

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

KIM A. BARANOSKY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wilkes Barre, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 03-678
Issued: July 9, 2004**

Appearances:
Paul M. Jennings, Esq., for the appellant
Miriam D. Ozur, for the Director

Oral Argument May 6, 2004

DECISION AND ORDER

Before:

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

JURISDICTION

On January 21, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated October 18, 2002. Under 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 the Office properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

Appellant, a 40-year-old mail driver, filed a traumatic injury claim on November 14, 2001, alleging that she experienced severe anxiety, panic and fear of exposure to Anthrax on October 28, 2001 when a white powdery substance was found on postal equipment. Appellant alleged that management failed to undertake appropriate corrective action to remedy this hazardous situation. The employing establishment controverted the claim on the form, stating

that no white powder was found and that appellant was not at work on the alleged date of exposure.

By letter dated December 17, 2001, the Office advised appellant that she needed to submit additional information in support of her claim. The Office requested that she submit additional medical evidence in support of her claim, including a comprehensive medical report and provide factual evidence, which would establish that she had developed an emotional condition caused by factors of her employment.

By decision dated January 18, 2002, the Office denied appellant's claim on the basis that she failed to establish that an injury occurred in the performance of duty. The Office found that the evidence was insufficient to establish that appellant experienced the claimed incident as alleged.

By letter dated May 8, 2002, appellant's attorney requested reconsideration. By letter dated June 4, 2002, appellant requested reconsideration and submitted additional evidence including a January 15, 2001 report from Dr. Matthew Berger, a psychiatrist; three employing establishment bulletins regarding Anthrax; and a May 8, 2002 narrative statement.

In his report, Dr. Berger stated:

“[Appellant's] preexisting symptoms of depression and anxiety were clearly exacerbated on October 28, 2001 when she learned of a “white powder” at her workplace. Anthrax incidents were occurring in [employing establishment] facilities around our country at this time. [Appellant's] underlying symptoms of anxiety escalated into full-blown panic attacks. She experienced paralyzing fear, shortness of breath, avoidance of stimuli which reminds her of the incident, pressure in her chest, a choking sensation, difficulty concentrating, anxiety, weakness, dizziness, tingling in her extremities, heart palpitations, sweating and butterflies in her stomach. Symptoms of depression increased into helplessness, hopelessness, worry, rumination, amotivation, anhedonia, insomnia, irritability, loss of libido and impatience/mood reactivity.... It is my opinion that she is more debilitated by symptoms of recurring major depression with panic attacks since the ‘white powder’ incident at her workplace on October 28, 2001. She is not emotionally, or cognitively stable to return to work at present.”

Appellant stated that, as of October 7, 2001, the employing establishment advised her of the possibility of bombs and Anthrax being transported through the mail system; on October 9, 2001 she learned that a postal worker had died due to inhalation of Anthrax at a mailroom; and on October 14, 2001 the employing establishment issued gloves and masks, although she was told the gloves would not protect her from Anthrax exposure. Appellant related that discussions of the risk of Anthrax exposure became commonplace at her workplace and noted that her plant manager was quoted in the local newspaper discussing the possibility of postal employees coming into contact with tainted mail. Appellant became more fearful of Anthrax exposure on October 18, 2001 when she learned that buildings at the U.S. Capitol and House of Representatives were shut down because Anthrax was found on the grounds.

On October 24, 2001 management distributed a memorandum which discussed the risks of Anthrax exposure at the employing establishment and outlined the precautions postal employees should undertake. Appellant stated that shortly afterward a suspicious white powder was discovered at a post office located only seven miles from her postal station, which caused the evacuation of that building. Appellant believed that because mail was processed at her worksite prior to being transported to this nearby post office, she began to fear that this “white powder” had made its way to her worksite. Appellant stated that learning of this situation caused numbness, breathlessness, fear of dying and sleepless nights. Appellant felt that postal management was not taking sufficient precautions to protect employees from Anthrax exposure. Appellant was off work on October 26, 2001 and was later told that granule powder was found on a flat sorter at her worksite on October 31, 2001. The powder was subsequently tested and determined to be crushed animal crackers. She also related that “white powder” was found at the worksite on November 9 and December 24, 2001, although these substances contained no traces of Anthrax.

The employing establishment distributed three memoranda, dated October 24, 25 and 26, 2001, which outlined the precautionary measures it had taken to protect employees from possible Anthrax exposure. These included the purchase of four million face masks; implementing a new mail vacuuming system; looking into the purchase of state-of-the-art sanitizing equipment; issuing stronger, anti-bacterial cleaning chemicals to maintenance personnel; shutting down compressed air attachments and air filtration systems; and, where necessary, evacuating employees from postal buildings when suspicious-looking substances are found. The employing establishment advised its employees to be aware of any suspicious mail and to immediately report any illness to an immediate supervisor.

By decision dated October 18, 2002, the Office denied modification of the January 18, 2002 decision. The Office noted that although appellant’s initial filing for a traumatic injury was based on an alleged incident of white powder being found on postal equipment on October 28, 2001 the evidence of record indicated that she was not at work on the alleged date of exposure. The Office stated that, on reconsideration, appellant’s attorney had expanded the claim into one based on occupational disease; the Office found that the expanded claim of events was not sufficiently related to appellant’s day-to-day duties to arise within the performance of duty.

LEGAL PRECEDENT

To establish appellant’s claim that she 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.¹ Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment.²

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² *Id.*

In the case of *Lillian Cutler*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising 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 the concept or coverage under the Act.⁵ When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her 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 her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁶ Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁷ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence, that the condition for which she claims compensation was caused or adversely affected by employment factors.⁹ 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.¹⁰

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.¹¹ 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

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

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 3.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

⁹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁰ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹²

ANALYSIS

In the present case, appellant alleged that she sustained an emotional condition as a result of possible exposure to a white powder substance on October 28, 2001, which was found on postal equipment at the worksite. The Board notes that appellant alleged that this incident occurred on October 28, 2001, a date on which she was not at work. On the November 14, 2001 claim form, appellant noted that her last day of work was October 25, 2001. Appellant was not required by her regular or specially assigned duties to be in close proximity to any “white powder” as found on the premises.¹³ The record is devoid of any evidence that appellant ingested, inhaled or in any manner came into physical contact with any suspicious powdery substance while in the performance of duty. This case can, therefore, be distinguished from those, in which the claimant is exposed to an unknown and potentially dangerous substance.¹⁴ Furthermore, although appellant stated that suspicious powders were found at the worksite on October 31, November 9 and December 24, 2001, these substances were subsequently tested and contained no traces of Anthrax. The Board finds that appellant’s reaction was self-generated and based on her perception of events. However, perceptions and feelings alone are not compensable factors.¹⁵

Appellant’s allegation that her supervisors failed to take appropriate actions to correct a potentially hazardous situation and protect employees from potential Anthrax exposure falls into the category of administrative or personnel actions.¹⁶ In *Thomas D. McEuen*,¹⁷ the Board held that an employee’s emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such

¹² *Id.*

¹³ Where the disability does not result from an employee’s emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability would not come within the coverage of the Act. See *Lillian Cutler*, *supra* note 3.

¹⁴ See *Judy C. Rogers*, 54 ECAB ____ (Docket No. 03-565, issued July 9, 2003); see *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

¹⁵ *Pamela R. Rice*, *supra* note 9.

¹⁶ See *Marguerite J. Toland*, 52 ECAB 294 (2001). (An employee’s complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his 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).

¹⁷ See *Thomas D. McEuen*, *supra* note 8.

error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The Board finds that the employing establishment acted reasonably in this administrative matter. Postal management promptly notified employees, in three bulletins, of the precautionary measures it was undertaking to protect employees from Anthrax exposure. The employing establishment advised employees to be aware of any suspicious mail and to immediately report any illness to an immediate supervisor. Appellant has presented no evidence to support that the employing establishment erred or acted abusively with regard to the actions taken in response to potentially hazardous substances. Appellant has not established administrative error or abuse in regard to the measures taken by management in response to the possibility of workplace Anthrax exposure. The Board finds that appellant has provided insufficient evidence to establish that the employing establishment acted unreasonably or committed error in discharging its administrative duties with regard to this incident.

The Board notes that, since appellant has not established a compensable work factor, the medical evidence will not be considered.¹⁸

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

¹⁸ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2002 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 9, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member