

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS S. MAYES and U.S. POSTAL SERVICE,  
POST OFFICE, Denver, CO

*Docket No. 02-1835; Submitted on the Record;  
Issued March 26, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On January 10, 2002 appellant, then a 49-year-old mailhandler acting supervisor, filed a claim for stress and depression that he attributed to a January 3, 2002 meeting with his supervisor. He alleged that he "was intentionally intimidated, provoked, threatened and reminded that I had no place to go because of my disability [and] no regular job. This manager also refused me annual leave September 11, 2001 to attend city-wide prayer services even though she knew I was a pastor."

Appellant submitted a statement addressed to "the United States Postal Inspectors" in which he provided details of what his supervisor said to him in the January 3, 2002 meeting: "when you get an ass chewing you get an ass chewing," that it was "not very smart" that he brought his attitude, that it was not a threat but a promise that she could do things to him, that he should not respond like he had in a recent email if he wished to remain in the unit, that he would be the "first to go" if his actions cost her supervisor his job, that she could disapprove his leave requests and mess up his schedule and "you think I'm bad you ain't seen nothing yet."

The Office requested that appellant's supervisor comment on his account of the January 3, 2002 meeting. In a statement dated March 19, 2002, appellant's supervisor denied that she made any of the specific statements that appellant attributed to her and that in the January 3, 2002 meeting appellant was "defensive and combative" when asked about the accuracy of his report on his unit's performance on December 31, 2001. Appellant's supervisor also stated that the employing establishment's manager of human resources, acting district manager and manager of marketing investigated appellant's allegations and "did not find that any "abusive behavior or violence in the workplace" had occurred.

By decision dated April 26, 2002, the Office found:

“In regard to the claimant’s allegations, I find that without any other supportive evidence I cannot find that, for the purpose of awarding benefits, that the events occurred exactly as the claimant alleged. The tone and volume of his supervisor’s responses, the exact nature of the responses, then become secondary to the agreed-on circumstances of the event, which is that the claimant received an informal appraisal of his performance on January 3, 2002 and was subsequently treated for depression and anxiety. In this case, the claimant did not allege that he became ill merely because he received feedback regarding his performance, but it was the manner in which he was given the feedback. As there is no corroborating evidence regarding this I cannot find that this occurred as the claimant alleged. What can be established from the evidence currently in the record is that a performance discussion occurred on January 3, 2002. As there is no proof that the agency erred in this matter that the event is not compensable.”

By letter dated April 30, 2002, appellant requested reconsideration, stating that he had advised the Office twice that “there is corroborating evidence in the form of a tape recording available” and that this recording showed that his supervisor’s statements about the January 3, 2002 meeting were false. Appellant stated that the Office advised him that it did not need the tape as long as his statement included what was on the tape. Appellant’s request for reconsideration was accompanied by “the aforementioned tape and transcript.” His transcript contained each of the statements that appellant’s earlier letters attributed to his supervisor in the January 3, 2002 meeting.

By decision dated June 12, 2002, the Office found:

“Because your letter neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time. Please be aware that recordings such as the one you submitted is not acceptable evidence for the purposes of any type of review.”

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

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 the coverage of the Federal Employees’ Compensation Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.<sup>1</sup>

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<sup>1</sup> *Michael Thomas Plante*, 44 ECAB 510 (1993).

Appellant has not shown any error or abuse in the employing establishment's denial of his request for annual leave for September 11, 2001.<sup>2</sup>

The only incident to which appellant attributed his stress and depression was the way his supervisor treated him at a January 3, 2002 meeting. Appellant contended that his supervisor was verbally abusive and threatening and that she harassed him.

The Board has held that actions of an employee's supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment are not compensable under the Act.<sup>3</sup> The same is true of verbal abuse: it can be covered under the Act if it is substantiated by the evidence in the record.<sup>4</sup>

At the time of the Office's April 26, 2002 decision, there was no evidence substantiating appellant's account of harassment and verbal abuse at the January 3, 2002 meeting. Appellant's supervisor specifically denied the statements attributed to her, and there was no reason to accept appellant's account of this meeting in preference to that of his supervisor. Appellant did not meet his burden of proof to establish an emotional condition in the performance of duty.

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

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<sup>2</sup> Decisions by the employing establishment on leave requests are administrative in nature. *Jimmy Gilbreath*, 44 ECAB 555 (1993).

<sup>3</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>4</sup> *Gary M. Carlo*, 47 ECAB 299 (1996).

The Office's April 26, 2002 decision denied appellant's claim on the basis that he had not established that the January 3, 2002 incident occurred as he alleged. The tape and the transcript that appellant submitted to the Office with his request for reconsideration are relevant to the issue of harassment or verbal abuse at the January 3, 2002 meeting. The Office may develop the evidence to determine the authenticity of the tape and transcript, but, in the absence of any inquiry it was error to find the evidence lacked relevancy to the claim. The Office improperly refused to reopen appellant's case for a review of the merits of his claim. The case will be remanded to the Office for a merit decision.<sup>5</sup>

The June 12, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board. The April 26, 2002 Office decision is affirmed.

Dated, Washington, DC  
March 26, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>5</sup> The Office should also obtain a copy of the investigative report referred to by appellant's supervisor in her March 19, 2002 statement.