

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

STEVEN M. SCHWARTZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Ft. Lauderdale, FL, Employer**

)
)
)
)
)
)
)
)

**Docket No. 04-236
Issued: March 29, 2004**

Appearances:
Steven M. Schwartz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 4, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 28, 2003, denying his request for reconsideration and a July 16, 2003 decision that denied his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition causally related to factors of his employment; and (2) whether the Office properly refused to reopen appellant's claim for further merit consideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 18, 2001 appellant, then a 41-year-old clerk, filed an occupational disease claim alleging that he sustained an emotional condition causally related to factors of his

employment.¹ He alleged that on October 11, 2001 he was forced to break down mail in a manner that caused him to have a panic attack. Appellant stated that he had advised the employing establishment that he had panic attacks and felt “closed in” whenever he did not have at least a four- to six-foot work space with a clear view of the back door. He also alleged that his supervisor reprimanded and harassed him about his requests for housekeeping that were based on Occupational Safety and Health Administration (OSHA) standards and safety manuals.²

In a November 9, 2001 memorandum, Jeanette Pringle, supervisor of customer services, stated that appellant was instructed to perform housekeeping duties after distributing the mail because the carriers needed to obtain the mail as soon as possible. She stated that, if a safety matter was involved, however, that matter would be corrected before the distribution of mail. Ms. Pringle denied that appellant was harassed.

By letter dated November 16, 2001, Lois Paulson, an employing establishment human resources specialist, controverted appellant’s claim and stated that his modified distribution clerk tasks³ included sorting and distributing mail to carrier routes and boxes and staging third-class mail. She noted that appellant had performed this position for six months and there was no work restriction requiring a four- to six-foot work space with a clear view to the back door. Ms. Paulson denied that the employing establishment had erred or acted abusively towards appellant.

Appellant also submitted medical evidence in support of his claim.

By decision dated October 11, 2002, the Office denied appellant’s emotional condition claim on the grounds that he had failed to establish any compensable factors of employment.

Appellant requested a hearing that was held on April 22, 2003.

By decision dated and finalized July 16, 2003, the Office hearing representative affirmed the Office’s October 11, 2002 decision.

¹ Appellant has three accepted emotional condition claims for injuries on August 25, 1993 (anxiety disorder), October 19, 1996 (exacerbation of anxiety disorder and depression) and February 8, 2000 (anxiety and depression) that were accepted by the Office under file numbers A6-586524, 060694619 and 06200747, respectively.

² At the hearing held in this case, appellant alleged that he was not allowed to move hampers and empty mail trays before distributing mail and these trays and hampers blocked his egress from the facility and made him feel closed in. He alleged that his supervisor told him he did not work fast enough and gave him frequent instructions on how to perform his job.

³ Appellant began working a limited-duty position effective April 23, 2001 based on restrictions established by his physician for his accepted August 25, 1993 employment injury. The job offer signed by appellant’s treating Board-certified psychiatrist, Dr. Anthony F. Yacona, did not indicate that he needed to work in a four- to six-foot space with a clear view of the back door.

Appellant requested reconsideration and submitted additional evidence consisting of copies of four pages from a union collective bargaining agreement.⁴

By decision dated October 28, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of his request for reconsideration was insufficient to warrant further merit review.⁵

LEGAL PRECEDENT -- ISSUE 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.⁶ 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.⁷ 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.⁸ 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 Where appellant alleges compensable factors of employment, he must substantiate such allegations with probative and reliable evidence.¹⁰

ANALYSIS -- ISSUE 1

Appellant alleged that his supervisor reprimanded and harassed him regarding his "housekeeping" concerns that mail trays and hampers were not kept out of the way and blocked his egress from the facility. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment

⁴ The Board notes that appellant's request for reconsideration refers to other exhibits. However, the Office received only the collective bargaining agreement.

⁵ The record contains evidence submitted subsequent to the Office's October 28, 2003 decision. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

⁹ *Elizabeth Pinero*, 46 ECAB 123 (1994); *Michael Thomas Plante*, 44 ECAB 510 (1993).

¹⁰ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

factors.¹¹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹² The employing establishment denied that appellant was harassed regarding his safety concerns. His supervisor stated that appellant was expected to distribute mail before performing any housekeeping activities, but that housekeeping matters involving safety would take priority over mail distribution. The supervisor denied harassing appellant and appellant has submitted insufficient evidence to establish that he was harassed by his supervisor.

Appellant alleged that his supervisor frequently told him to work faster and gave him instructions on how to perform his job. Supervisory discussions of job performance are administrative matters of the employing establishment and are covered under the Act, only when a showing of error or abuse is made.¹³ In this case, appellant did not provide evidence establishing that his supervisor erred or acted abusively in giving him instructions regarding his job performance. Therefore, this allegation is not deemed a compensable employment factor.

Appellant alleged that on October 11, 2001 he was forced to break down the mail in a manner that caused a panic attack. He alleged that he was not allowed to move hampers and empty mail trays before distributing mail. Appellant alleged that the hampers and trays blocked his means of exit from the facility and made him feel closed in. He stated that he experienced panic attacks whenever he could not work in a space of at least four- to six-feet with a clear view of the back door. Assignment of work duties and work space is an administrative function, so that appellant's reaction to his assignment of work space would be covered only if he could establish error or abuse by the employing establishment, which he has not done.¹⁴ What may be covered under the Act, however, is appellant's reaction to his actual physical work environment.¹⁵ He attributed his emotional condition not only to the assignment of his work space, but also to the closeness of the space itself. The record does not contain a physical description with size dimensions of appellant's work space. Therefore, it is not possible to ascertain whether the work space and appellant's reaction to it, constitutes a compensable factor of employment. On remand the Office should obtain a description of appellant's work space with size dimensions such as length, width and height, the location and size dimensions of areas of ingress and egress, the placement of furniture and equipment and any other pertinent information. Thereafter, the Office should adjudicate whether appellant has established a compensable factor and if so, develop the medical evidence as appropriate.

¹¹ *David W. Shirey*, 42 ECAB 783 (1991); *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹² *Donna J. DiBernardo*, 47 ECAB 700 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

¹³ *Lorna R. Strong*, 45 ECAB 470 (1994).

¹⁴ *Michael Thomas Plante*, *supra* note 9.

¹⁵ *Kathleen D. Walker*, *supra* note 11.

CONCLUSION

This case requires further development on the issue of appellant's claim for an emotional condition.¹⁶

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 28 and July 16, 2003 are set aside and the case is remanded for further action consistent with this decision.

Issued: March 29, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁶ In light of the Board's resolution of the first issue, the second issue is moot.