

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT G. BURNS and DEPARTMENT OF THE TREASURY,
PORT OF ENTRY, U.S. CUSTOMS SERVICE, Rouses Point, NY

*Docket No. 03-1648; Submitted on the Record;
Issued January 28, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an emotional and diabetic condition in the performance of duty.

On July 17, 2000 appellant, then a 52-year-old senior custom intelligence analyst, filed an occupational disease claim asserting that he was subjected to harassment and retaliation from representatives of the employing establishment which caused him severe stress, deterioration of his legs and feet and ultimately diabetes. Appellant indicated on his claim form that he first realized that the alleged disease or illness was caused or aggravated by his employment in August 1998. He retired on disability from the employing establishment on December 8, 1999.

Appellant submitted detailed statements outlining the actions of management which he alleged caused his emotional and medical conditions. He alleged that he was transferred to the office of the resident agent in charge (RAIC) at Rouses Point, New York in 1994, where Daniel H. Letourneau, the C made him the subject of continued retaliation for his past association with the former office of enforcement assistant, John Hensley. Appellant asserted that his previous involvement in high profile investigations and operations with Mr. Hensley created problems with employees at customs and that his loyalty to Mr. Hensley resulted in an excessive number of Internal Affairs and Inspector General Investigations. He alleged that Mr. Letourneau specifically created, promoted and maintained a hostile work environment without cause by subjecting him and other employees to unexplained mood swings and changes in behavior, ranging from calm to explosive. Appellant stated that Mr. Letourneau's conduct had included threatening and aggressive physical advances, defensive physical posturing and inducing violent behavior by yelling and screaming while invading appellant's and others personal space. He asserted that the supervisor had developed a system of employee informants in the office, which he used to obtain information regarding the activities of other employees and then confronted implicated employees in a hostile manner. Appellant alleged that Mr. Letourneau continually questioned the veracity of his statements with others in his field, which impacted the overall perception of his competence and integrity. He further asserted that the supervisor had infringed upon his privacy by routinely opening personal mail and copying

fax messages addressed to him. Appellant further indicated that Mr. Letourneau had openly asserted that he “keeps books on people,” which appellant alleged was meant to intimidate him and other employees. He also alleged that the supervisor manipulated the employee’s access to upper management when problems arose by providing upper level managers with versions of events that were highly distorted or slanted for his own protection.

In a statement submitted in support of his disability retirement, received August 7, 2000, appellant stated that Mr. Letourneau also smeared his personal and professional reputation by characterizing him as an “axe man” for certain factions of management and making representations that appellant had been the subject of an unresolved investigation by the Office of Internal Affairs. He further asserted that Mr. Letourneau began making derogatory remarks against him and reduced his work duties without cause and directed that his group supervisor, Michael J. Bridgeman, accompany him whenever he met with outside agencies. Appellant stated that the supervisor physically isolated him from two essential work groups with which he required contact to carry out his work duties and denounced his name to law enforcement officials with whom he worked.

Appellant indicated that in April 1997, he was admitted to the hospital, where 75 percent of his right foot was amputated. He stated that he was also hospitalized in 1998 and again in June 1999, for surgery on both his feet. Appellant further indicated that he sought professional assistance for his stress from a clinical psychologist and in December 1999, was no longer able to perform the duties of the position. He asserted that the severe stress caused increased hypertension and led to substantial weight gain which in turn, led directly to his contracting diabetes, further exacerbating the leg and feet conditions.

In a report dated January 27, 2000, Dr. Richard Smith, a clinical psychologist, reported that appellant was interviewed on several occasions and discussed his employment and medical history. Dr. Smith related that appellant seemed to be a workaholic whose main life satisfaction came from his work and that, when he was transferred to Rouses Point he had great difficulty with his supervisor, Mr. Letourneau, whom he feared. Dr. Smith indicated that appellant reported having cold sweats and shakes and being worried about deadlines such that he could not control his diabetes given his substantial job pressures. He stated that in April 1997, appellant had his feet examined by a surgeon who found the right foot to be severely gangrenous with diabetic complications. Dr. Smith opined that appellant’s job stress was so severe that it caused him to temporarily neglect the care of his foot resulting in amputation and caused the emotional reacting that resulted in his inability to sustain effective work.

Appellant also submitted a report from Dr. John Kennedy, an internist, dated September 9, 1999, who indicated that he first saw appellant on May 11, 1981 at which time he weighed 350 pounds and had high blood pressure. Dr. Kennedy noted that he saw appellant again in 1992 and 1997 and he had been diagnosed with Type II diabetes and undergone a partial amputation of his foot. He reported that just prior to amputation in 1997, he had a two-week history of an accident to his foot which became gangrenous, but that appellant indicated that he had been unable to see a doctor because he had been busy at work. Dr. Kennedy indicated that due to his excessive obesity, poor vascular system, hypertension and partial amputation of the foot, the impact of his condition was immense and horrendous on his lifestyle. He opined that

appellant was fully disabled noting that the stresses he found himself under and the type of work he performed precluded any management success of his diabetes and hypertension.

In a letter dated August 11, 2000, the Office of Workers' Compensation Programs requested a detailed chronological account of all the factors that appellant considered responsible for his condition. The Office advised appellant to also submit witness statements as well as Equal Employment Opportunity (EEO) and grievance resolutions if applicable.

In a statement regarding his injuries, appellant asserted that in December 1994, he began to suffer the first manifestations of stress related to his official duties of mild to moderate depression and anxiety, insomnia, withdrawal, restlessness, fatigue and overeating. He was largely unaware of his deteriorating health. Appellant indicated that there was a subtle escalation of these conditions from 1994 to 1997 and that he stated that he continued to involve himself further in work, totally oblivious to the reality that his working conditions were contributing to the aggravation of his physical and emotional health.

In a statement received August 24, 2000, Edmond J. Kerwick, a retired senior special agent who served as group supervisor when appellant arrived at the Rouses Point office discussed his tenure as supervisor. Mr. Kerwick indicated that in 1993, he served as acting RAIC, when the former agent retired until the position was filled by Mr. Letourneau. He stated that, at that time the overall working atmosphere of the group was productive and harmonious and that he enjoyed the cooperation and camaraderie of the office, until Mr. Letourneau arrived, who heralded a significant change in policy and demeanor on the part of management. He further stated:

“The new RA[I]C displayed a management style characterized by secrecy, stern discipline and a rigid adherence to written rules and regulations. Mr. Letourneau, as events later proved, inspired a working atmosphere of fear and insecurity.... By the time of the arrival of [appellant] at Rouses Point, the morale had deteriorated to the point of daily animosity among the office staff and agents. Mr. Letourneau had already made secret arrangements for me to be replaced as [g]roup [s]upervisor with Sr. Special Agent Mark Garrand, with whom he had been communicating regularly even before his selection as RA[I]C.”

“[Mr.] Garrand was present at least part of the time when [Mr.] Letourneau informed me and the administrative aides ... that a new intelligence analyst was to be transferred to Rouses Point from Los Angeles. [He] said that he knew of no good reason for the measure, in that we already had an analyst on board. Sometime in the period immediately preceding the arrival of [appellant], remarks were passed freely in front of the office staff both by [Mr.] Letourneau and by [Mr.] Garrand that [appellant] was a personal friend of LA SAC and other high ranking officials and was described as an ‘axe man’ for a certain faction of management. It was remarked by both parties in different settings that [appellant] has been the subject of unresolved investigations by Internal Affairs.... Mr. Letourneau further commented to me that he would see to it that [appellant] did not leave the office or contact anyone outside the [c]ustoms [s]ervice in the course of his duties.”

Mr. Kerwick further stated that immediately following appellant's arrival, Mr. Letourneau demanded that he obtain a copy of appellant's position description and that of another description for another analyst so that he could bring appellant's position description into conformity. Mr. Kerwick stated that Mr. Letourneau procured the documents on his own. He further stated that Mr. Letourneau declined to place appellant within the existing intelligence unit or with the working agents, but instead gave him a separate office by himself, thus physically isolating him from the rest of the work group.

Mr. Kerwick stated that he visually observed appellant display outward signs of stress and fatigue and that, although he knew him to be positive and upbeat when he arrived at Rouses Point, he watched constant rejection take him into what he described as a depressed state of mind. Mr. Kerwick indicated that Mr. Letourneau removed him from his group supervisor position in 1994 and replaced him with Mr. Garrand. He stated that at some point during his first years in tenure, Mr. Letourneau himself became the subject of an internal affairs investigation and when several of the staff was interviewed regarding his activities, the atmosphere in the office slid from poor to abominable. Mr. Kerwick indicated further that Mr. Letourneau directed a great deal of animosity toward appellant after his inquiry. He stated that Mr. Letourneau was eventually removed from his position and was replaced by Mr. Bridgeman, who from the onset totally alienated himself from the workforce and also created a hostile work environment.

By decision dated July 20, 2001, the Office found that two compensable employment factors occurred; that upon his arrival at Rouses Point appellant was characterized as an "axe man" for certain levels of management and that Mr. Letourneau commented to Mr. Kerwick that "he would see to it that [appellant] did not leave the office or contact anyone outside the [c]ustoms [s]ervice...." The Office however denied appellant's emotional condition claim on the grounds that the medical evidence of record failed to establish that appellant developed a medical condition caused, aggravated or contributed to by the identified compensable factors of employment.

On August 17, 2001 appellant through counsel requested an oral hearing and that subpoenas be issued for employees of the employing establishment to present evidence at the hearing. Appellant's counsel submitted a report from Dr. Kennedy dated April 4, 2002, in which he related again that he initially treated appellant for obesity and hypertension and he further discussed the course of treatment over the years of appellant's diagnosed diabetes and related conditions. The physician further stated: "In this case, I would have to say in my opinion that the hostile work environment caused by [appellant's] supervisors at [c]ustoms in Rouses Point, New York, caused his stress which brought on the diabetes and the amputation was directly related to the diabetic peripheral vascular occlusive disease that occurred."

A hearing was held on April 24, 2002 at which appellant, with counsel, provided testimony about his alleged stressful and hostile work environment due to the "backdoor politics" utilized by Mr. Letourneau. Appellant testified that he was intentionally isolated in his position, demeaned and continually harassed by Mr. Letourneau and that Mr. Garrands, an agent who was promoted to group supervisor after Mr. Kerwick retired in 1999, also began to harass and discredit him. Appellant testified that Mr. Kerwick, a supervisor, who had generally supported his claim retired for stress related to harassment by Mr. Letourneau as well. He testified that Mr. Kerwick was getting to a point where "he was going to put a gun to his mouth."

Appellant also testified that Mr. Bridgeman was another supervisor who was subjected to harassment by Mr. Letourneau, which appellant believed affected him emotionally. He testified that Bridgeman became the resident agent after Mr. Letourneau. Appellant further testified regarding his obesity, diabetic condition and ultimate foot amputation as well as anxiety attacks which he attributed to the actions of Mr. Letourneau in the workplace.

Appellant's counsel submitted additional clinical and operative notes to the record following the hearing. He submitted a supplemental statement from Mr. Kerwick dated May 20, 2002, in support of the claim, which discussed the physical and emotional toll he believed the work environment took on appellant's health.

In further support, appellant submitted a statement from David Conrad, a former senior criminal investigator, for the employing establishment dated July 18, 2002, which discussed that many employees had difficult times working with Mr. Letourneau including appellant. He stated that Mr. Bridgeman told him on one occasion that there were three employees including appellant that "could not do anything right in the eyes of Mr. Letourneau and that Mr. Letourneau would find fault with anything that they did harassing them in various ways including restricting their professional (and necessary) contacts in law enforcement."

Appellant submitted a statement from Jeremiah Sullivan a former special agent in charge for the employing establishment dated July 21, 2002, which indicated that during his tenure prior to May 1998 he received several hostile work environment complaints from employees at Rouses Point including appellant. He stated that the complaints centered around both the negative office environment and threatening behavior caused and exhibited by the "RAIC" Mr. Letourneau, who was the senior management official in that office. Mr. Sullivan indicated that a formal inquiry was conducted and as a result of its findings the RAIC received a directed assignment to a nonsupervisory position.

Appellant further submitted a statement from Senior Special Agent Kevin Cleary dated October 22, 2001, which discussed personal allegations of harassment by Mr. Letourneau against himself and the hostile work environment under Mr. Letourneau's tenure. Appellant also submitted a letter from John Hensley, Special Agent in charge in Los Angeles, dated July 17, 1999, which commended appellant's job performance with the employing establishment.

In a statement submitted following the hearing dated June 14, 2002, Mr. Bridgeman, appellant's former supervisor challenged appellant's claim. He indicated that he directly supervised appellant from March 17, 1997 until his retirement on December 8, 1999. Mr. Bridgeman discussed that the testimony that appellant provided during the hearing regarding the atmosphere of the office was untrue and that he specifically exercised a great deal of compassion as did others and gave appellant many allowances because of his difficulties in performing his duties. He noted that appellant obviously resented management's oversight of his position and his supervisory direction and asserted that he was not subjected to a hostile work environment. Mr. Bridgeman maintained that no one was out to get appellant and denied his allegation that he was personally under stress caused by Mr. Letourneau.

By decision dated May 2, 2003, an Office hearing representative agreed with the Office's prior finding, that two employment factors occurred in the performance of duty; that prior to

appellant's arrival at Rouses Point he was characterized as an "axe man" for certain levels of management and that Mr. Letourneau commented to a supervisor that he would see to it that appellant did not leave the office or contact anyone outside the customs service. The Office hearing representative found; however, that the medical evidence submitted in support of the claim did not provide any well-rationalized medical opinion that appellant's conditions were a result of employment factors and affirmed the prior decision.

The Board finds that appellant has failed to establish that he sustained emotional and diabetic conditions causally related to work factors.

In an emotional condition claim, appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the mental condition for which he claims compensation was caused or adversely affected by factors of his federal employment. To establish 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.² There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act.³ These injuries occur in the course of the employment, but nevertheless are not covered because they are found not to have arisen out of the employment.⁴

In this case, appellant alleged that his supervisor, Mr. Letourneau specifically created, promoted and maintained a hostile work environment without cause by subjecting him and other employees to threatening and aggressive physical advances, defensive physical posturing and violent behavior by yelling and screaming while invading appellant's and others personal space. Appellant alleged that Mr. Letourneau continually questioned the veracity of appellant's statements with others in his field and also smeared his personal and professional reputation by characterizing him as an "axe man" for certain factions of management and making representations that appellant had been the subject of an unresolved investigation by the Office of Internal Affairs. Appellant further asserted that Mr. Letourneau began making derogatory remarks against him and reduced his work duties without cause and that the supervisor physically isolated him from two essential work groups, with which he required contact to carry out his work duties and denounced his name to law enforcement officials with whom he worked.

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

² *Samuel Senkow*, 50 ECAB 370, 373 (1999).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Frank B. Gwozdz*, 50 ECAB 434, 436 (1999).

Verbal altercations and difficult relationship with supervisors, when sufficiently detailed by the claimant and supported by the record may constitute factors of employment.⁵ Verbal altercations may constitute harassment, but 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.⁶ An employee's complaints concerning the manner in which a supervisor performs his duties or exercises his supervisory discretion falls, as a rule, outside the scope of coverage provided by the Act.⁷ This principle recognizes that supervisors or managers in general must be allowed to perform their duties that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.⁸

Many of appellant's allegations are either unsubstantiated or concern administrative or personnel matters of the employing establishment, which are not covered under the Act unless error or abuse is shown. 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. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.⁹

The Office found that only two of appellant's many allegations of work factors were compensable based on the statements provided Mr. Kerwick -- that prior to appellant's arrival at Rouses Point he was characterized as an "axe man" for certain levels of management and that Mr. Letourneau commented to a supervisor that he would see to it that appellant did not leave the office or contact anyone outside the Customs Service. The record reflects that Mr. Kerwick also had emotional reactions to the manner in which Mr. Letourneau carried out his duties and some of his statements depict a level of high emotion with regard to actions against appellant. Mr. Kerwick made clear his perception that after Mr. Letourneau took the RAIC position the workplace atmosphere was hostile. However, outside of the specific statements accepted by the Office as factual, Mr. Kerwick's assertions of hostility and mistreatment are unsupported. He asserted that Mr. Letourneau subjected appellant to harassment; however, his statements do not confirm appellant's assertions that Mr. Letourneau committed error or abuse in the administration of his duties.

Appellant submitted three statements from personnel who discussed the hostile climate of the employing establishment under Mr. Letourneau and allegations of harassment by the RAIC against appellant and other employees. The statements by Mr. Conrad and Mr. Sullivan are both too vague with regard to Mr. Letourneau's specific actions towards appellant to constitute the type of corroboration necessary to establish his claim. Mr. Conrad only related information he

⁵ *Christopher Jolicoeur*, 49 ECAB 553, 556 (1998).

⁶ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁷ *Id.*

⁸ *Alfred Arts*, 45 ECAB 530 (1994).

⁹ *Michael Thomas Plante*, 44 ECAB 510 (1993).

learned from Mr. Bridgeman; namely that there were employees including appellant that “could not do anything right in the eyes of Mr. Letourneau and that he would find fault with anything that they did, harassing them in various ways, including restricting their professional (and necessary) contacts in law enforcement.” This statement does not establish first hand knowledge of any acts of harassment by Mr. Letourneau as alleged by appellant, particularly those accepted by the Office. Mr. Sullivan indicated that a formal inquiry was conducted of Mr. Letourneau’s alleged actions against appellant and that as a result of those findings Mr. Letourneau received a directed assignment in a nonsupervisory position. Without further information regarding the investigation or specific allegations of harassment against appellant by Mr. Letourneau, his statement can not be used to corroborate the claim. Mr. Cleary delineates several allegations of harassment by Mr. Letourneau against himself, in his statement of record; however, he does not discuss the supervisor’s actions towards appellant. Mr. Hensley’s letter serves only to commend appellant’s service for the employing establishment and does not support his allegations of harassment in this case.

Furthermore, the Board notes that there is evidence contradictory to appellant’s claim in the record from Mr. Bridgeman, who maintained that appellant was not subjected to a hostile work environment. He asserted that many of the staff was compassionate towards appellant and that no one was out to get him including Mr. Letourneau.

In the present case, appellant has established two compensable factors of employment with respect to Mr. Letourneau characterizing him as an “axe man” for certain levels of management and that he would see to it that appellant had limited contact to anyone outside of the employing establishment. However, 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 claim for an emotional or physical condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or physical disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁰

Regarding the medical evidence, the record contains reports from Dr. John Kennedy, an internist, who treated appellant intermittently from 1981 through 1997. He mainly discussed appellant’s medical conditions and prognosis and related appellant’s complaints that a highly stressful work environment caused the conditions. The record also contains medical evidence from Dr. Smith, a clinical psychologist, who performed several interviews of appellant, who noted in his January 27, 2000 report, that he believed that appellant did not seek appropriate medical attention for his foot due to his preoccupation with job stress, which resulted in the partial amputation of appellant’s foot.

Neither physician specifically related appellant’s condition to the only two accepted work factors in this case. Their vagueness on these accepted factors render their reports deficient. Rather than establishing the requisite causal connection between the accepted work factors and appellant’s stress and diabetic condition, the medical evidence in this case supports that he did not seek much needed medical attention in a sufficient period of time due to the stressful

¹⁰ See *William P. George*, 43 ECAB 1159, 1168 (1992).

demands of his job. His reactions to incidents and situations in his work environment that produced anxiety and stress are not covered under the Act or were not established as factual. While appellant has alleged that his work environment was hostile and specifically that Mr. Letourneau acted abusively, there is no evidence in the record supporting these allegations. Appellant has failed to provide any specific details of managerial actions relating to administrative or personnel matters that could be shown to be error or abuse. Therefore, he has failed to establish that he developed emotional and diabetic conditions in the performance of duty and the Office properly denied his claim.

The May 2, 2003 decision of the Office of Workers' Compensation Programs is affirmed.¹¹

Dated, Washington, DC
January 28, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹¹ The Board notes that although the hearing representative did not make a specific finding about the denial of appellant's request for subpoenas in the May 2, 2003 decision, the hearing representative effectively made such a decision in a letter of record dated April 1, 2002, thus, it is within the Board's jurisdiction. Section 8126 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 regulations 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. *See* 20 C.F.R. § 10.619. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained." *Id.* The Office hearing representative determined that appellant had not provided specific discussion on the topic of the testimony or explanation as to why the testimony was directly relevant to the issue at hand. The Office hearing representative retains discretion on whether to issue a subpoena. The Board, therefore, finds that the hearing representative properly denied appellant's subpoena request in this case.