

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSWALDO VERA and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 03-45; Submitted on the Record;
Issued March 12, 2003*

DECISION and ORDER

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

The issue is whether appellant sustained an injury in the performance of duty on October 2, 2001, as alleged.

On October 9, 2001 appellant, then a 52-year-old letter carrier, filed a claim alleging that he sustained an injury at work on October 2, 2001, when he was harassed and physically assaulted by supervisor Damon Marro. He alleged that Supervisor Marro was standing behind him and pushed him in the back with both hands, causing him to fall and hit his head, neck and back. Appellant described the nature of the injury as "emotional trauma, neck, back and head injury."

The employing establishment controverted the claim and submitted witness statements from Mr. Marro and two employees.

In a statement dated October 2, 2001, Mr. Marro wrote that he had been observing appellant perform his duties on the morning of October 2, 2001 and that he brought appellant into the office for a predisciplinary interview after he refused an order. Mr. Marro wrote: "Approximately 10 minutes later back at his route [appellant] looked over his shoulder at me and took a step back, still looking over his shoulder and leaning back he continued to move back until he made contact with my hands. When he made contact with my hands he immediately threw himself on the floor."

Thomas J. Surace noted in an October 2, 2001 statement, that appellant received a predisciplinary interview that morning at 10:00 a.m. at which time he witnessed appellant look over his right shoulder at Mr. Marro and take a step back. He stated that appellant did this once again and then threw himself on the floor at the feet of Mr. Marro.

In an October 3, 1999 statement, Mildred Evans related that she saw her manager standing in back of appellant when he fell. She indicated that Mr. Marro was playing with a pencil in his hand when appellant fell and that she did not see his arm move.

In a letter dated October 29, 2001, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish his claim for compensation.

In a November 15, 2001 statement, appellant maintained that he had been physically assaulted by his supervisor on October 2, 2001 and that he had sustained emotional and physical injury as the result. He wrote that the supervisor had used both hands to push him in the back, causing him to lose his balance and fall.

The record contains an investigative memorandum dated October 30, 2001 prepared by the Postal Inspection Service. The exhibits included copies of the previously described statements from Mr. Marro, Mr. Surace and Ms. Evans, as well as reports of interviews the postal inspectors conducted. In a memorandum of an interview of appellant conducted on October 29, 2001, a postal inspector wrote that appellant alleged having been pushed in the back at work on October 2, 2001 by Mr. Marro. He stated that Mr. Marro had been standing only an inch or two behind him while he was racking mail into his case. Appellant further alleged that the push from Mr. Marro caused him to move forward and then fall backwards.

The postal inspector interviewed Mr. Marro on October 16, 2001 and he stated that he "stood arms length behind [appellant] and observed him casing mail." He also stated that appellant had looked over his shoulder and then took a step back. The postal inspector wrote: "[Mr.] Marro states that he edged backward to give clearance but that [appellant] took another step backward and upon making contact fell to the floor. [Mr.] Marro states that he put his hands up to brace but did not push off because the contact was so brief."

In the memorandum of her interview on October 18, 2001, Ms. Evans stated that appellant was standing at his case and that Mr. Marro was standing approximately one foot in back of the case area while twirling a pencil in his hand. The postal inspector wrote that Ms. Evans saw appellant hit the floor as she was bending down to retrieve a bucket of mail. The Postal Inspector wrote: "She looked up at Supervisor Marro, who appeared startled. [Ms.] Evans states she did not see Supervisor Marro's hands move and that he was still playing with a pencil in his hand."

The record indicates that appellant was removed from his position on January 2, 2002 and filed a grievance for wrongful discharge. In a decision issued by the Labor Relations Board investigator, appellant's grievance was deemed without merit on the grounds that he falsely claimed that he had been pushed to the ground by his supervisor and for attempting to falsely receive remuneration by claiming an on-the-job injury.

In a decision dated December 5, 2001, the Office denied compensation on the grounds that appellant had failed to establish that he sustained an emotional condition or physical injury in the performance of duty.

Appellant requested a hearing, which was held on May 22, 2002.

In a decision dated September 10, 2002, an Office hearing representative affirmed the Office's December 5, 2001 decision.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹

In a traumatic injury claim, an employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.

In this case, appellant contends that he sustained physical and emotional injuries as a result of having been shoved from behind by his supervisor, causing him to lose his balance and fall on the ground, hitting his head, neck and back on the floor. Contrary to appellant's description of the events of October 2, 1999, the three witness statements to the alleged injury dispute that the supervisor touched appellant. The witness statements suggest that appellant purposefully backed up into his supervisor in an attempt to stage an injury. The discrepancies between appellant's version of the events on October 2, 1999 and those of Mr. Marro, Mr. Surace and Ms. Evans cast serious doubt on the validity of appellant's claim for a traumatic injury. Consequently the Board concludes that appellant had not established that the incident occurred in the performance of duty on October 2, 1999 as alleged.

The Board finds that appellant has not established that his supervisor pushed or assaulted him in the back on October 2, 1999. Therefore, his alleged emotional claim is not deemed to have arisen from a compensable employment factor. A claim based on verbal or physical altercations with a supervisor or fellow employee must be supported by the evidence of record.² For harassment to give rise to a compensable disability there must be evidence that the harassment did, in fact, occur.³ There is no evidence other than appellant's statement, which has been contradicted by witness statements, that he was harassed by his supervisor or that the supervisor pushed him, causing him to fall. Appellant has failed to establish that he sustained an injury while in the performance of duty.

¹ *James Mac*, 43 ECAB 321 (1991); *Willie J. Clements, Jr.*, 43 ECAB 244 (1991).

² *See Bonnie Goodman*, 50 ECAB 139 (1988).

³ *Sandra Davis*, 50 ECAB 450 (1999); *John Polito*, 50 ECAB 347 (1999); *Goodman*, *supra* note 2.

The decision of the Office of Worker's Compensation Programs dated September 10, 2002 is hereby affirmed.

Dated, Washington, DC
March 12, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member