

**United States Department of Labor
Employees' Compensation Appeals Board**

DAVID R. KARCZEWSKI, Appellant)
and) Docket No. 03-1318
U.S. POSTAL SERVICE, POST OFFICE,) Issued: January 8, 2004
Buffalo, NY, Employer)

)

Appearances:
David R. Karczewski, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 14, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 22, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On September 11, 2001 appellant, then a 35-year-old letter carrier, filed an occupational disease claim alleging that he developed work-related stress that day while speaking with his supervisor, Leo Wheeler. Appellant stopped work that day and returned on January 7, 2002.

Appellant submitted a narrative statement on November 7, 2001 alleging that he worked in an abusive environment for over five years but that his current condition began on

September 11, 2001 and had not subsided. Appellant alleged that around 9:00 a.m. Mr. Wheeler pushed in close to his face and told him that he did not like him and called him inefficient and useless, which scared and intimidated appellant. Later that day, appellant stated that he called Mr. Wheeler from his postal route and Mr. Wheeler raised his voice and began berating and belittling him. Appellant telephoned Mr. Wheeler to inform him that he would be late finishing his route that day. Mr. Wheeler allegedly stated that he would make appellant's life miserable and that if appellant filed a grievance against him, he would just deny it. Mr. Wheeler claimed that the union would not help appellant and that he was the only person that mattered. Mr. Wheeler allegedly said that he would control appellant's future, that he did not need to follow any rules and the only rules were his. Mr. Wheeler allegedly concluded the conversation by stating that appellant was wasting his time and slammed the telephone down. Appellant stated that following the conversation, his chest felt tight and he was shaking uncontrollably. He drove back to the office, filled out the necessary paperwork and went home. He indicated that Mr. Wheeler displayed aggressive, violent, combative, threatening and humiliating behavior.

The employing establishment submitted documentation, including a grievance memorandum and statements, which controverted appellant's claim. In a letter dated September 29, 2001, Mr. Wheeler provided his version of the conversations he had with appellant on September 11, 2001. Mr. Wheeler explained that most of appellant's mail for that day's route was cased prior to appellant reporting to work so that he could leave the office at his scheduled time. He noted that appellant had usually been given an hour of street assistance each day because he had previously claimed being overburdened on his route. Mr. Wheeler indicated that other carriers who worked appellant's route in his absence were able to complete the route without any assistance, so he believed there might be a performance problem with appellant's methods. Mr. Wheeler stated:

"[Appellant] was observed playing with his headset. At 8:55 [a.m.], he made a trip to the men's room, finally at 9:05 [a.m.] he loaded his vehicle, yet at 9:15 [a.m.] he again went to the men's room. At 9:20 [a.m.] he sat back down at his case and started to verify changes. He appeared to be delaying his departure and I instructed him, saying, '[appellant] you can leave now.' He simply looked at me and left."

Mr. Wheeler further stated that sometime between 2:15 p.m. and 2:25 p.m. in the afternoon, appellant called him from the route to inform him that he could not finish the route in eight hours. Mr. Wheeler stated:

"I asked him what the problem was, it was n[o]t quite 2:30 [p.m.] and there was the 1 hour help in the office and he had left on time. He replied, 'you do n[o]t understand this route is over a lot more than an hour and it [i]s illegal to give router help. Don't you know the rules?' I explained I would not argue on the [tele]phone, it was a further waste of time, he should continue the route and if he could not finish the route in 8 hours, he should bring back what was left. I hung up the [tele]phone, further considered the situation and decided I needed to observe [appellant] on the route.... I went out there, went up and down every street and could not find [appellant] delivering the route. I received a call on my

cell[ular] [tele]phone, Postmaster [Anthony] Curella informed me, ‘Mr. Karczewski drove back to the post office, came in and asked for a CA-2, he filled it out and said he was going home on stress.’”

In a letter dated September 28, 2001, Mr. Curella the postmaster corroborated Mr. Wheeler’s assertions. He noted that appellant had received discipline on several occasions dating back to 1997, for failure to follow supervisor’s instructions, expanding his lunch time, and for failure to satisfactorily perform his duties as a letter carrier.

By decision dated March 18, 2002, the Office denied appellant’s emotional condition claim on the grounds that he failed to establish any compensable factors of employment.

In a letter dated April 12, 2003, appellant requested an oral hearing. Additional information was submitted to the record, including grievance documentation and statements from coworkers and union representatives to support the harassment claim. In an undated statement, Al DeChambeau asserted that he witnessed postal supervisors harass appellant. In another undated statement, Patrick Gettings discussed his own allegations of harassment at the duty station and alleged that there were many others who were subjected to harassment. In a statement dated October 18, 2002, Tony Minicucci indicated that he represented appellant regarding several issues involving his supervisor, Mr. Wheeler. Mr. Minicucci found through investigations that postal officials did route adjustments in the spring of 2001 and that several routes, including that of appellant, were given too much work. In a statement dated October 28, 2002, Arthur Odorczyk indicated that he witnessed appellant’s supervisor verbally harassing him about sorting his mail faster and further discussed his own mistreatment. In a statement dated October 29, 2002, Kevin McDonough asserted that he worked next to appellant for many years and witnessed on several occasions the harassment and intimidation by supervisors of the employing establishment. In a statement dated October 30, 2002, James Glaser asserted that he witnessed appellant many times being harassed and threatened at his duty station. In a statement also dated October 30, 2002, Richard Kim, the union president, alleged that appellant had been harassed for his inability to complete his route in eight hours. Mr. Kim asserted that on the afternoon of September 11, 2001, appellant called the office and informed Mr. Wheeler that he would not be able to complete his route in eight hours and Mr. Wheeler yelled at appellant over the telephone and said he would come out to show him how it was done.

An oral hearing was held on October 30, 2003 before a representative of the Office’s Branch of Hearings and Review. Appellant reiterated his account of harassment on September 11, 2001.

Following the hearing, appellant responded to assertions made by his supervisor regarding his work and also submitted letters commending his job performance and a newspaper article similarly commending appellant’s service. The employing establishment submitted additional information including copies of numerous disciplinary actions involving appellant’s job performance and statements from employing establishment supervisors.

By decision dated January 22, 2004, the Office hearing representative affirmed the March 18, 2002 Office decision.

LEGAL PRECEDENT

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. 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 (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. 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 Federal Employees' Compensation Act.² On the other hand, where disability results from an employee's emotional reaction to his or her regular or specially assigned-work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.³

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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.⁴ Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁵

ANALYSIS

Appellant's primary allegation in this case concern two conversations with his supervisor Mr. Wheeler on September 11, 2001. Actions by coworkers or supervisors that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.⁶ Mere perceptions of harassment or discrimination are not compensable

¹ See *Wanda G. Bailey*, 45 ECAB 835 (1994); see *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

² 5 U.S.C. §§ 8101-8193.

³ *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ See *Margaret Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 3.

⁵ *Donald E. Ewals*, 45 ECAB 111 (1993).

⁶ See *Marie Boylan*, *supra* note 3.

under the Act.⁷ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁸

Appellant alleged that at approximately 9:00 a.m. on September 11, 2001 Mr. Wheeler told him that he did not like him and that he was inefficient and useless. Mr. Wheeler countered that around 9:20 a.m. that morning, he told appellant that he could leave for his route at that time. He explained that it appeared appellant had been delaying his departure and that he needed to finish his route on time. Mr. Wheeler noted that appellant had previously complained that his route was overburdened and could not be completed within eight hours. The record contains numerous statements from employees and union representatives alleging that appellant and others were subjected to harassment in the workplace; however, their general allegations are too vague to establish a compensable factor of employment. Specifically, they do not provide any reference or specifics as to time, place or manner of the incident alleged by appellant on September 11, 2001.

Regarding the second incident that day, both appellant and Mr. Wheeler acknowledge that they talked by telephone around 2:15 p.m. when appellant called to inform Mr. Wheeler that he would not be able to complete the route during his shift. Appellant alleged that Mr. Wheeler raised his voice and berated and belittled him. He alleged that Mr. Wheeler threatened to make his life miserable if he filed a grievance and told him that the only rules were his and that he would control his future. There is nothing in the record to establish that Mr. Wheeler harassed appellant during his telephone conversation with appellant about completing the route. Again, the statements submitted to support the harassment claim do not corroborate this specific claim. In a statement dated October 30, 2002, Mr. Kim made reference to the afternoon conversation that appellant had with Mr. Wheeler on September 11, 2001; however, it is apparent that he simply reiterated appellant's assertions that Mr. Wheeler yelled at him over the telephone and did not personally witness the conversation. Therefore, his statement does not corroborate appellant's allegations.

The Board notes that appellant filed many grievances against the employing establishment related to harassment, however, the record established that the grievances were either resolved with no finding of error against the employing establishment, withdrawn or denied. Therefore, the record does not establish that these incidents constitute compensable factors of employment.

As appellant failed to establish any compensable employment factors, the Office properly declined to address the medical evidence of record.⁹

⁷ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁸ See *Joel Parker, Sr.*, 43 ECAB 220 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

⁹ *Bernard Snowden*, 49 ECAB 144, 148 (1997).

CONCLUSION

Under the circumstances described above, the Board finds that appellant has not established an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member