

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

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**ULYSSES C. LOVING, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Salt Lake City, UT, Employer**

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**Docket No. 04-657  
Issued: September 17, 2004**

*Appearances:*  
*David J. Holdsworth, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 12, 2004 appellant, through counsel, filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 24, 2003, denying his emotional condition claim. Appellant also timely appealed two decisions of an Office hearing representative dated October 31, 2003, affirming the emotional condition claim denial and affirming a denial of wage-loss compensation from August 1, 2001 to November 15, 2002 causally related to a cervical sprain injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

**ISSUES**

The issues are: (1) whether appellant is entitled to wage-loss compensation for the period August 1, 2001 to November 15, 2002 for a cervical condition related to his federal employment; and (2) whether appellant has established that he sustained an emotional condition in the performance of duty.

## **FACTUAL HISTORY**

On January 28, 2002 appellant, then a 45-year-old mail processor, filed an occupational disease claim alleging that he experienced neck and shoulder pain related to his employment on August 1, 2001. On May 22, 2002 the Office accepted the claim for aggravation of a preexisting cervical sprain and expanded the claim to sprain/strain of the neck on September 18, 2002. Appellant stopped work on August 1, 2001.

Appellant thereafter filed five Form CA-7 claims for leave without pay and wage-loss compensation dating from August 1, 2001 to November 15, 2002, related to the accepted cervical conditions. Appellant submitted medical evidence, including a CA-20 form dated August 22, 2002 from Dr. John Berneike, an attending family practitioner. He related that appellant sustained cervical spasms and tension headaches with seasonal migraines beginning June 1, 2001 due to workplace ergonomics. Dr. Berneike noted that appellant was very tall and had to look down much of the day. He related appellant's condition to workplace harassment that resulted in anxiety and stress.

In a letter dated August 28, 2002, Dr. Kay Koellner, Ph.D, a clinical psychologist, reported that appellant presented with symptoms consistent with an anxiety disorder and major depression. She stated: "While he has a history of treatment for similar symptoms his current presentation seems exacerbated by his conflicts at work. At this time he is unable to work due to increased anxiety levels, decreased concentration and racing thoughts."

By decision dated December 11, 2002, the Office denied appellant's claim for wage loss for the period August 1, 2001 to November 15, 2002 on the grounds that the medical evidence failed to support disability for work due to the accepted cervical conditions. The Office continued entitlement to medical treatment for the accepted conditions at that time.

In a letter dated December 31, 2002, appellant requested an oral hearing of the December 11, 2002 decision and submitted additional evidence. In a November 27, 2002 CA-20 form, Dr. Berneike indicated that on November 23, 2002 appellant experienced an exacerbation of his cervical spasms and tension headaches due to workplace ergonomics and would be off work at least until December 27, 2002. On November 27, 2002 Dr. Berneike reported that appellant had a recurrence of his neck spasms and was unable to work. On December 27, 2002 Dr. Kyle Matsumura, a Board-certified anesthesiologist, reported that appellant had been referred for chronic headaches and neck pain which caused him to be off work since August 2002. Dr. Matsumura related that appellant's pain began approximately a year prior when he experienced stressors and prejudice at work and began holding tension in his neck which progressed to his current level of pain and headache syndrome. Appellant reported that he had been singled out in a confrontational and derogatory manner and prejudicial statements were made to him in front of other coworkers by his manager. The physician related appellant's belief that the incident at work facilitated his current painful syndrome.

On September 17, 2002 appellant filed an occupational disease claim alleging work-related stress beginning June 1, 2001. Appellant indicated that he attached equal employment opportunity (EEO) files to the claim. On November 27, 2002 appellant filed a third

occupational disease claim form and implicated “low machine and harassment by Ute [Eisinger]” as employment factors that caused him cervical spasms and tension on June 1, 2001.

In a statement dated September 28, 2002, appellant alleged that on October 12, 1999 his supervisor Ms. Eisinger approached him on the floor and asked him if he was combining the mail. She had previously approached him that evening about why there was no mail on the machines. Appellant indicated that he asked Ms. Eisinger why she was harassing him and she responded “[appellant] come into my office.” He alleged that he requested that a union steward be present, to which she complied. Following their conversation, appellant reportedly took responsibility for combining the mail. Appellant stated that on October 13, 1999 the next night Ms. Eisinger called his partner, Lisa Peterson into her office and talked to her about what appellant said the night prior. Ms. Peterson subsequently told appellant that Ms. Eisinger blamed her for combining the mail. Appellant believed that his supervisor discriminated against him by taking him to her office, talking to his partner behind his back and singling him out on the floor for issues relating to everyone else. Appellant submitted a statement from Ellen Moullox dated November 3, 1999 which noted that Ms. Eisinger approached him on October 13, 1999 about combining mail. Ms. Moullox stated that Ms. Eisinger told appellant to come to her office and, that on the way to the office, she witnessed the supervisor shake her finger as if appellant was a “bad dog.” Appellant submitted a statement from Ms. Peterson dated November 3, 1999 which noted that he was approached by the supervisor for combining mail and involved in an office discussion with Ms. Eisinger about who was to blame for combining the mail.

In an undated statement, appellant alleged that Ms. Eisinger began harassing him on June 1, 2001. He asked her to see the vacation roster and she started yelling at him on the work floor. Appellant alleged that on the same evening, he was returning from the cafeteria with Diane Mayada, a coworker, when Ms. Eisinger stopped him and confronted him about his break. Appellant submitted a June 2, 2001 statement from Karen Ewell which noted that on June 1, 2001 Ms. Eisinger asked appellant whether or not he had asked a manager if he could see the vacation roster.

In a step-one grievance form dated October 27, 1999, appellant’s allegations of harassment occurring October 13, 1999 were discussed. Appellant was feeding mail and was approached by Ms. Eisinger, who asked him if they had combined stacker bins into single trays. Ms. Eisinger denied the grievance orally and stated that the allegations were untrue.

Ms. Eisinger provided a February 13, 2003 statement which addressed appellant’s allegations. She stated that she was never negative in conversations with appellant and did not harass him about his work breaks. Ms. Eisinger had a discussion with appellant about the length of his breaks but noted that she was performing her job. Regarding his performance reviews, she stated that she addressed weaknesses and offered suggestions for improvement. Ms. Eisinger asserted that regarding job assignments, she placed people in operations where they were most useful. Ms. Eisinger went to a redress meeting after appellant alleged that she yelled at him on the workroom floor on June 1, 1999. Regarding the office discussion Ms. Eisinger had with appellant and his partner on October 12, 1999 she noted that appellant blamed the combining of mail on his partner, Ms. Peterson. She spoke with both of them about the incident because they worked together on the machine. Ms. Eisinger denied shaking her finger at appellant on October 13, 1999 as alleged by Ms. Moullox. Regarding appellant’s allegation concerning the

vacation roster on June 1, 2001, Ms. Eisinger alleged that she instructed Ms. Ewell to take the roster to certain employees who had asked for it and she later observed appellant and Ms. Ewell looking at the roster. Ms. Eisinger asserted that appellant had not requested to see the vacation roster, as was company policy and, when she saw him looking at it she simply advised that he must first ask a supervisor.

By decision dated February 24, 2003, the Office denied appellant's emotional condition claim on the grounds that the evidence submitted failed to establish that an injury occurred in the performance of duty. The Office found that certain incidents occurred, including that appellant had a verbal confrontation with Ms. Eisinger on October 12, 1999 about combining mail; that she met with appellant and Ms. Peterson concerning the event in her office and that on June 1, 2001 Ms. Eisinger informed appellant that he was not allowed to see the vacation roster without manager permission. The Office found that these were personnel matters and the employer had the authority to set rules in such matters. The Office found that while Ms. Eisinger acted in a loud and aggressive manner concerning the vacation roster, it did not rise to the level of verbal abuse.

In a letter dated March 18, 2003, appellant requested an oral hearing which was held on August 13, 2003 for both of appellant's claims.

The Office hearing representative issued two decisions on October 31, 2003. In the first decision the Office hearing representative found that appellant had not met his burden of proof in establishing that he was totally disabled from work for the period August 1, 2001 to November 15, 2002 due to the accepted cervical sprain. The Office hearing representative found that the medical evidence did not establish that appellant was disabled from work or unable to work full duties because of the accepted condition. In the second decision, the hearing representative found that appellant failed to establish a compensable factor of employment and affirmed the denial of his emotional condition claim.

### **LEGAL PRECEDENT -- ISSUE 1**

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.<sup>1</sup> Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from an employment injury.<sup>2</sup> Whether a particular employment injury causes disability for employment and the duration of that disability are medical questions that are in the realm of medical evidence.<sup>3</sup>

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<sup>1</sup> *David H. Goss*, 32 ECAB 24 (1980).

<sup>2</sup> *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>3</sup> *Edward H. Horton*, 41 ECAB 301 (1989).

### **ANALYSIS -- ISSUE 1**

The medical record includes an August 22, 2002 form report, from Dr. Berneike, appellant's physician, who stated that appellant experienced cervical spasms and tension headaches with seasonal migraine headaches due to the fact that appellant's height caused him to look down much of the day and to workplace harassment that resulted in anxiety and stress. Dr. Berneike noted however that appellant was not incapacitated for work, but only that he might miss work one or two days a month for migraine headaches. With respect to the period of claimed disability from August 1, 2001 through November 15, 2002, this report is insufficient to support appellant's claim for total disability from work.

In a letter dated August 28, 2002, Dr. Koellner, Ph.D, a clinical psychologist, reported that appellant presented with symptoms consistent with an anxiety disorder and major depression. She stated: "While he has a history of treatment for similar symptoms his current presentation seems exacerbated by his conflicts at work. At this time he is unable to work due to increased anxiety levels, decreased concentration and racing thoughts." The Board notes that the symptoms discussed by appellant's psychologist related only to appellant's claimed emotional condition and not to the accepted cervical sprain conditions. Therefore her opinion on disability lacks probative value to establish total disability for the claimed period due to the accepted cervical condition.

Appellant submitted numerous other medical reports; however, most discussed appellant's disability subsequent to the period claimed. In a November 27, 2002 form report, Dr. Berneike indicated that appellant was disabled at that time until December 27, 2002, for an exacerbation of his cervical spasms and tension headaches however he did not relate the disability back to the period claimed. In a report dated December 27, 2002, Dr. Matsumura stated that appellant had been off work since August 2002, for chronic headaches and neck pain. He did not find that appellant was disabled from work for the period claimed or relate appellant's disability to the accepted cervical conditions. The physician instead connected appellant's August 2002 disability to the alleged stressors and prejudice at work related to the emotional condition claim. Therefore, Dr. Matsumura's opinion is insufficient to establish total disability from August 1, 2001 to November 15, 2002 causally related to accepted cervical conditions.

No further medical evidence of record contains a rationalized medical opinion establishing a causal relationship between appellant's accepted cervical sprain and his claim for disability for the period August 1, 2001 through November 15, 2002. As appellant has failed to submit rationalized medical evidence establishing that his disability from August 1, 2001 through November 15, 2002, was causally related to his accepted employment injury, he has not met his burden of proof.

### **LEGAL PRECEDENT -- ISSUE 2**

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable

employment factors are causally related to the claimed emotional condition.<sup>4</sup> There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.<sup>5</sup>

The first issue to be addressed is whether appellant has established a compensable factor of employment that contributed to his emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>6</sup> On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the evidence of record does not establish that the administrative and personnel actions taken by management in this case constitute error or abuse, as alleged. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.<sup>8</sup> However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.<sup>9</sup> Appellant has failed to establish error or abuse on the part of Ms. Eisinger, his supervisor, with respect to the situations in which she counseled him in her office about combining mail on October 12, 1999, questioned him about looking at the vacation roster without management consent and discussed the length of his work breaks. Ms. Eisinger offered a reasonable explanation in response to these allegations that she was serving in a supervisory capacity and following company policy. The Board finds that appellant has provided insufficient evidence to establish that she acted unreasonably or committed error in discharging her administrative duties with regard to these incidents.

The Board further finds that appellant has failed to establish that management engaged in harassment. Appellant has not submitted sufficient factual evidence to support his allegations that he was harassed, mistreated or treated in a discriminatory manner by his supervisor. Appellant alleged that he felt singled out and harassed when Ms. Eisinger yelled at him on the workroom floor about combining mail. Appellant submitted a witness statement from

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<sup>4</sup> See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

<sup>5</sup> See *Ruth C. Borden*, 43 ECAB 146 (1991).

<sup>6</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>7</sup> *Id.*

<sup>8</sup> See *Alfred Arts*, 45 ECAB 530, 543-44 (1994).

<sup>9</sup> *Margreate Lublin*, 44 ECAB 945 (1993).

Ms. Moullox who asserted that Ms. Eisinger told appellant to come to her office and that on the way to the office, she shook her finger as if appellant was a “bad dog.” Appellant further asserted that he had a verbal confrontation with Ms. Eisinger about looking at the vacation roster without permission from management. Appellant submitted a statement from Ms. Ewell dated June 2, 2001 which noted that Ms. Eisinger asked appellant whether or not he had asked a manager if he could see the roster before looking at it. The witness statements do not establish that Ms. Eisinger harassed appellant in these instances. An employee’s complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the coverage of the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties, that employees will at times dislike actions taken, but that mere disagreement or dislike of supervisory or management action will not be actionable, absent evidence of error or abuse.<sup>10</sup> An oral reprimand does not generally constitute a compensable factor of employment because it involves the employing establishment’s administration of personnel matters.<sup>11</sup>

Appellant’s allegations constitute mere perceptions or generally stated assertions of dissatisfaction with his superior, which do not support his claim for an emotional disability.<sup>12</sup> Appellant has not established a compensable work factor, therefore, the medical evidence will not be considered with respect to his emotional condition claim.<sup>13</sup>

### **CONCLUSION**

The Board finds that appellant failed to establish that his disability from August 1, 2001 to November 15, 2002, was causally related to his work-related cervical sprain. The Board further finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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<sup>10</sup> See *Marguerite J. Toland*, 52 ECAB 294, 299 (2001).

<sup>11</sup> See *Carolyn S. Philpott*, 51 ECAB 175, 179 (1999).

<sup>12</sup> See *Curtis Hall*, 45 ECAB 316 (1994); *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>13</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 31 and February 24, 2003 are affirmed.

Issued: September 17, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member