United States Department of Labor
Employees' Compensation Appeals Board

FRANCISCO LAO, Appellant	)	
and	)	**Docket No. 04-57**
	)	**Issued: April 6, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ, Employer	)	

Appearances:
Francisco Lao, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 12, 2003, which denied modification of an Office hearing representative's January 15, 2002 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On January 4, 2000 appellant, then a 61-year-old letter carrier, filed a Form CA-1, notice of traumatic injury, alleging he developed a stress or psychiatric condition on September 20, 1999 due to ongoing harassment on the part of management. On February 1, 2000 appellant filed another Form CA-1, which alleged the development of a "stress reaction job related" occurring on January 18, 2000. By letter dated September 6, 2000, the Office advised appellant

that his claims would be combined under claim number 022001392. Appellant retired from the employing establishment on or about April 30, 2000.

In response to a request for information from the Office, appellant submitted statements dated November 2, 1999 and May 12, 2000. He stated that he had been a victim of discrimination on the basis of his race, national origin and age and had been retaliated against due to his prior Equal Employment Opportunity (EEO) activity and union grievances and on the basis of his disability. Appellant related that he had a back condition, which the Office had accepted in a prior claim for a right L4 radiculopathy by aggravation. Appellant stated that, when he returned to work in 1996 following his back injury, the employing establishment gave his regular bid assignment to a part-time employee (a part-time African American woman with less than one year of service) and placed him on another route to perform part-time work. Appellant alleged that all non-Hispanic employees placed on light duty were permitted to work their regular bid assignments and he was discriminated against on the basis of his race.

Appellant advised he left work on September 23, 1998 because of his back problems. When he returned to work on September 28, 1998 appellant stated that his supervisor (Ollie Stancil) denied his request for light duty, which his physician had recommended and sent him to the medical unit for evaluation without providing him any transportation or allowing him to clock in for the day. Appellant stated that he missed additional time off work as a result of his supervisor's actions and had to use his accrued leave. Appellant returned to work on October 8, 1998 and was placed on regular duty. On October 10, 1998 appellant stated that his supervisor changed his route by taking approximately 45 minutes to 1 hour of street work off his route while adding 3 to 4 medical buildings and another street to his route. Appellant stated that these changes were done without a routine inspection, increased the amount of preparation time before going on street delivery, overburdened his route by two hours and caused additional stress and strain on his back. Appellant indicated that he was denied a request for a "board" to be used as a shelf to assist him in the sorting of flats. He further stated that when his route was inspected on May 13, 1999 it was 96 units over an 8-hour route. On October 30, 1998 because of the additional strain to his back, appellant requested to be placed on light duty. He indicated that, on October 31, 1998, his supervisor sent him to the medical unit for evaluation but, as he was unable to drive due to the distance involved and the medication he was on, he was instructed to go to the medical unit on November 2, 1998. On November 2, 1998 appellant alleged that his supervisor refused to allow him to clock in and informed him that he had to go to the medical unit "off-the-clock." Appellant stated that he then engaged in a discussion with his supervisor about "fitness-for-duty [FFD]" examinations and, when his supervisor got confrontational, he was not allowed to clock-in. As a result, appellant stated that he had to miss additional time off work, which came from his accrued leave. Appellant indicated that a February 22, 1999 decision, found that management acted inappropriately in denying him "pay status as a result of the management directed FFD exam[ination] and travel costs related thereto."

Appellant indicated that when he arrived at work on January 15, 1999 he was directed to the medical unit for an examination and was not permitted to check in. He stated that he became ill with acute bronchitis on January 2, 1999 and had informed the employing establishment on January 4, 1999 that he would let them know when he could return to work. Appellant stated that when he provided the medical documentation to management on January 14, 1999 he noticed his route had been put up for bid as a "hold down" although the employing establishment

had been advised that he would be returning to work on January 15, 1999. Appellant indicated that the February 26, 1999 decision of the N.N.J. Dispute Resolution Team, found that management had improperly refused to allow him to clock-in on January 15, 1999 following an extended absence.

Appellant further alleged that, in September 1999, the employing establishment engaged in further discriminatory and retaliatory acts intended to humiliate him and force his resignation. He stated that Troy Williams, a 204B management trainee, with the knowledge and approval of postmaster Harold Ware and supervisor Stancil, "harassed" him in front of his coworkers by making remarks that he was a "slow worker," that he was stealing from the employing establishment and that his route was not an eight-hour route. Appellant stated on September 20, 1999 that Troy Williams came by his workstation and demanded that he work faster. Appellant indicated that there was a heavy volume of mail due to Hurricane Floyd. He further indicated that he told Troy Williams that he was doing his work and that he did not need to harass him. Appellant indicated that Troy Williams stated that, if he did not like it, he should quit. On the way to a meeting to discuss the situation, appellant alleged that Troy Williams announced in a loud voice in front of all the employees that appellant should quit his job and had repeated his statement at the meeting with supervisor Stancil and shop steward Samuel Williams. Appellant also alleged that Troy Williams retaliated against him in connection with a prior petition filed due to Troy Williams' unprofessional behavior. He indicated that management did not take any action against Troy Williams. Appellant indicated that such actions by the employing establishment caused him a tremendous amount of stress and anguish and he has since retired. Physician reports concerning appellant's emotional state were submitted along with copies of grievances filed.

In a letter dated August 17, 2000, the employing establishment controverted appellant's claim.

A January 12, 2000 United States District Court, District of New Jersey opinion granted the employing establishment's motion for summary judgment to dismiss appellant's complaint with prejudice. The court found that appellant's discrimination claim stemming from his failure to be awarded the morning shuttle run was dismissed as he could not prove that he was denied the position and that the position was instead given to a person of another race. The court further rejected appellant's claim that he suffered an adverse employment action when he was not allowed to assist on route 10 (appellant's original route) when he was assigned to light duty in May 1996.

In an April 27, 1999 letter, the employing establishment listed the dispositions of appellant's grievance settlements. In a settlement dated February 22, 1999, it was noted that appellant received reimbursement for 48 miles round trip travel to a medical appointment. In another settlement dated February 22, 1999, appellant was credited with work hours as opposed to sick leave for 32 hours from January 15 through February 18, 1999.

In a decision dated February 17, 2001, the Office denied appellant's claim on the basis that he failed to establish that he sustained an injury in the performance of duty.

On February 24, 2001 appellant requested an oral hearing, which was held on October 18, 2001. At the hearing appellant essentially reiterated the allegations described in his previous statements and critiqued the Office's prior decision.

By decision dated January 15, 2002, the Office hearing representative affirmed the February 17, 2001 decision denying compensation. The Office hearing representative found that all of appellant's contentions were accepted as having in fact occurred as portrayed with the following exceptions: that he prevailed in all the grievances indicated, that he was "harassed" by a supervisor, that he was replaced with a part-time female employee with less than one year of service and that he was accused by his employer of "stealing." Additionally, the hearing representative found that appellant failed to establish that the employing establishment either erred or acted abusively in carrying out its administrative responsibilities.

In a November 4, 2002 letter, appellant requested reconsideration of the Office's decisions. Numerous evidence was submitted, which was either previously of record or irrelevant to appellant's claim. By decision dated May 12, 2003, the Office denied modification of its January 15, 2002 decision.[1]

LEGAL PRECEDENT

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (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 condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.[2]

Workers' compensation law is not applicable 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. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[3] To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.[4]

[1] The Office's procedure manual provides: "When a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002). Thus, pursuant to its procedures, the Office conducted a merit review on appellant's claim.

[2] *See Leslie C. Moore*, 52 ECAB 132 (2000); *Kathleen D. Walker*, 42 ECAB 603 (1991). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Roger Williams*, 52 ECAB 468 (2001); *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[3] *See Roger Williams, id*; *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Ruthie M. Evans*, 41 ECAB 416 (1990).

As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.[5] However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[6]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[7] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[8] Where an employee alleges harassment and cites to specific incidents or working conditions and the employer denies that harassment occurred, the Office as part of its adjudicatory function must make findings of facts regarding whether the alleged factors are factually established and constitute compensable factors of employment.[9] In such cases the issue is not whether the claimant has established harassment or discrimination under Equal Employment Opportunity Commission standards. Rather, the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[10] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[11]

Appellant's burden of proof is not discharged by the fact that he has established an employment, factor which may give rise to a compensable disability under the Act. To establish his occupational disease for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[12]

ANALYSIS

Appellant alleged that, when he returned to work in 1996, following his back injury, he was discriminated against on the basis of race and disability as the employing establishment gave his regular bid assignment to a part-time African American woman with less than one year of service. An employee's frustration from not being permitted to work in a particular environment

[5] *Roger William, supra* note 2.

[6] *Id.*

[7] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[8] *James E. Norris*, 52 ECAB 93 (2000); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[9] *See James E. Norris, id; Elizabeth W. Esnil*, 46 ECAB 606 (1995).

[10] *See James E. Norris, id; Martha L. Cook*, 47 ECAB 226, 231 (1995).

[11] *Marguerite J. Toland*, 52 ECAB 294 (2001); *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[12] *See Dennis J. Balogh*, 52 ECAB 232 (2001)*; William P. George*, 43 ECAB 1159 (1992).

or hold a particular position is not compensable.[13] The January 12, 2000 decision of the United States District Court, District of New Jersey specifically rejected appellant's claim of discrimination when he was assigned to light duty in May 1996. There is no other evidence in the record to substantiate appellant's claim. Thus, the record does not establish that the employing establishment erred or acted abusively in placing appellant on another route when he returned to work in a light-duty capacity in 1986. Appellant has further failed to substantiate his allegations that his reassignment was based on discrimination by race or disability.[14]

Appellant alleged that his supervisor had changed his route on October 10, 1998 without a proper route inspection and that such change had increased his preparation time and overburdened his route. The Board has held that emotional reactions to situations, in which an employee is trying to meet his position requirements are compensable.[15] Although appellant noted the results of a May 13, 1999 inspection, which implied appellant's route was overburdened, he has not specifically alleged that his emotional condition was aggravated by the requirements of his work. Instead, appellant has generally expressed disagreement with how his supervisor exercised his discretion because, had the supervisor followed proper procedure, he would have known the route would have been overburdened. Perceptions of what or how the supervisor should have been exercising his managerial functions do not demonstrate error or abuse by the supervisor in discharging his supervisory duties.[16] Although the May 13, 1999 inspection results lend credibility to appellant's claim that his route was overburdened, the record is devoid of any evidence that appellant could not meet or had a hard time trying to meet his position requirements. Without such evidence, appellant's claim is reduced to one of personal perception and a mere perception of harassment is not enough to establish a factual basis for a claim.[17] Although appellant alleged that his back condition was affected by the route changes and the employing establishment's refusal to give appellant the requested "board," the record is devoid of any evidence showing any error or abuse on the part of the employing establishment in either changing the route or denying appellant the board. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has alleged that the employing establishment had discriminated and retaliated against him by putting his route up for bid as a "hold down" although he had advised management that he would be returning to work on January 15, 1999. The facts, however, show no evidence of discrimination or retaliation on the part of the employing establishment in putting appellant's route up for bid as a "hold down." The record reveals that on January 2, 1999 appellant became ill with acute bronchitis and had notified the employing establishment on January 4, 1999 that he was ill

[13] *See Roger William, supra* note 2; *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

[14] Unsubstantiated allegations of harassment or discrimination are not determination of whether such incidents occurred. A claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence. *See Sherman Howard*, 51 ECAB 387 (2000).

[15] *See Trudy A. Scott*, 52 ECAB 309 (2001).

[16] *See Marguerite J. Toland*, *supra* note 11.

[17] *See Sharon R. Bowman*, 45 ECAB 187 (1993).

and would let them know when he would return to work. There was no communication from appellant until January 14, 1999, when he dropped off medical documentation at the employing establishment, which advised he could return to work on January 15, 1999. In light of the fact that appellant did not know when he would be returning to work due to his illness and had not informed the employing establishment when he could return to work until January 14, 1999, it was reasonable that the employing establishment would have put appellant's job up for a "hold down" bid to ensure that the work would be completed in appellant's absence. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has alleged that Troy Williams, a management trainee, made remarks in September 1999, indicating that he was a slow worker, he was stealing from the employing establishment and that appellant could quit if he did not like it. Appellant also alleged that Troy Williams said that he should quit in a loud voice, in front of other employees. Appellant alleged that Troy Williams harassment and management's failure to act on the matter was retaliation for his pending suit and past EEO activity. The evidence indicates that appellant was reacting to statements made by his supervisor and not from being unable to complete the employment duties. The evidence suggests that there was a heavy volume of mail and Troy Williams was monitoring appellant's activity. Appellant, however, submitted no corroborating evidence to substantiate that these events occurred as alleged and even if they did, there is no evidence that they rise to the level of harassment or abuse, as monitoring employee work is a legitimate supervisory function.[18] Although appellant alleged that Troy Williams stated in a loud voice, in front of other employees that he should quit if he did not like it, he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made.[19] Thus, appellant has not established a compensable employment factor with respect to the claimed harassment and discrimination.

The Board finds that appellant has established a compensable factor with regard to being directed to go to the medical unit for a fitness-for-duty evaluation on September 28 and October 31, 1998 and January 15, 1999 and not being permitted to clock-in. The February 22, 1999 decision of the N.N.J./A.D.R.T lends support that appellant should have been in pay status when directed to undergo a fitness-for-duty examination[20] and this has not been disputed by the employing establishment. Inasmuch as appellant was not allowed to clock-in on the days he was directed to undergo a fitness-for-duty examination and had to use his accrued leave, the Board finds that appellant established a compensable factor in this regard.

The Board further finds that the employing establishment erred in not permitting appellant to return to work on January 15, 1999. A January 26, 1999 decision of the N.N.J./A.D.R.T supports that the employing establishment erred when they did not permit appellant to return to work on January 15, 1999 the day his personal physician cleared him for

[18] *See Sandra Davis*, 50 ECAB 450 (1999); *John Polito*, 50 ECAB 347 (1999).

[19] *See Marguerite J. Toland*, *supra* note 11.

[20] As a result of that decision, appellant was to be made whole for any wages/benefits lost. It is noted that appellant received reimbursement for 48 miles round trip travel to a medical appointment. The record is devoid of any information as to whether appellant received lost wages for not being allowed to clock-in on September 28, October 31 and November 2, 1998.

work.[21] As the record is devoid of any contrary evidence from the employing establishment, the Board finds that appellant has established a compensable factor.

The Board notes that, although appellant has identified compensable factors of employment with respect to the directives given regarding his fitness-for-duty evaluations on September 28 and October 31, 1998 and January 15, 1999 and not being permitted to return to work on January 15, 1999, a review of the relevant medical evidence of record fails to establish a condition causally related to the accepted employment factors. In a January 18, 2000 report, Dr. P. Alsen, a clinical psychologist, advised appellant had been under his care since September 24, 1999. The physician noted that appellant appeared to be under a great deal of pressure at his job with an increased stress-reaction to the conditions there. In a June 24, 2000 attending physician's report, Dr. George E. Landberg, a Board-certified psychiatrist, diagnosed appellant with chronic major depression with anxious features and opined that the medical condition was causally related to appellant's employment through "patient's description of long-standing harassment by his supervisors as stated in his complaints." In an October 5, 2000 report, Dr. Landberg advised that appellant had been in treatment since September 24, 1999 and was diagnosed with major depression. Dr. Landberg opined that, given appellant's long satisfactory work history and the severity of his symptoms, he believed that appellant's story of systematic harassment was credible. The physician further stated that appellant's satisfactory response to treatment and his relief at being free of his former work stressors support the conclusion that his work situation was instrumental in aggravating his medical condition. The Board notes that neither physician discusses the work factors found to be compensable or provides a discussion on appellant's work stressors. As there is no rationalized medical opinion of record relating appellant's condition to the identified compensable factor, the reports of Drs. Alsen and Landberg are insufficient to meet appellant's burden.[22]

CONCLUSION

Although appellant identified two compensable employment factors as a cause of his claimed emotional condition, he has failed to discharge his burden of proof as the medical evidence was insufficient to establish a causal relationship between appellant's condition and the accepted employment factors.

[21] As a result of the employing establishment's action, appellant was to be made whole for the hours of work lost. The record reflects appellant was credited with work hours as opposed to sick leave for 32 hours from January 15 through February 18, 1999.

[22] *Dennis J. Balogh*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2003 decision of the Office of Workers' Compensation Programs is affirmed to reflect the denial of appellant's claim, but modified to accept two compensable factors of employment but further denied based on the failure of the medical evidence to establish a causal relationship to the accepted compensable factors.

Issued: April 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member