

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLTON R. SWAIN and U.S. POSTAL SERVICE,
POST OFFICE, Madison, WI

*Docket No. 03-1381; Submitted on the Record;
Issued August 15, 2003*

DECISION and ORDER

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

The issue is whether appellant has met his burden in establishing that he sustained an emotional condition in the performance of duty causally related to compensable factors of his federal employment.

On August 13, 2001 appellant, then a 46-year-old customer service supervisor, filed an occupational disease claim alleging that working six days a week since December 2000, caused him to suffer high cholesterol, anxiety and stress. Appellant indicated on the claim form that his office was short staffed and that because four other supervisors had "gone out on stress" he was given additional work. Appellant stated that he first became aware of the illness on February 20, 2001 and realized the illness was caused or aggravated by his employment on August 7, 2001.

Accompanying appellant's claim was a narrative statement and chronology of events, outlining the employment factors, which allegedly caused or contributed to his condition. Appellant alleged that since his transfer to the Westside station on July 31, 2000 he worked 12-hour days with overtime and had no time off. He stated that there had been four supervisors in addition to the station manager who left because of the stress at the Westside station. Appellant alleged that his stress level also increased because of understaffing and working with inexperienced supervisors. He alleged that there were times when his section was down five, six or seven routes and others when the mail did not get delivered. Appellant indicated that there were numerous days where he worried on a daily basis about the mail not being delivered.

Appellant further alleged that there was always a threat of discipline in the workplace. He stated that in his chronology that on April 25, 2001 he received a memorandum about there being clock ring errors for the unit and was informed that if the clock rings were not corrected by 7:30 a.m., there would be corrective action. Appellant further alleged that on May 29, 2001 he called Kim Mayo, the postmaster, to discuss a vacant job detail for station manager and that during his conversation with her, she stated: "I have a little bit of a problem putting a level 16 into a level 22 position." Appellant indicated that the decision about the position had already

been made because another supervisor had called to advise who the new station manager would be. Appellant stated that he then contacted the Equal Employment Opportunity (EEO) Commission to file a claim for discrimination against Ms. Mayo because there was nothing in the postal policy stating that a level 16 supervisor could not perform a level 22 position. Appellant alleged that Ms. Mayo retaliated against appellant for filing the EEO claim when on July 2, 2001 Jay Brooks, the newly hired station manager, assigned appellant undesirable days off work during a staff meeting under Ms. Mayo's direction.

Appellant also alleged that on July 18, 2001 Mr. Brooks told appellant to do an AVUS report, which he had never been trained on and had not done since working at the post office. Appellant alleged that Mr. Brooks stated: "do it before I do something I don't want to do." Appellant indicated that he was not sure whether that remark meant that he would be fired or disciplined.

Appellant alleged that on July 26, 2001 he requested a transfer to another job from Mr. Brooks and that on the next day the tour superintendent from their plant informed appellant that he would give him a position in the plant from 10:30 p.m. to 7:00 a.m. beginning August 25, 2001. Appellant alleged that Mr. Brooks retaliated against him by delaying his release for the plant position until September 8, 2001 or until a replacement was found. Appellant further alleged that on one occasion he informed Mr. Brooks that he finally planned to take vacation for four days beginning the following week but that Mr. Brooks stated that they did not have enough help to get days off so that he could not have the vacation. Appellant further alleged that he underwent a variety of medical tests and learned that he had a blockage and high cholesterol, the latter of which he stated his physician related to stress.

On October 15, 2001 the employing establishment controverted appellant's claim. Mr. Brooks, manager of the Westside station, provided a statement, in which he explained that he supervised appellant from June 20 through September 7, 2001 and that he could only respond to allegations limited to that timeframe. Mr. Brooks stated that on August 23, 2001 he discussed with appellant the allegations set forth in his emotional condition claim and that appellant stated at that time that his accounts of the information as stated in his narrative were not factual. Mr. Brooks denied that appellant was assigned undesirable days off during a staff meeting in retaliation for the EEO claim. He noted that the staff meeting was scheduled for the purpose of exploring various possibilities regarding scheduled days off and that no decision was made at that time regarding schedules. Mr. Brooks further stated that, although appellant referenced various medical procedures being performed for cholesterol and stress, he had not provided any details of his medical visits or prognosis until August 20, 2001, the day he filed the claim. Mr. Brooks also asserted that he inquired as to appellant's health and ability to perform his duties and that appellant replied that he was okay and undergoing some tests. Mr. Brooks further discussed appellant's allegation regarding his request for an AVUS report on July 18, 2001. He stated that the routine completion of this report is a core duty and function of the position and that appellant was instructed verbally and in writing on three occasions that he was deficient in performing these duties. Mr. Brooks stated that the report deadline was at the end of the monthly accounting period and throughout the month he reminded appellant that this report was required by motor vehicle services; however, it was never filed. Mr. Brooks stated that, when questioned, appellant indicated that he had not been trained on how to complete the report. Mr. Brooks asserted that he had informed appellant that one of his fellow supervisors was available to train

him throughout the training period but that appellant refused to be trained by them. Mr. Brooks alleged that he informed appellant that his failure to perform the requisite job duty would not be tolerated and that disciplinary action would be warranted if it continued. Regarding appellant's allegation that Mr. Brooks delayed appellant's transfer to the plant position, the manager replied that a turn around time of six weeks from the time a request for transfer is made to the start date of the new assignment is extremely quick. Mr. Brooks asserted that he kept appellant informed throughout the process and told him that September 8, 2001 would likely be the first available release date. Mr. Brooks indicated that when he discussed these allegations with appellant on August 23, 2001 appellant recanted and admitted that his statements were untrue. Mr. Brooks indicated that he had not acted with retaliation or malice and that he had not required appellant to work long hours or do any work outside the scope of his normal core duties.

On October 19, 2001 appellant replied to the allegations set forth by Mr. Brooks. Appellant asserted that he did discuss his allegations with Mr. Brooks on August 23, 2001, however, that he did not indicate at that time that the information as stated by him was not true. Appellant stated that he told Mr. Brooks that perhaps he could have worded some of his statements differently so as not to attack him and that the postmaster was responsible for retaliation since she directed Mr. Brooks to perform certain acts. Appellant asserted that regarding the staff meeting, he did not admit that the meeting was called to explore possibilities and regarding medical evidence submitted, appellant stated that Mr. Brooks was aware that he was having problems and seeing a physician for stress. Appellant replied that the employing establishment never asked for the details of his medical visits. Appellant alleged that with regard to Mr. Brooks' contention that appellant failed to perform a requisite duty of his position when failing to file the AVUS report, appellant asserted that he had never worked on this type of report in his 24 years with the postal service and that the AVUS report was the responsibility of a different office. Appellant then stated: "[a]t the Westside station I guess things are different. In addition to working six days per week (and some long hours) plus an additional ten hours of street supervision, I really didn't know where to add in the AVUS report." "I did not have enough hours in the day to perform everything that needed to be done. So, after starting the AVUS report, something else didn't get accomplished." Appellant alleged that, after Mr. Brooks threatened him about completing the report, he did start doing the report. Appellant alleged that under the supervision of Mr. Brooks he continued to work six days per week and on occasion more than eight hours per day.

By decision dated February 14, 2002, the Office denied appellant's emotional condition claim on the grounds that the evidence of record failed to demonstrate that appellant sustained an injury in the performance of duty.

In a letter dated March 11, 2002, appellant requested an oral hearing, which was held October 22, 2002.¹ During the hearing, appellant testified regarding his allegations and submitted a return to work slip from his physician. Following the hearing, additional medical evidence was submitted to the record.

¹ Appellant submitted additional factual statements received March 18, 2002, reiterating his position that he developed an emotional condition due to the specified employment factors.

By decision dated February 6, 2003, an Office hearing representative found that appellant had failed to allege and substantiate any compensable factors of employment, therefore, had not established that he sustained an emotional condition in the performance of duty and affirmed the prior decision.

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty causally related to compensable factors of his federal employment.

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that 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. Such an 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.³

The 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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁴ Conversely, if the employee's emotional reaction stems from employment matters, which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁵

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Id.*

⁴ *Donna Faye Cardwell*, *supra* note 2; see also *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Id.*

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 and which working conditions are not deemed factors of employment and may not be considered.⁶ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁷ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁸ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

Many of appellant's allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,⁹ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is generally not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment.¹⁰ Absent evidence of such error or abuse, the resulting emotional condition is considered self-generated and not employment generated. The incidents and allegations made by appellant, which fall into this category of administrative or personnel actions include: being scheduled certain work hours, days off and overtime, being reprimanded or disciplined for work error or failure to perform work duties, being denied time off and being denied a promotion.¹¹ Appellant has presented insufficient evidence to establish administrative error or abuse. There is nothing in the record to indicate that management at the Westside station acted abusively in requiring its staff to work unreasonably long hours, unreasonably denied vacation requests or denied promotions for unjust reasons. Although it is apparent that appellant's work hours and job duties might have differed at the Westside station from his service in other offices over the years, as he so admitted in a narrative discussed above, there is nothing of record to establish error or abuse on the part of the employing establishment. Further, appellant has not established that when his supervisors

⁶ See *Barbara Bush*, 38 ECAB 710 (1987).

⁷ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁸ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

⁹ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁰ See *Richard J. Dube*, 42 ECAB 916 (1991).

¹¹ See *William Karl Hansen*, 49 ECAB 140 (1997).

reprimanded him for clock ring errors or failing to complete a mandatory report that they did so in an abusive manner. Therefore, these allegations do not constitute compensable factors.

Appellant also alleged that his emotional condition arose from the overwork to which he was subjected. Appellant indicated that four of his supervisors left the employing establishment because of stress and because the office was left understaffed and he was made to work with inexperienced supervisors, he was overworked. The Board has held that overwork may be a compensable factor of employment;¹² however, such overwork must be established on a factual basis by substantial and probative evidence.¹³ In this case, appellant's overwork allegations were disputed by his supervisor and by the employing establishment. The evidence of record is not sufficient to substantiate appellant's allegations.

Appellant further alleged that he developed an emotional condition arising due to retaliation by the postmaster. It is a well-established principle that for harassment, discrimination or retaliation to give rise to a compensable disability under the Act, there must be some evidence that the implicated incidents of harassment, discrimination or retaliation did, in fact, occur. Mere perceptions of harassment, discrimination or retaliation are not compensable.¹⁴ An employee's allegations that he or she was harassed or discriminated or retaliated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or his allegations with probative and reliable evidence.¹⁵ Such incidents and allegations may rise to the level of compensable harassment if they are established to have occurred.

In this case, appellant alleged that his EEO claim which outlined allegations that postmaster Mayo denied appellant a manager's position, directed the new manager chosen for the position to schedule appellant for certain days off and deny time off and vacation was proof of supervisory discrimination and retaliation. However, he presented no evidence of an EEO settlement or any finding of the employing establishment harassment or discrimination. The Board finds that appellant has failed to submit sufficient, reliable evidence in support of his allegations that establishes retaliation or harassment as alleged. Accordingly, the Board finds that his allegations do not constitute compensable factors of employment.

Appellant has failed to submit sufficient evidence that he was subjected to discrimination, retaliation or administrative error or abuse. He has failed to establish any compensable factor of his employment in the development of his emotional condition. Therefore, the denial of his emotional condition claim must be affirmed.

¹² See *Robert Bartlett*, 51 ECAB 664 (2000).

¹³ 20 C.F.R. § 10.606(b)(1)(2).

¹⁴ *Helen Casillas*, 46 ECAB 419 (1995).

¹⁵ *Anthony A. Zarcone*, 44 ECAB 751 (1993).

The decision of the Office of Workers' Compensation Programs dated February 6, 2003 is hereby affirmed.

Dated, Washington, DC
August 15, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member