United States Department of Labor
Employees' Compensation Appeals Board

RALPH S. PARENTE, Appellant	)	
and	)	**Docket No. 05-1290**
	)	**Issued: November 4, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Warwick, RI, Employer	)	

Appearances:
Ralph S. Parente, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 26, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 26, 2004 merit decision denying his emotional condition claim and the May 17, 2005 decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 17, 2003 appellant, then a 61-year-old custodian, filed an occupational disease claim alleging that he sustained an emotional condition due to various incidents and conditions at

work. He first realized on July 15, 2003 that his claimed condition was related to his employment. Appellant stopped work on June 3, 2003.

In several undated statements received by the Office on August 4, 2003, appellant claimed that he developed stress because he was unfairly demoted from a letter carrier position to a custodian position.[1] He asserted that it was stressful to constantly see his fellow former letter carriers while he worked as a custodian and that his coworkers constantly harassed him. Appellant alleged that he was forced to take a pay cut from a "level 5" custodian to a "level 3" custodian. He claimed that he did not receive a contract award through arbitration for his work as a letter carrier until June 19, 1999 and alleged that he unfairly went from third on the seniority list for letter carriers to last on the seniority list for maintenance workers. Appellant asserted that he should be allowed to work as a letter carrier because his physician indicated that he could perform the work and his custodian job required more physical duties than the letter carrier job. He claimed that he lost the opportunity to work 12 to 15 hours of overtime per week due to the fact that he went from the letter carrier position to the custodian position. Appellant asserted that the employing establishment discriminated against him on the basis of age and claimed that he had been placed on a "hit list."

Appellant claimed that on May 21, 2003 he informed Michael Kocak, a supervisor, of a security problem involving the fact that the dock and bulk mail area doors were not locked when no employees were present. He asserted that he had to continuously lock the doors only to find them unlocked a few minutes later. Appellant claimed that Mr. Kocak instructed a clerk to lock the bulk mail area doors at a certain time and asserted that on May 22, 2003 he locked the bulk mail area doors at approximately 9:30 a.m. On the same date, he observed that the dock and bulk mail area doors were not locked between 8:00 and 9:00 a.m. and that no employees were present to inspect the mail being dropped off by customers. Appellant alleged that at approximately 10:00 a.m. three employees came running out of the bulk mail room and yelled at him about the fact that the bulk mail area doors were not supposed to be locked until 10:30 a.m. He responded angrily that he did not know "anything about that" and indicated that the three employees went to Dino Petrangolo, a union steward, to discuss the matter. Appellant claimed that at approximately 11:00 a.m. Mr. Petrangolo came to get him off the work floor and took him to Mr. Kocak to talk about the matter. He alleged that Mr. Kocak told him that the bulk mail area doors would be locked at 10:30 a.m. and that two other employees would let customers in when the buzzer went off. Appellant asserted that he told Mr. Kocak that he would no longer be in charge of security in the building. He claimed that no one cared about security in the building and that the bulk mail area doors continued to be open with no employees present.

Appellant further alleged that on May 23, 2003 John Ball, a coworker, came up to him with a "mean look," told him that he should not touch the bucket under the flat mail cases and threatened him with physical harm. Appellant claimed that he reported the incident to Mr. Petrangolo and that another supervisor indicated that she had previously told him not to touch the bucket under the flat mail cases. Appellant asserted that on May 23, 2003 he told Mr. Petrangolo and Bill Downs, a supervisor, that he was concerned that the mirrors in the men's restroom were marked up with toothpaste and claimed that Mr. Downs gave him a "dirty" look.

[1] The record contains evidence which indicates that appellant began working as a custodian in 1999.

He claimed that he stated to Mr. Downs "what are you looking at?" and Mr. Downs responded that he did not want him to talk like that. Appellant claimed that the same date he observed Jeff Hakanson, a coworker, using a bucket and mop to clean the union offices and that Mr. Petrangolo took him to see Mr. Kocak about the matter. He asserted that Mr. Kocak told him it would be best to "cool down" and placed him on paid administrative leave for several days without any disciplinary action. Appellant alleged that the employing establishment was setting him up for removal just because he followed the rules and suggested that some employees were shown favoritism.

Appellant submitted documents regarding his concerns about fitness-for-duty examinations required by the employing establishment between 1997 and 1999 and his transfer to a custodian position. Some of these documents were produced in connection with a complaint before the Equal Employment Opportunity Commission (EEOC). He also submitted medical records, including a March 11, 1999 report of Dr. Geoffrey Tremont, a clinical psychologist, to whom he was referred by the employing establishment; May 18, 1999 and June 2, 2003 fitness-for-duty reports of Dr. Nicholas Tsiongas, an employing establishment physician Board-certified in occupational medicine; and a July 10, 2003 report of Dr. Thomas Keller, an attending Board-certified psychiatrist.

The record contains an August 22, 2003 statement in which Gary Neirinckx, a supervisor, stated that appellant returned to work in 1997 after a long period recovering from a serious heart condition and noted that attempts were made to find a letter carrier position which was suitable given his work restrictions. Mr. Neirinckx stated that appellant's employment as a letter carrier required him to operate a vehicle but that appellant failed the driving test on two occasions. He asserted that, given his medical restrictions and the availability of a custodian position, appellant accepted the custodian position on a voluntary basis. In a report dated August 26, 2003, Patricia Barnard, an injury compensation specialist for the employing establishment, claimed that appellant was not forced to take a position as a custodian but rather accepted the position on a voluntary basis. Ms. Barnard stated that appellant suffered from a serious nonwork-related heart condition and was unable to pass the driving test required by the letter carrier position. She denied that the employing establishment committed harassment or discrimination.

In a statement dated August 19, 2003, Mr. Kocak stated that in May 2003, he advised appellant that he should leave the dock and bulk mail area doors alone and that the clerks in the area had the responsibility to lock the doors at specified times. He asserted that three employees came to him and told him that appellant had been yelling at them regarding the doors. Mr. Kocak claimed that at a meeting with appellant and Mr. Petrangolo he again advised appellant that he was not in charge of security. He asserted that the next day appellant complained that a coworker had made a threatening statement to him. Mr. Kocak claimed that the coworker's account of the event differed greatly from appellant's account and he advised appellant that he had previously been informed of the proper procedure for handling empty buckets. He asserted that Mr. Hakanson had received permission from another custodian to use the bucket and mop. Mr. Kocak stated that, given that appellant was involved in three incidents in three days, he placed him on administrative leave and asked him to leave the building.

By decision dated May 26, 2004, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors.

By letter dated February 15, 2005, appellant requested reconsideration of his claim and asserted that the enclosed medical evidence established his claim because it showed that he had a disabling employment-related emotional condition. Appellant submitted a May 18, 2004 report in which Dr. Tremont and Dr. Laura B. Brown, also a clinical psychologist to whom appellant was referred by the employing establishment, discussed his emotional condition.

By decision dated May 17, 2005, the Office denied appellant's request for further merit review.

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.[2] 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.[3]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[4] 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.[5]

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.[6] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *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.[7]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated May 26, 2004, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant claimed that he developed stress because he was unfairly demoted from a letter carrier position to a custodian position in 1999 and that he was later forced to take a pay cut from a "level 5" custodian to a "level 3" custodian.[8] Appellant asserted that he did not receive a contract award through arbitration for his work as a letter carrier until June 19, 1999 and alleged that his demotion to the custodian position adversely affected his seniority and ability to work overtime. Appellant further claimed that in May 2003 management officials mishandled a situation which arose from the fact that he locked the dock and bulk mail area doors to ensure that the workplace was secure. He claimed that the management officials did not care about security and did not adequately address his concerns. Appellant also suggested that management officials did not adequately address his concerns about toothpaste on the mirrors in the men's bathroom and the fact that a coworker, Mr. Hakanson, used a bucket and mop when it was not his job to do so. He also suggested that Mr. Kocak, a supervisor, improperly placed him on administrative leave for several days.

Regarding appellant's allegations that the employing establishment improperly handled position transfers and pay matters, mismanaged security tasks and work-duty assignments and engaged in wrongful disciplinary actions, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[9] Although matters concerning transfers, pay, security tasks, work assignments and disciplinary actions are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[10] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[11]

---

[7] *Id.*

[8] Appellant claimed that his medical condition did not prevent him from working as a letter carrier.

[9] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[10] *Id.*

[11] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. It appears that he filed an EEOC complaint regarding some of these matters, but the record does not contain a decision showing that the employing establishment committed any form of wrongdoing. Several superiors submitted statements which indicated that appellant voluntarily accepted the custodian position in 1999 because his medical condition prevented him from passing the driving test, which was required by the letter carrier position. With respect to the May 2003 matter concerning the locking of doors, Mr. Kocak indicated that he advised appellant that he was not responsible for security matters and that he should leave the doors alone. There is no indication that management did not adequately address appellant's other concerns during this period or that it was improper to place him on administrative leave for several days.[12] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant claimed that on May 22, 2003 three employees came running out of the bulk mail room and yelled at him about the fact that the bulk mail area doors were not supposed to be locked until 10:30 a.m. He further alleged that on May 23, 2003 Mr. Ball, a coworker, came up to him with a "mean look," told him that he should not touch the bucket under the flat mail cases and threatened him with physical harm. He asserted that on May 23, 2003 Mr. Downs, a supervisor, gave him a "dirty" look during a meeting. Appellant generally alleged that his coworkers constantly harassed him and that the employing establishment discriminated against him on the basis of age, placed him on a "hit list," showed favoritism to other employees and set him up to be fired.

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 factors.[13] 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.[14]

The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[15] Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions

[12] Mr. Kocak indicated that it was appropriate to place appellant on leave given the fact that he was involved in three incidents in three days and, by appellant's own admission, he was told that the placement on leave was not a form of punishment.

[13] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[14] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[15] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

actually occurred.[16] It should be noted that Mr. Kocak indicated that the three employees told him that appellant had been yelling at them regarding the doors and that Mr. Ball's account of the event claimed by appellant differed greatly from appellant's account. Appellant made several generalized claims of harassment and discrimination but he did not provide any further detail about the specific claimed acts of wrongdoing. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[17]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[18] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[19] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[20] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[21]

ANALYSIS -- ISSUE 2

By letter dated February 15, 2005, appellant requested reconsideration of his claim and asserted that the enclosed medical evidence established his claim because it showed that he had a disabling employment-related emotional condition. Appellant submitted a May 18, 2004 report of Dr. Brown and Dr. Tremont, two clinical psychologists to whom he was referred by the employing establishment. The submission of this medical evidence would not require reopening of appellant's claim because the evidence is not relevant to the main issue of the present case which is factual rather than medical in nature, *i.e.*, whether the Office properly denied appellant emotional

[16] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[18] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[19] 20 C.F.R. §§ 10.606(b)(2).

[20] 20 C.F.R. § 10.607(a).

[21] 20 C.F.R. § 10.608(b).

condition claim because he did not establish any compensable employment factors.[22] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[23] For the same reason, appellant's argument that the submitted medical evidence established that his claim does not have a reasonable color of validity. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[24]

Appellant has not established that the Office improperly denied his request for further review of the merits of its May 26, 2005 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[22] *See Margaret S. Krzycki*, *supra* note 17, which provides that it is not necessary to consider the medical evidence of record when a claimant has not established any compensable employment factors in an emotional condition claim.

[23] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[24] *John F. Critz*, 44 ECAB 788, 794 (1993).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 17, 2005 and May 26, 2004 decisions are affirmed.

Issued: November 4, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board