

submitted a note informing him that due to the cold weather he was experiencing pain in his left knee. Mr. Medina asked appellant and his union representative to discuss this matter in the office and informed appellant that he could not “properly forecast the day’s workload with ... daily notes.” He asserted that appellant’s current medical documentation supported that appellant could perform the duties assigned and that if appellant had additional medical issues, he required additional updated medical documentation. Appellant asserted that this was harassment and left the office. Appellant did not respond to Mr. Medina’s pages to return to the office and, when confronted by Mr. Medina at his workstation, “became very loud and disrespectful toward me shouting ‘I’m not going to any office! Send me home!’” Mr. Medina concluded that appellant’s continued shouting created an unsafe work environment and warranted placement in emergency off-duty status, without pay.

Mr. Medina completed a statement on March 25, 2002 noting that on March 22, 2002 appellant advised him that his left knee was hurting in a note. Mr. Medina requested that appellant and his union representative report to his office to discuss the note. He informed appellant that he could not accept daily notes due to the need to prepare a work schedule. Mr. Medina stated that appellant then became upset, stating that he had a condition and “raising his voice” to declare that he was not interested in pursuing the conversation. Appellant then left the office. Mr. Medina stated that he paged appellant twice over the intercom, with no response and he then went to appellant’s workstation and asked him to return to the office to continue the discussion. Appellant refused to cooperate and again raised his voice. Mr. Medina placed appellant in an emergency off-work placement for his display of disrespect to a supervisor and for creating an unsafe work area. He ordered appellant to report to work on March 23, 2002 as scheduled. Janet Felix, a supervisor, submitted a witness’ statement dated March 22, 2002 confirming Mr. Medina’s account of events.

Robert Bethune, a manager, completed a statement on February 4, 2002 and noted that appellant complained about Ms. Felix’s request for medical evidence of his incapacity to work.

On February 12, 2002 Ms. Felix issued appellant a letter of warning finding that he was absent without leave and demonstrated unacceptable behavior. She stated that on January 9, 2002 appellant requested two hours of sick leave due to his knee condition. Ms. Felix stated that she made appropriate accommodations, but that appellant was not satisfied. She requested medical documentation in support of appellant’s leave request and he then began a “verbal tirade” asserting that his personnel file contained the necessary medical documentation. Appellant left early on January 9, 2002 and telephoned the employing establishment on January 10, 2002 stating that he would not report to work until January 15, 2002. The medical documentation appellant submitted on January 15, 2002 did not specify the dates of his disability for work and Ms. Felix determined that appellant was absent without leave. She found that appellant had voluntarily deserted the mail before making a proper disposition and had failed to conduct himself in a manner which reflected favorably on the employing establishment. Ms. Felix noted that appellant failed to appear for two scheduled predisciplinary conferences.

In a statement dated March 21, 2002, Ms. Felix submitted a witness statement noting that on March 21, 2002, Mr. Medina had a discussion with appellant regarding appellant’s request for five hours of union time. Mr. Medina informed appellant that he needed a written statement of the union matters that required his attention. Appellant informed him that he had a 10 page letter

and inquired whether Mr. Medina required a copy. Mr. Medina asked for a note with a list of the matters involved. Appellant raised his voice and Mr. Medina asked to speak with him in the office. Appellant complied.

In a letter dated May 15, 2002, the Office requested additional evidence from appellant. Appellant submitted a medical report from Dr. Harold Koenigsberg, a Board-certified psychiatrist, dated June 11, 2002 diagnosing panic disorder. In a separate report of the same date, Dr. Koenigsberg stated that appellant became disabled as a direct result of his supervisor at work.

By decision dated July 17, 2002, the Office denied appellant's claim finding that he failed to substantiate a compensable factor of employment.

Appellant initially requested an oral hearing by letter dated August 12, 2002. In a letter dated October 8, 2002, appellant requested reconsideration rather than an oral hearing.

In support of his requests for reconsideration, appellant submitted additional evidence documenting his knee condition. Appellant's physician, Dr. Eial Fairman, restricted appellant to 6 to 8 hours of regular work depending on his pain, building delivery only with no overtime. He supported these restrictions from November 9, 2001 through February 22, 2002.

In a statement dated March 24, 2002, Robert Mendez, a shop steward, described the March 22, 2002 incident noting that Mr. Medina informed appellant that he would no longer accept daily notes from appellant as his knee condition. Appellant stated that the employing establishment was aware of his medical limitations and that the requests for medical documentation was harassment. Appellant returned to his route. Mr. Medina "seemed to be upset that [appellant] refused to further discuss the issue." He called appellant on the intercom several times requesting that appellant return to the office. Mr. Medina then accompanied Mr. Mendez to appellant's workstation and requested that appellant return to the office. Appellant again stated that this was harassment and asked to be allowed to continue his work. Mr. Medina made several more attempts to elicit appellant's cooperation and then suspended appellant for failure to follow instructions. Appellant repeated his assertion that this was harassment.

In a separate statement also dated March 24, 2002, Mr. Mendez noted that appellant reported that he was embarrassed to discuss his medical condition in an open caged area with no privacy. He stated that appellant was humiliated and intimidated by the way Mr. Medina continued to yell his name for him to return to his office. Mr. Mendez stated that appellant was a very diligent and dedicated shop steward and that he had observed appellant's fatigue following his attempts to process grievances in a timely fashion.

Appellant submitted a statement dated March 22, 2002, noting that he has an employment-related knee condition. He asserted that prior to Mr. Bethune's tenure as station manager, he had no problems regarding his work restrictions. Appellant asserted that with Mr. Bethune's arrival harassment began. He contended that he previously had an agreement with Mr. Medina that as soon as possible he would provide his daily knee condition to give Mr. Medina time to set his worksheet. Appellant alleged that on March 13, 2002 he had a

discussion with Mr. Medina regarding a note detailing his knee pain. He stated: "I felt very intimidated that he took me to an open caged area with no privacy." Appellant asserted that Mr. Medina stated that he was tired of appellant's notes regarding his knee and that appellant was harassing him with the notes. Mr. Medina also stated that he did not have medical documentation supporting appellant's requested accommodations. Appellant also alleged that Mr. Medina attempted to require him to work overtime in violation of his medical restrictions following a period union time. Appellant alleged that Mr. Medina was harassing him, he then provided Mr. Medina with a personal copy of his medical restrictions and asserted that Mr. Medina stated that appellant was harassing him.

Regarding the incident on March 22, 2002 appellant stated that due to the extreme cold his left knee hurt and he notified Mr. Medina that he was experiencing pain. Mr. Medina requested a meeting and appellant with his representative reported to the cage area. Appellant found the location of the meeting humiliating. He stated that Mr. Medina repeated the conversation of March 13, 2002 and that appellant felt that this was harassment. Appellant repeatedly stated that the conversation constituted harassment and then returned to his workstation. He noted that he was embarrassed because Mr. Medina called him over the intercom system and that he continued to work. Mr. Medina then approached appellant's workstation and instructed him to return to the cage area. Appellant again stated that this conduct was harassment and asked to be left alone. He stated: "Mr. Medina was persistent and continued harassing me to return to the caged area, then he instructed me to leave the building...."

Appellant further alleged that he was treated unfairly on January 9, 2002 by Ms. Felix. He stated that he notified Ms. Felix of his left knee pain, that she requested medical documentation and that she did not allow appellant to return to work until he had visited his physician. Appellant stated: "She purposely denied me from returning to work until I can produce proper documentation, then after I returned to work and requested administrative leave, she did not give me my copy of [request for leave slip] until March 6, 2002."

Appellant requested union time on February 4, 2002. Appellant completed a letter on February 10, 2002 and grieved the lack of union time accorded him by management. Appellant stated that Ms. Felix denied him the time necessary to investigate and prepare pending grievances.

In a statement dated February 27, 2002, Mr. Mendez reported that Mr. Bethune and Ms. Felix wanted to discuss appellant's absence without leave (AWOL) as well as a statement appellant made "You have to be blessed to work at the Post Office." Appellant stated that he was not feeling well, that he wanted to be left alone and asked that the supervisors stop harassing him. Mr. Mendez concluded by stating: "I felt that management was harassing [appellant]. First they said it was not a PDI [predisciplinary investigation] and they continued questioning [appellant] concerning AWOL which can lead to disciplinary charges."

In a separate statement dated March 4, 2002, appellant reported on February 22, 2002 he requested sick leave due to left knee pain from Ms. Felix. He stated that he would provide medical documentation after visiting his physician. Appellant then telephoned Mr. Medina on Friday, February 23, 2002 to notify him that his physician stated that he should not return to

work until February 25, 2002. Mr. Medina instructed appellant to call on Saturday, the following morning, to notify him whether appellant would report to work. Upon his return to work on February 25, 2002 appellant noted that his leave slip had been processed as absent without leave for Saturday, February 23, 2002. Appellant also stated that in response to a coworker's sneeze and the resultant God bless you's, appellant commented, "We all need to be blessed working in the [employing establishment]." Mr. Bethune inquired about this statement and also about appellant's absence on February 23, 2002. Appellant asked if this line of questioning was going to lead to discipline and stated that if so, he required representation. Appellant informed Mr. Bethune that he did not feel well and attempted to return to his work site. Mr. Bethune directed appellant to go to the manager's office and wait for him there. He provided appellant with Mr. Mendez as representation and then Mr. Bethune and Ms. Felix proceeded to question appellant about his comment and leave usage. Mr. Bethune stated that this was not a predisciplinary investigation, but appellant felt harassed and intimidated.

Appellant submitted a letter dated March 4, 2002 in which he requested union time to process grievances.

In a letter dated March 15, 2002, addressed to B. Leone, appellant alleged a stressful atmosphere at the employing establishment. He stated that Mr. Bethune and Ms. Felix were "stalling" the grievance process and not allowing him proper time to get the grievances into the system. Appellant alleged that on March 6, 2002 Mr. Medina intimidated him into working two hours of overtime following a meeting with Mr. Bethune. He asserted that Ms. Felix refused to allow him union time to process any grievances since February 6, 2002. Appellant alleged that the employing establishment was treating him unfairly by delaying the return of his leave slips and the submission of these to the Office for compensation. Appellant alleged that this inaction had caused him serious financial hardship.

Appellant submitted a report dated March 20, 2002 in which he requested that Mr. Bethune review union matters. Appellant asserted that management was delaying processing grievances and that he was required to move the grievances to a higher level. Appellant stated that on March 14, 2002 he had requested union time to process the grievances in a timely manner or an extension of the deadlines.

In a letter dated February 27, 2002, appellant protested the decision of Ms. Felix and Mr. Bethune prohibiting him from speaking when representing a coworker in his capacity as union steward in a predisciplinary investigation. Appellant submitted statements from two coworkers¹ noting that he was not allowed to speak when acting as union steward in predisciplinary investigative meetings before Ms. Felix.

On June 21, 2002 the employing establishment provided appellant with a notice of a seven-day suspension based on the March 22, 2002 incident charging him with disrespect to a postal supervisor, failure to follow instructions and absence without official leave.

¹ Only the first names of these coworkers are legible in the signatures, Nelson and Carlos submitted statements dated July 20 and March 13, 2002 respectively.

In an undated statement received by the Office on August 13, 2002 and a similar statement dated June 13, 2002, appellant alleged that his manager's actions were abusive, stressful and harassing. He stated that he was harassed due to his position as union steward. Appellant alleged that the confrontation with Mr. Medina on March 22, 2002 resulted from his letter dated March 21, 2002, informing the employing establishment that he planned to go forward with 49 grievances. He contended that the employing establishment decided to rid itself of the grievances by eliminating him. He also stated that he was harassed due to his job-related work restrictions as a result of his accepted knee conditions. Appellant also alleged that the employing establishment neglected to return his leave request slips in a timely manner and that he was not allowed union time to process grievances, but instead had to work at home.

In a grievance decision dated August 28, 2000, the union and the employing establishment determined that Mr. Bethune should be removed from all supervisor duties involving letter carriers.

In a letter dated September 23, 2002, the employing establishment stated that appellant had been continuously absent since July 22, 2002 and directed appellant to report to work at once or submit satisfactory evidence substantiating his absence. In a letter dated October 7, 2002, the employing establishment noted that appellant was required to submit medical evidence supporting disability every 30 days.

Appellant submitted additional medical evidence dated April 10, 2002 from Dr. Gail T. Mauer, a clinical psychologist, noting that appellant reported panic attacks which he attributed to harassment by his manager including giving him too much work, berating him and asking him to do things that he cannot physically do.

By decision dated January 27, 2003, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration on January 20, 2003. He described his grievances and the resolutions. Regarding the January 9, 2002 incident, on August 13, 2002 it was determined that appellant had not violated the contract through his actions, however, the listed charges were still under consideration. Appellant's seven-day suspension as a result of the March 22, 2002 incident was rescinded. The emergency placement on March 22, 2002 was rescinded and appellant was authorized to use leave on that date. Regarding the February 12, 2002 letter of warning, the dispute resolution team found that the employing establishment had just cause to issue the letter of warning for being absent without leave, but that management did not have just cause to support the charge of unacceptable behavior and personal habits. Appellant also grieved the requirement that he submit documentation for February 22 and 23, 2002 and that following this submission he was denied sick leave. This grievance was resolved by allowing appellant to use 11 hours of sick leave.

Appellant also submitted additional medical documentation listing appellant's allegations that his condition arose from an unmanageable amount of work, beratings from his manager and requests that he work outside his physical abilities.

In a letter dated February 11, 2003, appellant again requested reconsideration. By decision dated May 1, 2003, the Office denied modification of its prior decision.

Appellant appealed this decision to the Board by letter dated May 5, 2003. In an order dismissing appeal² dated July 21, 2003, the Board dismissed appellant's appeal at his request.

Appellant, through his attorney requested reconsideration on July 10, 2003. He attributed appellant's diagnosed emotional condition to harassment, the failure of the employing establishment to abide by appellant's light-duty work restrictions, failure of the employing establishment to provide appellant with union time to fulfill his duties as a shop steward, the refusal of Mr. Bethune to timely process grievances necessitating that appellant spend personal time developing these issues and disciplinary actions taken against appellant.

By decision dated December 4, 2003, the Office denied modification of its prior decisions.

LEGAL PRECEDENT

To establish appellant's occupational disease claim that he has 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 her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁵

² Docket No. 03-1398 (issued July 21, 2003).

³ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁴ *Id.*

⁵ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

In cases involving emotional conditions, 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 compensation 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.⁶ Perceptions and feelings alone are not compensable to establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence. Only when the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, should the Office consider the medical evidence of record to determine the causal relationship between the accepted factors and the diagnosed condition.⁷

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Federal Employees' Compensation Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁸

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. 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.⁹

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated July 17, 2002 and December 4, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed his emotional condition to disciplinary actions taken by the employing establishment including the March 22, 2002 emergency off-duty placement, the resulting seven-day no time off suspension issued June 21, 2002 and the February 12, 2002 letter of warning. Appellant submitted evidence establishing that the seven-day suspension was

⁶ *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

⁷ *Id.*; *Fred Faber*, 52 ECAB 107, 110 (2000).

⁸ *Martha L. Watson*, 46 ECAB 407 (1995).

⁹ *Alice M. Washington*, 46 ECAB 382 (1994).

rescinded, as was the March 22, 2002 emergency placement. The denial of sick leave on February 22 and 23, 2002 was resolved by allowing appellant to use 11 hours of sick leave. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹⁰ Appellant did not submit any evidence establishing why these grievances were sustained and there is no evidence in the record establishing error or abuse on the part of the employing establishment in issuing the disciplinary actions and denial of leave. Regarding the February 12, 2002 letter of warning, appellant submitted a portion of a decision from the dispute resolution team finding that the employing establishment had just cause to issue the letter for being absent without leave, although it did not support the charge of unacceptable behavior and personal habits. The evidence of record does not establish that the letter of warning was issued in error based on the partial decision submitted.

Appellant also alleged error or abuse in the discussion with Mr. Bethune and Ms. Felix regarding the charge of AWOL on February 22 and 23, 2002 and his statement regarding blessings. In support of this claim, appellant submitted a statement from Mr. Mendez, a shop steward, noting that although Mr. Bethune and Ms. Felix stated that the discussion was not a predisciplinary investigation but they questioned appellant in a manner that Mr. Mendez did not feel was appropriate. Appellant noted that Mr. Bethune stated the discussion was not a predisciplinary investigation and that he felt harassed and intimidated. The evidence of record is not sufficient to establish error or abuse by appellant's supervisor's pertaining to the AWOL discussion.

Appellant also alleged error or abuse on the part of the employing establishment in delaying the return of his approved leave slips, in requests for additional medical documentation to support his partial disability for work and in Mr. Medina's attempt to discuss his medical condition in a semi-public setting. Appellant has not submitted any evidence of error or abuse on the part of the employing establishment in these actions. Although appellant submitted several requests for leave slips, these requests do not establish that the employing establishment unreasonably delayed returning these documents to appellant. Regarding the requests for additional medical documentation regarding appellant's varying degrees of total and partial disability, appellant has not submitted evidence substantiating that it was unreasonable of the employing establishment to request medical documentation for periods of total disability. Regarding his ability to work between six and eight hours a day consistent with his physician's restrictions, it is not unreasonable for the employing establishment to require advance notice of whether appellant could complete his full duties and to request that appellant substantiate his inability to do so on any given day. Finally, appellant has not submitted any evidence substantiating that Mr. Medina acted unreasonably in discussing appellant's medical condition and resultant work restrictions in his work area variously described as an office or cage. Mr. Mendez did not indicate that this was not the usual practice and there is no indication that a more private location was available. Therefore, appellant has not established error or abuse in this administrative decision.

Appellant also attributed his condition to the denial of union time to pursue grievances for himself and others, and the failure of the employing establishment to move on grievances in a

¹⁰ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

timely manner. With regard to union activities in general, the Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment. However, the Board has found that the involvement of union activities does not preclude the possibility that compensable factors of employment have been alleged. The Board has recognized an exception to the general rule in that employees performing representational functions which entitle them to official time are in the performance of duty and entitle them to all benefits of the Act if injured in the performance of those functions. The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union office may simultaneously serve the interests of the employer. Therefore, the Board determined that actions directly related to the performance of “representational functions” could, if substantiated by the record as occurring, constitute compensable factors since it arose out of covered representational duties.¹¹ While appellant has alleged that management improperly delayed many grievances and has submitted his requests for union time to pursue his and others’ grievances, appellant has not submitted any evidence that the employing establishment erred or acted abusively with regard to appellant and his union activities. As appellant failed to submit any evidence corroborating or substantiating these allegations, he has not established error or abuse on the part of the employing establishment and has not established that these allegations constitute compensable factors of employment.

Appellant also alleged that the employing establishment erroneously refused to allow him to speak in predisciplinary investigations when acting as a union representative for fellow employees. Appellant submitted statements from two coworkers asserting that he was not allowed to speak during predisciplinary interviews held between these employees and Ms. Felix. Although appellant has submitted evidence indicating that he was not allowed to speak during two predisciplinary interviews, this evidence does not come from an impartial source, but from the employees who appellant represented.¹² Appellant also failed to submit any evidence that Ms. Felix’s refusal to allow him to speak during these predisciplinary interviews was inappropriate or erroneous. Appellant did not submit any documentation regarding the appropriate role of union representatives during predisciplinary investigations and supporting his contention that Ms. Felix’s decision to restrict his participation was erroneous.

With respect to appellant’s allegations that the employing establishment acted abusively by requiring him to work outside of his restrictions including over time, the Board has held that being required to work beyond one’s physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.¹³ However, in this case appellant has alleged only one instance in which he was required to work overtime and did not submit any evidence to substantiate that he was required to work outside his physical restrictions. As appellant failed to submit substantiating evidence, he has not established this compensable factor of employment.

¹¹ *Marie Boylan*, 45 ECAB 338, 342-43 (1994).

¹² *Paul F. Whelan*, Docket No. 00-2399 (issued July 5, 2002).

¹³ *Robert W. Johns*, 51 ECAB 137 (1999).

Appellant alleged harassment through the above-mentioned incidents and through Mr. Medina's repeated requests that he report to the office. The Board has defined harassment as a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers.¹⁴ As noted above, mere perceptions of harassment or discrimination are not compensable under the Act. The record contains insufficient factual evidence to document or substantiate appellant's allegations of harassment and he has not established this compensable factor of employment.

CONCLUSION

The Board finds that appellant has not established any compensable factors of employment.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).