United States Department of Labor
Employees' Compensation Appeals Board

JOHN R. GIBREE, Appellant **and** **U.S. POSTAL SERVICE, CENTRAL MASSACHUSETTS PROCESSING & DISTRIBUTION CENTER, Shrewsbury, MA, Employer**	)	**Docket No. 03-147** **Issued: December 22, 2004**

Appearances:
John R. Gibree, pro se
Jim C. Gordon, Esq., for the Director

Oral Argument Held September 16, 2004

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 16, 2002 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 22, 2002, denying his request for a hearing and an April 11, 2002 decision which affirmed the denial of his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 22 and April 11, 2002 Office decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition causally related to factors of his federal employment; (2) whether the Office abused its discretion in denying appellant's request for subpoenas and (3) whether the Office abused its discretion in denying appellant's request for a second hearing.

FACTUAL HISTORY

On August 22, 2001 appellant, then a 44-year-old mail handler, filed a traumatic injury claim alleging that on August 13, 2001 he was exposed to second-hand cigarette smoke and sustained a stress condition as a result.[1]

In a disability certificate dated August 22, 2001, Dr. Gayatridevi Ika, a Board-certified internist, indicated that he treated appellant on August 15, 2001 for neck pain and stress symptoms.

An emergency room note dated August 23, 2001, indicated that appellant was treated for a shoulder muscle spasm related to work stress.

On September 10, 2001 the Office requested additional information from appellant, including factual information regarding the alleged injury and a comprehensive medical report supporting his claim.

By decision dated October 11, 2001, the Office denied appellant's claim for an emotional condition on the grounds that the evidence failed to establish that he had been exposed to second-hand smoke or that he sustained a medical condition causally related to any exposure to smoke. The Office noted that the medical evidence indicated that appellant had neck pain and stress symptoms but no definite diagnosis was provided.

On October 15, 2001 appellant requested a hearing before an Office hearing representative. By letter dated November 26, 2001, he requested that one witness and a number of records be subpoenaed. Appellant requested the subpoenas because he did not have "direct access" to the records.

On January 17, 2002 a hearing was held before an Office hearing representative. Appellant testified that he had been loading a truck on August 13, 2001 when he sustained injury. He stated that an individual was smoking in a designated smoking area on the ramp adjacent to the loading dock where he was working. Appellant alleged that the designated smoking area was "against the contract." He was exposed to smoke on two occasions on August 13, 2001 for approximately five minutes each. Appellant indicated that he developed neck pain caused by stress due to his emotional reaction to individuals smoking in the designated smoking area near his work area.

Following the hearing, appellant submitted documents related to his occupational disease claim as well as medical reports that predated the August 13, 2001 incident. In support of the August 13, 2001 traumatic injury claim, he submitted an accident report indicating that he had developed a headache and stiffness when he came into contact with individuals smoking in both a designated area and an area not designated for smoking. In a January 7, 2002 note, Dr. Wadie Alkhouri, a Board-certified psychiatrist, stated that appellant had developed depression and anxiety due to stress. He stated that "most of the stress is related to his work environment which

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[1] Appellant has also filed an occupational disease claim for an emotional condition related to exposure to second-hand smoke in Office Claim No. 01-0380754. This claim was denied in a June 4, 2001 Office decision.

he considers unhealthy since smoke is allowed in that environment." In a January 16, 2002 note, Dr. Ika, a Board-certified internist, stated that appellant had symptoms of depression.

Appellant also submitted an August 27, 2001 letter from a city Board of Health to the employing establishment, indicating that the smoking areas violated its policies. The City Board of Health noted that one of its employees saw individuals smoking near an office entrance and outside the cafeteria, smelled smoke in restrooms and saw cigarette butts near the loading dock. It stated that city health regulations prohibited smoking in workplaces unless an enclosed and ventilated area was provided.

By decision dated April 11, 2002, an Office hearing representative affirmed the October 11, 2001 decision. The Office hearing representative found that appellant had failed to establish that the employing establishment's designated smoking areas violated federal law and his allegation was essentially an emotional reaction to not being permitted to work in a particular environment, which was not a compensable factor of employment. The Office hearing representative found that appellant had not met his burden of proof to establish that he sustained an employment-related emotional condition on August 13, 2001. The Office hearing representative also denied appellant's request for subpoenas on the grounds that he had not demonstrated how the information in the requested documents was relevant to the proceedings or how a witness subpoena was the only means necessary to obtain the information.

By letter dated July 10, 2002, appellant requested a second hearing before an Office hearing representative, stating that he wanted to submit new evidence. He requested that the subpoenas he had requested for his first hearing be issued, stating that he needed the information to prove that "management willingly collaborated to deny me healthy working conditions."

By decision dated August 22, 2002, the Office denied appellant's request for a second hearing. The Office noted that he had already been provided with a hearing and his concerns could be addressed equally well through a request for reconsideration and the submission of additional evidence.

LEGAL PRECEDENT -- ISSUE 1

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (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. In the case of *Lillian Cutler,*[3] the Board explained that there are distinctions in the type of employment situations giving rise to a

[2] *George C. Clark,* 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004).

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

compensable emotional condition under the Federal Employees' Compensation Act.[4] There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within coverage under the Act.[5] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[6]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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 and which working conditions are not deemed factors of employment and may not be considered.[7] If a claimant does implicate 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]

Where the disability results from an employee's emotional 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.[9] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[10] 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 coverage of the Act.[11] However, 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.[12]

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[4] 5 U.S.C. §§ 8101-8193.

[5] *George C. Clark, supra* note 2.

[6] *Lillian Cutler, supra* note 3.

[7] *Dennis J. Balogh,* 52 ECAB 232 (2001).

[8] *Id.*

[9] *Supra* note 4.

[10] *Lillian Cutler*, *supra* note 3.

[11] *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

[12] *Charles D. Edwards,* 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

ANALYSIS -- ISSUE 1

Appellant alleged that he developed a stress condition as a result of exposure to second-hand smoke on August 13, 2001. The record shows that some of the individuals who were smoking on that date did so in one of the areas designated by the employing establishment for smoking, but he felt that all smoking areas were improperly located.

The Board finds that the employing establishment's choice of location for designated employee smoking areas is an administrative matter and there is no evidence that the employing establishment erred or acted abusively in this matter. Appellant submitted evidence from a City Health Board indicating that the smoking areas violated its policies but this municipal agency has no jurisdiction over a federal facility. He submitted no evidence that the employing establishment erred in its selection of the designated employee smoking area. Appellant also alleged that the location of the smoking areas violated the union contract. However, he provided no supporting evidence for this allegation. Due to the lack of evidence of error or abuse in the employing establishment's choice of designated smoking area locations, appellant's stress condition amounts to an emotional reaction to his frustration from not being permitted to work in a particular environment, which, as noted above, is not a compensable factor under the Act. As appellant failed to establish that the employing establishment erred or acted abusively in this administrative matter, the Office properly denied his claim for a stress condition on August 13, 2001.[13]

LEGAL PRECEDENT -- ISSUE 2

Section 8126[14] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulation state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[15]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and show that a subpoena "is the best method or opportunity to obtain such evidence because there are no other means by which the … testimony could have been obtained."[16] The Office hearing representative retains discretion on whether to issue a subpoena.[17] The function of the Board on appeal is to determine whether there has been an

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[13] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. *See Gary M. Carlo,* 47 ECAB 299 (1996).

[14] 5 U.S.C. § 8126.

[15] 20 C.F.R. § 10.619.

[16] *Id.; see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.f (January 1999).

[17] *Id.*

abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.[18]

ANALYSIS -- ISSUE 2

Appellant submitted a request for subpoenas for one witness and a number of documents in this case. However, he did not demonstrate why information from the documents could only be obtained through the subpoena process or why oral testimony from the requested witness was the best way to ascertain the facts. The Board finds that the hearing representative, under the circumstances of this case, acted within his discretion in denying appellant's request for subpoenas.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that, before review under section 8128(a), a claimant not satisfied with a decision of the Secretary of Labor is entitled, on a request made within 30 days after the date of issuance of the decision, to a hearing on his claim.[19] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[20]

ANALYSIS -- ISSUE 3

Appellant requested an oral hearing in this case. However, he had previously requested reconsideration and, therefore, under section 8124(b)(1) of the Act, he was not entitled to a hearing as a matter of right. The Office properly exercised its discretion and determined that his request could be addressed equally well with a request for reconsideration and the submission of additional evidence establishing that his emotional condition was causally related to compensable factors of his employment. There is no evidence of record that the Office abused its discretion in denying appellant's request for a second hearing.

CONCLUSION

The Board finds that appellant failed to establish that his emotional condition was causally related to any compensable factor of employment. The Board further finds that the Office properly denied appellant's request for subpoenas and a second hearing.

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[18] *Dorothy Bernard*, 37 ECAB 124 (1985).

[19] 5 U.S.C. § 8124(b)(1).

[20] *Claudio Vasquez,* 52 ECAB 496 (2002); *Herbert C. Holley,* 33 ECAB 140 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 22 and April 11, 2002 are affirmed.

Issued: December 22, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member