

FACTUAL HISTORY

On July 30, 2001 appellant, then a 51-year-old clerk, filed a claim alleging that he sustained an anxiety attack and gastritis due to harassment by his supervisor, Lesly Jerome.¹ He alleged that, on June 28 and July 3, 2001, Mr. Jerome told him to “shut up” and not speak to the letter carriers. Appellant asserted that on July 30, 2001 there was no cage clerk to help him distribute first class mail to the letter carriers. Mr. Jerome twice refused to let him move empty mail trays, although they posed a safety hazard. Appellant then felt stressed and experienced gastric symptoms and tachycardia. He alleged that Mr. Jerome then behaved like a “stalker” by following him into the bathroom. At appellant’s request, Mr. Jerome summoned paramedics, who transported him to the hospital. Appellant also asserted that on November 14, 2001 Mr. Jerome advised him that letter carriers had complained that appellant had offensive body odor. Mr. Jerome explained to appellant that postal regulations specified that employees were to report to work clean and neat. Appellant also alleged a pattern of discrimination by Mr. Jerome on the basis of Caucasian race and retaliation for being granted overtime on July 20, 2001. He submitted a Step 1 grievance form reiterating his account of the July 30, 2001 incidents and a September 20, 2001 Equal Employment Opportunity (EEO) inquiry report alleging that Mr. Jerome, who was African American, discriminated against him on the basis of Caucasian race, Jewish religion and ethnicity, male gender, mental disability and in retaliation for prior EEO activity on February 5, 2001.

Appellant submitted questionnaires answered by coworkers, Grant Smith and Robert Kelly, indicating that they did not witness any of the alleged events of July 30, 2001 or any specific instances of harassment or discrimination against appellant by Mr. Jerome.

In a July 30, 2001 statement, Linette Smith, an employing establishment station manager, confirmed that appellant and Mr. Jerome appeared in her office at 7:00 a.m. that morning and that appellant accused Mr. Jerome of harassment. Mr. Jerome telephoned paramedics at appellant’s request. The paramedics found nothing wrong except appellant’s deliberate hyperventilation, but took him to the hospital at his insistence.

In an August 15, 2001 statement, Mr. Jerome noted that on July 30, 2001 he observed appellant picking up empty mail trays, a “housekeeping” task not part of his assigned duties. He instructed appellant to return to his assignment of “spreading” first class mail to the carriers. Appellant began to distribute mail, but stopped to talk with the carriers and pick up empty trays. Mr. Jerome instructed him to stop picking up the trays and to stop talking with the carriers. Appellant stated that he would distribute the mail, then that he wanted to go home, then that he was going to call emergency medical services as he was having a panic attack. He began to breathe rapidly and walked to the bathroom, but breathed normally when he stopped to talk to letter carriers along the way. Mr. Jerome asserted that he did not yell, raise his voice or use the phrase “shut up” when speaking to appellant.

¹ In an August 22, 2001 letter, the Office advised appellant to submit a detailed account of the events of July 30, 2001 and a report from his attending physician addressing any causal relationship between those events and the claimed emotional condition and gastritis.

By decision dated December 27, 2001, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that, while there was "no dispute concerning what transpired on July 30, 2001," appellant submitted insufficient medical evidence to establish any injury resulting from those events.

Appellant requested an oral hearing, held August 27, 2002. At the hearing, he noted that he had three prior emotional condition claims accepted.² He asserted that Mr. Jerome allowed empty mail trays to accumulate against the exit doors, aggravating his claustrophobia and producing panic attacks. Following the hearing, Mr. Jerome submitted a September 26, 2002 statement denying that he treated appellant differently than other clerks. He explained that appellant required close supervision as he had a history of working slowly, not performing his assignments, chatting with coworkers and disrupting postal operations. Mr. Jerome noted that on July 30, 2001 he accompanied appellant to Ms. Smith's office where Mr. Jerome called paramedics. Although the paramedics found nothing wrong with appellant, he insisted on being taken to the hospital.

By decision dated November 18, 2002, the hearing representative affirmed as modified the December 26, 2001 decision. The hearing representative found that appellant had not submitted sufficient evidence to establish his allegations of harassment as factual. The hearing representative found that Mr. Jerome's remarks regarding not picking up mail trays and talking with coworkers were administrative functions and that no error or abuse was shown that would bring those conversations under the Act.

Appellant requested reconsideration in an October 9, 2003 letter. He asserted that Mr. Jerome "acted unreasonably in the administration of a work assignment" and violated safety rules by allowing empty mail trays to remain on the floor. Appellant also claimed that Mr. Jerome violated his work restrictions related to a prior emotional condition claim which allegedly specified that he was not to work in enclosed spaces. He submitted an excerpt from an employing establishment collective bargaining agreement about unsafe working conditions, a July 22, 2002 grievance settlement and a September 11, 2003 EEO settlement. In both settlement agreements, Mr. Jerome agreed to treat appellant with dignity and respect, but did not admit any wrongdoing.

By decision dated December 12, 2003, the Office denied modification of the November 18, 2002 decision, finding that appellant had not submitted sufficient evidence to establish a compensable factor of employment.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provide for payment of compensation for personal injuries sustained while in the performance of duty.³ Where disability results from an

² The record indicates that the Office accepted three of appellant's prior emotional condition claims: Claim No. 06-0586524 for an anxiety disorder sustained on or before August 25, 1993; Claim No. 06-0694619 for anxiety and depression sustained on October 17, 1996; Claim No. 06-2000747 for anxiety depression sustained in February 2000. These three claims are not before the Board on the present appeal.

³ 5 U.S.C. § 8102(a).

employee's reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁴ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

In cases involving emotional conditions, the Board has held that, 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.⁷ If a claimant implicates a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

ANALYSIS

In the present case, appellant alleged that he sustained anxiety and gastritis as a result of a number of employment incidents which the Office found to be noncompensable. Therefore, the Board must review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

Appellant alleged that on June 28 and July 3, 2001 Mr. Jerome, his supervisor, yelled at him to shut up. However, he did not provide witness statements corroborating either of those incidents. Questionnaires completed by appellant's coworkers Mr. Kelly and Mr. Smith indicate that they had no knowledge of any specific incident in which Mr. Jerome yelled at appellant. Also, in an August 15, 2001 statement, Mr. Jerome asserted that he did not raise his voice or yell at appellant and that he did not use the phrase "shut up." The Board, therefore, finds that appellant has submitted insufficient evidence to establish the June 28 and July 3, 2001 incidents as factual.⁹ Also, regarding appellant's allegation that Mr. Jerome violated his work restrictions by allowing mail trays to block exit doors, the Board finds that appellant has not submitted

⁴ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁶ *Effie O. Morris*, 44 ECAB 470 (1993).

⁷ See *Norma L. Blank*, 43 ECAB 384 (1992).

⁸ *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

⁹ While verbal abuse or threats of physical violence in the workplace may be compensable under certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act. See *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

sufficient factual evidence to substantiate either that the doors were blocked or that he had such a work restriction.¹⁰

Appellant also alleged that Mr. Jerome erred in the assignment of work duties by refusing to allow him to pick up empty mail trays on July 30, 2001. The Board finds that this allegation relates to the assignment of work and the manner in which a supervisor exercises his or her discretion. In general, administrative matters do not fall within the coverage of the Act.¹¹ This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisor's management action will not be compensable absent evidence of error or abuse.¹² However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹³

In August 15, 2001 and September 26, 2002 statements, Mr. Jerome asserted that on July 30, 2001 appellant was not performing his assigned duties and was instead picking up mail trays and talking with letter carriers. He commented that appellant required close supervision due to a history of oppositional behavior. Mr. Jerome stated that he instructed appellant to resume his assigned duties of distributing first class mail to the letter carriers. Appellant then alleged that he was having an anxiety attack. Under the facts and the circumstances of this case, Mr. Jerome's remarks to appellant on July 30, 2001 constitute normal supervisory instructions as to how appellant was to perform his assigned duties.¹⁴ Therefore, the Board finds that appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these directions. Thus, he has not established that Mr. Jerome's instructions to him on July 30, 2001 constituted compensable factors of employment.

Similarly, Mr. Jerome's remarks to appellant on November 14, 2001 about appropriate hygiene when reporting for duty are an administrative, supervisory function.¹⁵ The Board finds that, under the circumstances of the case, it was reasonable for Mr. Jerome to explain to appellant that his coworkers had complained about his personal hygiene and that he was required to report to work "clean and neat." Thus, he has not established a compensable factor of employment in this regard.

¹⁰ See *Phillip L. Barnes*, 55 ECAB ____ (Docket No. 02-1441, issued March 31, 2004) (the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity is substantiated by the record).

¹¹ *Lori Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004); see *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹² *Frank B. Gwozdz*, 50 ECAB 434 (1999).

¹³ See *Charles D. Edwards*, (Docket No. 02-1956, issued January 15, 2004); see *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁴ *Michael L. Malone*, 46 ECAB 957 (1995); *Rudy Madril*, 45 ECAB 602 (1994).

¹⁵ See *Claudia L. Yantis*, 48 ECAB 157 (1996) (the Board found that enforcement of a dress code was an administrative matter).

Appellant also alleged a pattern of harassment and discrimination by Mr. Jerome on the basis of race, religion, gender and disability status and retaliation for EEO activities. Incidents of harassment or discrimination by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, could constitute employment factors,¹⁶ if the claimant submitted sufficient evidence to establish an injury arising in the performance of duty under the Act.¹⁷ For harassment or discrimination to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁸ Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁹ In support of his allegations of harassment and discrimination, appellant submitted questionnaires provided by coworkers Mr. Smith and Mr. Kelly. However, neither document indicated that Mr. Smith or Mr. Kelly had any direct knowledge of the alleged incidents. Also, Mr. Jerome provided statements denying that he yelled at or harassed appellant. Ms. Smith's July 30, 2001 supervisory statement noted that appellant accused Mr. Jerome of harassment, but did not indicate that she observed any of the alleged incidents. Thus, appellant has submitted insufficient evidence to establish his allegations of harassment.

Additionally, the EEO complaint and grievance related to the alleged July 30, 2001 incidents were settled with no finding of harassment or discrimination and no admission of wrongdoing by either party. While the Office may look to evidence from an EEO claim or grievance in determining whether incidents or harassment occurred as alleged, the Office must make its own independent findings as the standards of the Act differ from those of other administrative agencies.²⁰ As appellant has not submitted sufficient evidence, such as findings from an adjudicatory body regarding his EEO complaints and grievances, he has failed to establish his allegations of discrimination, harassment or retaliation in this regard. For these reasons, the Board finds that appellant has failed to establish harassment or discrimination as a compensable factor of employment.

¹⁶ *Janice I. Moore*, 53 ECAB ____ (Docket No. 01-2066, issued September 11, 2002). See *David W. Shirey*, 42 ECAB 783 (1991).

¹⁷ See *Martha L. Cook*, 47 ECAB 226 (1995).

¹⁸ *Marlon Vera*, *supra* note 9.

¹⁹ *Kim Nguyen*, 53 ECAB ____ (Docket No. 01-505, issued October 1, 2001).

²⁰ *Constance I. Galbreath*, 49 ECAB 401 (1998).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition with stress-induced gastritis in the performance of duty.²¹

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition with gastritis in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2003 is affirmed.

Issued: August 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

²¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Margaret S. Krzycki*, 43 ECAB 496, 503-03 (1992).