

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBAL R. KIDWELL and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Santa Clarita, CA

*Docket No. 02-1957; Submitted on the Record;
Issued March 13, 2003*

DECISION and ORDER

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

The issue is whether appellant has established an emotional condition causally related to compensable work factors.

On July 20, 2000 appellant, a 41-year-old laborer/custodian, filed a notice of occupational disease alleging that he sustained an emotional condition causally related to his federal employment. He alleged that he had been harassed, verbally threatened and physically assaulted on April 10, 2000.

In a decision dated December 11, 2000, the Office of Workers' Compensation Programs denied the claim, finding that appellant had not established any compensable work factors as contributing to an emotional condition. By decision dated April 24, 2001, the Office determined that the evidence was not sufficient to warrant further merit review. In decisions dated May 18 and August 3, 2001 and May 14, 2002, the Office reviewed the case on its merits and denied modification of the denial of the claim.

The Board finds that appellant has not met his burden of proof to establish an emotional condition causally related to compensable work factors.

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 factors of his federal employment.¹ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and

¹ Pamela R. Rice, 38 ECAB 838 (1987).

(3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.²

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 coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where 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.³

The initial issue is whether appellant has alleged and substantiated compensable work factors as contributing to a medical condition. In this regard he has alleged a general pattern of harassment and retaliation by the employing establishment. With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁴ An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.⁵

The allegation of retaliation is based on appellant's notification to the Occupational Safety and Health Administration (OSHA) of an alleged safety violation in March 2000. The record indicates that, in May 2001, OSHA notified appellant that there was a safety violation. The issue, however, is whether the allegation of retaliation has been substantiated. Appellant filed a grievance on August 12, 2000 alleging discrimination and retaliation. There is also evidence that appellant filed an EEO (Equal Employment Opportunity) complaint. No findings were submitted with respect to these complaints and there is insufficient evidence establishing that any specific act or acts of the employing establishment were in retaliation for contacting OSHA. In the absence of such evidence, the Board finds that appellant has not established a compensable work factor based on harassment or retaliation.

With respect to the allegation of a safety violation to OSHA, appellant has also alleged that prior to contacting OSHA, a supervisor, Delos Reyes, threatened to fire him if he contacted OSHA. In a statement dated August 7, 2000, an employing establishment labor relations specialist, Mr. Marney, reported that his department had investigated the allegation and found,

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

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁵ *Helen P. Allen*, 47 ECAB 141 (1995).

based on witness statements that no threat was made. The Board notes that in an April 6, 2000 statement Mr. Reyes indicated that on March 29, 2000 he had made a joke regarding reward money to an employee filing an OSHA report, but he did not report making a threat to fire appellant. The evidence of record is insufficient to establish a compensable factor, as alleged by appellant.

Appellant has also cited specific administrative actions by his supervisors as contributing to an emotional condition. He has alleged, for example, that he was denied union representation, that on June 6, 2000 he was required to provide medical documentation before he could return to work and that he was initially charged with being absent without leave for July 12, 2000. It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.⁶ The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.⁷ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁸ Although appellant filed grievances regarding union representation and the medical documentation requirement, no probative evidence of error or abuse in an administrative matter was submitted. Appellant reported an increase in his workload; to the extent that he is alleging overwork, he did not provide pertinent evidence to support the claim. In an August 1, 2000 statement, Mr. Lefkowski indicated that there was no increase in the workload and custodians were not expected to complete every task on the checklist in a single workday.

The Board does find, however, that there is sufficient evidence to establish a compensable work factor on April 10, 2000. Appellant alleged that Mr. Reyes physically assaulted him on April 10, 2000. A witness statement reported that Mr. Reyes slapped appellant on the back and stated: "How [i]s it going buddy ... you [wi]ll need more witnesses." Mr. Reyes, in an August 10, 2000 statement, acknowledged that he did touch appellant on the back but denied making any comments regarding witnesses. Appellant submitted a portion of an EEO affidavit from another supervisor, Mr. Lefkowski, stating that Mr. Reyes had acknowledged that his actions were "inappropriate," although the details of the incident had been exaggerated by appellant.

It is well established that physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation if the medical evidence establishes that a condition was thereby caused or aggravated.⁹ Although there is some discrepancy as to the nature and extent of the physical contact, the evidence does establish that physical contact was made in the course of employment. The Board finds that this constitutes a

⁶ *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

⁷ *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁸ *Anna C. Leanza*, 48 ECAB 115 (1996).

⁹ *Alton L. White*, 42 ECAB 666 (1991).

compensable factor of employment. Therefore, a medical question is presented as to whether this factor of employment caused or aggravated an emotional condition.¹⁰

The case record does not contain a reasoned medical opinion on causal relationship between a diagnosed condition and the employment factor. In a treatment note dated July 17, 2000, Dr. Harold Von Scotti, a psychiatrist, noted in his history that appellant alleged that he was hit in the back by his supervisor on April 10, 2000. Dr. Von Scotti diagnosed adjustment disorder with mixed mood, rule out major depression. He did not provide a medical opinion explaining the relationship between the diagnosed condition and the April 10, 2000 employment factor. A form report (Form CA-20) dated October 24, 2000 from Dr. Salvador del Rosario, a psychiatrist, diagnosed adjustment disorder with anxiety and depression and checks a box “yes” that the condition was employment related. The checking of a box “yes” in a form report, without additional explanation or rationale, is insufficient to establish causal relationship.¹¹ As noted above, the only compensable work factor established in this case is the April 10, 2000 touching incident and the medical report must explain the relationship of this factor with the diagnosed condition.

In the absence of a medical report containing a reasoned medical opinion, based on a complete and accurate background, on causal relationship between a medical condition and the accepted work factor, the Board finds that appellant has not met his burden of proof in this case.

The decisions of the Office of Workers’ Compensation Programs dated May 14, 2002 and August 3, 2001 are modified to reflect that appellant has established a compensable work factor and affirmed as modified.

Dated, Washington, DC
March 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Id.*

¹¹ See *Barbara J. Williams*, 40 ECAB 649, 656 (1989).