

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

JAMES A. HILDENBRAND, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Aiken, SC, Employer**

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**Docket No. 05-1638
Issued: November 1, 2005**

Appearances:
Theresa Loscalzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 2, 2005 appellant filed a timely appeal of a June 30, 2005 merit decision of an Office of Workers' Compensation Programs, denying modification of prior decisions finding that he had not established an emotional condition causally related to compensable work factors. 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 an emotional condition causally related to compensable work factors.

FACTUAL HISTORY

On May 18, 2003 appellant, then a 50-year-old letter carrier, filed an occupational disease claim for compensation (Form CA-2) alleging that he sustained an emotional condition as a result of his federal employment. Appellant stated that he experienced harassment and retaliation. He stopped working on January April 22, 2003.

Appellant submitted a narrative statement indicating that on February 4, 2003 he participated in Equal Employment Opportunity (EEO) Commission mediation with respect to a complaint he had filed. He stated that the proceedings were to be confidential, but the next day his supervisors announced at a meeting that someone had said workers were throwing out mail. According to appellant this incident as well as numerous disciplinary actions which followed were in retaliation for his EEO complaint.

With respect to the disciplinary actions, the record contains the following "Step B" decisions which reveal the following: (1) appellant received a letter of warning for "failure to follow instructions [and] failure to put forth reasonable effort" on December 23, 2002 when he failed to complete his route by 4:15 p.m.; a January 24, 2003 Step B decision found that the charge was somewhat vague and the charge of failure to put forth a reasonable effort was not proven, resulting in the letter of warning being reduced to a discussion; (2) appellant filed a grievance alleging that when his schedule was changed from a 7:30 a.m. starting time he should be paid out of schedule (OOS) premium pay; a February 3, 2003 Step B decision found that appellant was entitled to OOS premium pay; (3) appellant received a seven-day suspension on March 28, 2003 for leaving a door to his vehicle open; a May 8, 2003 Step B decision stated that there was no previous discipline as a basis for the suspension and reduced the action to a letter of warning; (4) appellant filed a grievance regarding the change of his starting time; a May 8, 2003 Step B decision found that the employment contract was not violated by the change; (5) appellant received a seven-day suspension for failure to follow instructions on April 18, 2003 regarding a lunch break; a June 17, 2003 Step B decision reduced the suspension to a letter of warning.

In an undated statement signed by appellant's supervisors, management stated that the confidentiality of EEO mediation becomes null and void if a crime is alleged, and appellant had acknowledged at the next day meeting that he made the allegation of employees throwing away mail. The employing establishment also indicated that a change in appellant's schedule was appropriate to provide effective service.

In a report dated June 10, 2003, Dr. Steven Levy, a psychiatrist, provided a history that appellant was under significant stress at work and the results on examination. Dr. Levy diagnosed major depressive disorder.

In an undated statement received on August 22, 2003, appellant stated that he was routinely reprimanded and disciplined in front of other carriers. He stated that he feared he would lose his job.

In a decision dated September 12, 2003, the Office denied the claim for compensation. The Office found as compensable work factors "a series of unwarranted, overly harsh disciplinary actions," finding that the four Step B decisions dated January 24, February 3, May 8, and June 17, 2003 were issued in appellant's favor. The Office also found as occurring in the performance of duty "that management issued no disciplinary actions while the time period to file the EEO complaint remained open for mediation but resumed issuing actions after the time to file had expired." The Office concluded that the medical evidence was insufficient to establish an injury causally related to the compensable work factors.

Appellant requested a review of the written record and submitted additional evidence. In a report dated September 29, 2003, Dr. Levy stated that the most probable cause of appellant's stress-related symptoms were his working conditions. Appellant also submitted a statement from a union steward, Robert Koehler, who stated that appellant did not allege that anyone was throwing out mail and management was trying to make him look like a "rat." He also reported an April 22, 2003 incident in which supervisors were asking questions about why he was stacking mail in a certain manner.

By decision dated February 26, 2004, the Office hearing representative affirmed the September 12, 2003 decision. The hearing representative found that the following incidents occurred in the performance of duty: (1) the letter of warning for failure to follow instructions/put forth a reasonable effort on December 23, 2002, as it was issued improperly; (2) management erroneously denied OOS premium pay, and (3) the seven-day suspension issued for leaving a vehicle door, as a determination was made that there was no basis for a suspension. The hearing representative found that the June 17, 2003 decision regarding a seven-day suspension for failure to follow instructions on April 22, 2003 did not find error and was not a compensable work factor. The finding with respect to the lack of disciplinary actions during a specific time period was not addressed.

Appellant requested reconsideration and submitted a February 22, 2005 report from Dr. John S. O'Brien, a psychiatrist, who provided a history and noted that he had reviewed evidence such as the Step B decisions regarding disciplinary actions. He diagnosed major depressive disorder, in partial remission with treatment. Dr. O'Brien further stated:

"It is my opinion that [appellant's] major depressive disorder was caused by his treatment by his supervisors between the [f]all of 2002 and the [s]pring of 2003, which was characterized as unwarranted, overly harsh and inappropriate disciplinary actions in his subsequent compensation litigation, and alleged harassment and discrimination with a pattern of disciplinary actions identified to have been characterized by a hiatus during the period of time that his initial EEO complaint remained open for mediation, and a resumption of disciplinary actions after the time to file an EEO complaint had expired."

By decision dated June 30, 2005, the Office denied modification of the February 26, 2004 decision. The Office found that Dr. O'Brien's report was not sufficient to establish an injury causally related to compensable work factors.

LEGAL PRECEDENT

To establish a claim that he 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 his condition; and (3) rationalized medical opinion evidence

establishing that the identified compensable employment factors are causally related to his emotional condition.¹

The Board has held that 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 employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or his fear and anxiety regarding her ability to carry out his work duties.²

By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.³

The Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable work factors, which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed factors of employment and may not be considered.⁴ As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence.⁵

It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.⁶ The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.⁷ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁸

¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

² *Ronald J. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

³ *Id.*

⁴ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁵ See *Charles E. McAndrews*, 55 ECAB ____ (Docket No. 04-1257, issued September 10, 2004).

⁶ *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

⁷ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁸ *Anna C. Leanza*, 48 ECAB 115 (1996).

ANALYSIS

In the present case, the Office hearing representative found three compensable work factors based on administrative error by the employing establishment. As the hearing representative noted, the reduction of a disciplinary action does not itself establish error or abuse.⁹ The January 24, 2003 Step B decision, regarding the letter of warning for failure to follow instructions/put forth a reasonable effort on December 23, 2002, and the May 8, 2003 decision with respect to a seven-day suspension for leaving a vehicle door open, do support a finding that the initial disciplinary actions issue were improper. In addition, the February 3, 2003 decision found that the employing establishment had erred in denying OOS premium pay.

Appellant alleged that he has identified other stressors, including a pattern of abusive practices in the workplace, of which the above disciplinary actions are examples. Appellant did file an EEO complaint alleging harassment and retaliation, but there are no findings of harassment or retaliation by the EEO Commission.¹⁰ It is appropriate for the Office to consider the specific incidents or actions by the employing establishment and make a determination as to whether each constitutes a compensable work factor, as the Office did in this case.

The record does not contain probative evidence of additional compensable factors based on error or abuse by the employing establishment. Appellant alleged that he was constantly reprimanded, but did not provide specific examples or supporting evidence. He appeared to allege error with respect to information provided confidentially at an EEO mediation, but the evidence is unclear as to what information was provided and the supervisors indicated that a crime was alleged and that appellant acknowledged providing the information.

The Board notes, however, that in its September 12, 2003 decision the Office found a compensable work factor with respect to the lack of disciplinary actions during a time period associated with the EEO complaint, followed by a series of disciplinary actions after this time period. It is not clear whether the Office was making a finding that the disciplinary actions did constitute retaliation for the filing of an EEO complaint; the hearing representative did not address the issue. It is particularly important to have an accurate factual background in order to properly assess the medical evidence.

Appellant submitted a detailed report dated February 22, 2005 from Dr. O'Brien, who noted his review of the Step B decisions and other evidence, and provided an unequivocal opinion on causal relationship between a diagnosed condition and federal employment. While the reference to disciplinary actions may have included noncompensable factors, it also included compensable work factors and clearly supported appellant's claim. The medical evidence is of sufficient probative value to require further development.¹¹

⁹ *Richard J. Dube, supra* note 6.

¹⁰ *See Donney T. Drennon-Gala, 56 ECAB ___* (Docket No. 04-2190, issued April 26, 2005) (the Board noted that while findings of an administrative agency are not dispositive, they are of probative value and in this case findings of retaliation by an EEO administrative judge were sufficient to establish a compensable work factor).

¹¹ *See Jamel A. White, 54 ECAB ___* (Docket No. 02-1559, issued December 10, 2002).

To properly evaluate the medical evidence, the Office should prepare a detailed statement of accepted facts that clearly outlines compensable work factors and noncompensable work factors. The Office should develop the evidence as necessary and make an appropriate finding with respect to a compensable work factor regarding the timing of the disciplinary actions. The Office should then secure medical evidence with a reasoned medical opinion on causal relationship between a diagnosed condition and the compensable work factors, based on the statement of accepted facts. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Office accepted compensable work factors and the medical evidence is sufficient to require further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 1, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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