

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

DONALD M. NILES, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 04-1282
Issued: October 21, 2004**

Appearances:
Vivian Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 15, 2004 appellant, through his representative, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 26, 2004, which affirmed the denial of appellant's emotional condition claim. Pursuant to 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 appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On September 19, 2002 appellant, a 61-year-old letter carrier, filed a traumatic injury claim¹ alleging that his anxiety, stress, fear, panic, depression, nervousness, confusion and

¹ This was converted to an occupational disease claim.

despair was employment related. Appellant indicated that he had submitted an attachment, but the employing establishment noted no statement had been provided.

In a statement dated September 19, 2002, Duane L. Allen, Jr., supervisor, customer service, related that on that date appellant arrived at work and handed him completed traumatic and occupational disease claims for, respectively, a right knee injury and right hand conditions. Appellant elected to go to his own doctor and Mr. Allen gave appellant Office Forms CA-16 and CA-17. Appellant returned that afternoon with a doctor's note indicating he was totally disabled until September 24, 2002. Mr. Allen went to instruct appellant to go home, but that he "was on the [tele]phone with John Watt, Shop Steward, and refused to get off." After approximately two minutes of listening to appellant complain about him, Mr. Allen hung up his telephone and told him to go home. Later that day appellant returned and requested additional claim forms for anxiety and stress. Appellant alleged that the stress was caused by the employing establishment and Mr. Allen, specifically Mr. Allen's humiliating him in front of other employees. Mr. Allen noted appellant has "numerous personal and legal problems to deal with" and that appellant had related to him "that all of these personal problems have caused him much anxiety and depression."

In a report dated September 19, 2002, Dr. Walter E. Afield, a Board-certified psychiatrist,² diagnosed "sequelae of injuries sustained in a work-related injury with" cephalgia, right knee sprain, severe depression, severe anxiety with panic attacks and possible lumbar/cervical strain/sprain.

Appellant related on September 18, 2002 that he and a coworker got into a heated argument at the time he was reporting to his supervisor. While trying to explain to his supervisor about his right knee condition his supervisor "became very argumentative with him," and comments were made by both appellant and his supervisor, which made appellant very anxious and extremely upset. On September 19, 2002 appellant returned to work with his physician's report, which stated appellant was to be off work until September 24, 2002. Appellant related "once again there was a 'heated discussion' with an exchange of 'very strong language' and the supervisor was very confrontational at this point." At this point appellant appeared to have a panic attack and hyperventilate. Appellant related that he was unable to respond to confrontations or arguments and "his supervisor ridiculed him in front of people and made him feel really helpless." Dr. Afield related that appellant had a history of depression and that appellant "apparently had two days of heated confrontation with a supervisor who was very aggressive towards him." He then concluded that appellant began to hyperventilate, which caused a panic attack, "due to his previous condition and the most recent event." He stated that appellant was unable to work for 30 days and that his "current condition, certainly, is work related."

By letter dated October 16, 2002, the Office informed appellant that the evidence was insufficient to support his claim. Appellant was advised as to the type of medical and factual evidence required to support his claim.

² In his report, Dr. Afield noted that appellant had been referred to him by Mr. Allen, appellant's supervisor.

On October 21, 2002 the Office received a September 21, 2002 neurobehavioral assessment by Dr. Afield. Under summary, Dr. Afield stated:

“He does not respond well to pain. He is introverted and extremely emotionally labile. There are many psychophysiologic problems noted. Repression and denial make any intervention difficult. He is severely depressed, worried and pessimistic. Feelings of self-depreciation and inadequacy are present. Severe levels of anxiety and tension make simple routine life tasks difficult for this patient. He is somewhat oversensitive and rigid. Suspiciousness, distrust, brooding and resentment are noted. He has several negative expectancies about the immediate and long-range future. Suicidal ideation is present. His overall quality of life is in the low range. His results are indicative of a post[-]traumatic stress disorder.”

In a letter dated November 5, 2002, appellant responded to the Office’s request for additional information. He attributed part of his stress to a route check, which took place from April 20 to 26, 2002. During the route check he “had an inspector watch and time my every move made in the office and on the street.” He further noted:

“Supervisor Al Smith actually stood by my shoulder and instructed me to read out every piece of mail per box that I was delivering to that box. I had to deal with tremendous levels of stress and anxiety during this period. I had to push myself constantly in the performance of all my duties or I would have faced disciplinary actions for not performing up to ‘standards.’”

Appellant stated that he feels “completely overwhelmed with the amount of production” expected of him since the University Square Mall was added to his route. He stated that once his route was adjusted, Mr. Allen “set out to enforce their implementation by confronting carriers with level of demonstrated performance during route inspection.” He found he did not take breaks or lunch and was “pushing myself excessively just so I could get the job done without having to risk confrontation with the supervisor.” Appellant alleged that Mr. Allen “was consistently confrontational” and “he would become confrontational and argumentative” with other coworkers. Appellant stated that the “recent route inspection has created a very hostile as well as unsafe work environment.” In support of this contention, he noted Ron Biggs, the prior letter carrier for the University Square Mall, “has ceased to speak to me or assist me in any way with the new addition to my route” and Frank Wengyn, a coworker accused appellant of “throwing Ron Biggs under the bus while he was on vacation.” Due to the addition to his route, appellant alleged that he was overburdened as the route takes eight or more hours to complete. He stated that the “volume of mail that this route now gets is burdensome and overwhelming.” Appellant stated:

“It is not uncommon to receive between 4 and 5 feet of raw letter size to process, 8 [to] 10 feet of raw flats to process, 3 [to] 6 trays of DPS to process, 10 [to] 15

parcels to handle, and 10 [to] 15 plugs to deliver. The overwhelming burden to case, sort and deliver the above was my responsibility.”

Regarding the incident of September 18, 2002, appellant noted that Mr. Allen had been in a heated discussion with Warren Sumlin, a letter carrier, at the time he entered the station. He related that, while talking to Mr. Allen about his claim forms, he felt Mr. Allen’s anger being redirected at him. At this point, appellant stated that Mr. Allen “became very angry” and displayed this anger by being “verbally loud, physically positioning, from folding arms to hands on hips to pointing his finger while verbalizing (sic) interrogating me on the workroom floor in front of other employees.” Due to the stress he felt by Mr. Allen’s interrogation, appellant alleged he “lost the ability to control myself, my thought processes, my ability to effectively communicate” and he “began to tremble and sense a somewhat loss of mental function under the attack.” With regards to September 19, 2002, appellant related Mr. Allen asking him, in front of a coworker, whether the employing establishment was responsible for appellant’s clumsiness. Appellant stated he “left the station with a feeling of deep depression” and he was unable to “figure out why he attacked me and maintained an adverse attitude toward” him. While talking with Mr. Watts, he noted Mr. Allen returned and listened to his “conversation for a few seconds and then walked over to the [tele]phone and disconnected my conversation.” Appellant related that he and Mr. Allen discussed whether Mr. Allen had the right to disconnect the telephone while appellant was having a conversation with a Union steward. Mr. Allen then told appellant to clock out as he was officially on bed rest and go home. Appellant stated that he felt he “had been the subject of” Mr. Allen’s “anger and aggressive behavior for two days.”

On November 18, 2002 the Office received progress notes dated November 6, 2002 by Dr. Afield, who diagnosed severe depression and post-traumatic stress disorder. He stated that appellant is bright “but essentially is burned out.” He related that appellant “has had multiple episodes over the years of panic attacks on the workroom floor and he has dealt with it.” He related that the last time occurred during a confrontation with his supervisor over a physical problem, “which pushed him over the edge.” Dr. Afield attributed appellant’s “profound depression” to his employment and concluded that appellant was totally disabled. In a medical note dated November 6, 2002, Dr. Afield stated that appellant “is suffering from a profound, severe and overwhelming depression and a variety of physical chronic pain issues” which he attributed to appellant’s work. He concluded that appellant “is totally disabled and will never return to the work force.”

In response to appellant’s November 5, 2002 letter, Mr. Allen denied that appellant was overworked. He noted that, after University Square Mall was added to appellant’s route, appellant “worked all 5 days only 6 of the 14 weeks.” Appellant’s “weekly work hours” during the 6 weeks he worked 5 days “were 42, 41, 41, 41, 43 and 41 hours.” Mr. Allen indicated this date “shows that [appellant] did accomplish his duties without the use of excessive overtime.” With regards to appellant’s skipping his breaks and lunch, Mr. Allen stated that appellant “is required to take a lunch and never mentioned that he had skipped lunch or break.” Mr. Allen related appellant stating “he liked to deliver the mall last so he could take his lunch at the food court.” Lastly, Mr. Allen related that appellant talked to him about personal problems and that “as the problems at home escalated, he became more dissatisfied with Post Office in general.”

In a January 8, 2003 progress note, Dr. Afield noted that appellant's mother died on December 5, 2002. The physician stated that appellant was "working very hard in real estate" and was "still in training." He stated that appellant remained depressed and was "still obsessed but at least he is functioning and doing something."

By decision dated March 18, 2003, the Office denied appellant's claim on the grounds that he failed to establish any compensable factor of employment.

In a letter dated April 17, 2003, appellant, through his representative, requested an oral hearing before an Office hearing representative. A hearing was held on December 30, 2003 at which appellant was represented by counsel and provided testimony.

In a January 27, 2004 response to appellant's testimony, Mr. Allen denied that appellant was subjected to a hostile work environment on September 18, 2002. He also denied harassing appellant when he disconnected appellant's telephone call after he had instructed appellant to hang up and that appellant did not request a union representative. Mr. Allen alleged that appellant made derogatory comments about him while he was on the telephone and later berated him before appellant left. With regards to the allegation of hostile work environment, Mr. Allen contends that appellant "created his own hostile work environment" and had requested "leave to deal with ongoing personal issues."

By decision dated March 26, 2004, the Office hearing representative affirmed the denial of appellant's emotional condition claim on the grounds that he failed to establish any compensable factors of employment.

LEGAL PRECEDENT

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 coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.³

Perceptions and feelings alone are not compensable. 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 factors of his federal employment.⁴ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment

³ *Roger W. Robinson*, 54 ECAB ____ (Docket No. 03-348, issued September 30, 2003).

⁴ *Linda K. Mitchell*, 54 ECAB ____ (Docket No. 03-1281, issued August 12, 2003).

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.⁵

ANALYSIS

Appellant attributed his depression and anxiety to confrontations with his supervisor, Mr. Allen, on September 18 and 19, 2002. He also contended that Mr. Allen humiliated him in front of coworkers by asking if the employing establishment was responsible for appellant's clumsiness and that he disconnected appellant's telephone call with Mr. Watts. He alleged that he felt he "had been the subject of" Mr. Allen's "anger and aggressive behavior for two days." Actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act.⁶ However, for harassment to give rise to a compensable factor of employment there must be evidence that the harassment did, in fact, occur.⁷ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discriminated occurred. To establish entitlement, the claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.⁸ Additionally, verbal altercations, when sufficiently detailed by appellant and supported by the evidence of record, may constitute a compensable factor of employment.⁹ However, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁰ Mr. Allen denied humiliating appellant in front of his coworkers, but did acknowledge that he disconnected appellant's telephone call with Mr. Watt. The record contains no witness statements regarding the September 18 and 19, 2002 incidents when appellant alleged that Mr. Allen was confrontational or that he made the statement about appellant's clumsiness. In addition, the record contains no other factual evidence supporting appellant's allegation. Appellant has not provided sufficient factual evidence to support his allegations that Mr. Allen either was verbally abusive or confrontational towards him. Consequently, appellant has not established a compensable factor under the Act with respect to the claimed verbal abuse.

Appellant also attributed his condition to a hostile work environment caused by coworkers, Mr. Biggs and Mr. Wengyn, refusing to speak to him or help him with his new route. Appellant alleged that he was accused of "throwing Ron Biggs under the bus while he was on vacation." As noted above, actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a

⁵ *Marlon Vera*, 54 ECAB ___ (Docket No. 03-907, issued September 29, 2003).

⁶ *Ernest J. Malagrida*, 51 ECAB 287 (2000).

⁷ *Helen P. Allen*, 47 ECAB 141 (1995).

⁸ *Sherman Howard*, 51 ECAB 387 (2000).

⁹ *Janet D. Yates*, 49 ECAB 240 (1997).

¹⁰ *Christophe Joliocoeur*, 49 ECAB 553 (1998).

compensable disability under the Act.¹¹ However, for harassment to give rise to a compensable factor of employment there must be evidence that the harassment did, in fact, occur.¹² Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement, the claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.¹³ Consequently, appellant has not established a compensable factor under the Act with respect to the claimed hostile work environment.

Appellant further alleged that he experienced a stress reaction while trying to complete his new route, which included the addition of University Square Mall. He alleged that he was overburdened as the route takes longer than eight hours to complete. The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.¹⁴ Appellant's job duties consisted of mail delivery for a new route which included the addition of University Square Mall. The employing establishment acknowledged that during a 6-week period appellant worked more than 40 hours, but that appellant was able to complete his duties "without the use of excessive overtime." Where the claimed disability results from an employee's emotional reaction to his regular or specially assigned duties or to an imposed employment requirement, the disability comes within the coverage of the Act.¹⁵ Therefore, appellant has established his difficulty performing his assigned duties as a compensable factor of employment.

CONCLUSION

In the present case, appellant has identified a compensable employment factor with respect to her difficulty keeping up with his workload. As appellant has implicated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.¹⁶ After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

¹¹ *Ernest J. Malagrida*, *supra* note 6.

¹² *Helen P. Allen*, *supra* note 7.

¹³ *Sherman Howard*, *supra* note 8.

¹⁴ *Trudy A. Scott*, 52 ECAB 309 (2001).

¹⁵ *Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁶ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2004 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: October 21, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member