Mr. Keen had frequent outbursts on the workroom floor, with sarcastic, "humiliating comments and intimidating actions to other employees." At the hearing, appellant noted that Mr. Keen had since been removed due to his "problems with many individuals" at the employing establishment. While these documents indicate that Mr. Keen was known to intimidate his subordinates, they do not substantiate any of the alleged incidents involving appellant. Therefore, they are not dispositive in this case.

As appellant has established the compensable work factors that he felt unable to perform his assigned duties due to inadequate training and that he was made to work beyond his psychiatric limitations, the case must be remanded to the Office for further development. As the Office has not yet conducted development of the medical evidence as it did not find a compensable factor of employment, the Office must now review the medical record and the issue of causal relationship determined. Following this and any other development deemed necessary, the Office shall issue a *de novo* decision in the case.

¹⁴ *Donald E. Ewals*, 45 ECAB 111 (1993); *see also David W. Shirey*, 42 ECAB 783 (1991).

¹⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁶ *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

The decision of the Office of Workers' Compensation Programs dated and finalized October 29, 2002 is hereby set aside and the case remanded for further development consistent with this decision.

Dated, Washington, DC
April 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member