United States Department of Labor
Employees' Compensation Appeals Board

DONALD M. MARTIN, SR., Appellant	)	
and	)	**Docket No. 05-708**
	)	**Issued: October 6, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Donald M. Martin, Sr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On February 2, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 23, 2004 denying his request for a subpoena and his claim for an employment-related emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the emotional condition and subpoena issues.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for a subpoena.

FACTUAL HISTORY

On July 22, 2003 appellant, then a 53-year-old mail handler, filed an occupational disease claim alleging that he developed stress/depression in the performance of duty related to "hollering, shouting, swearing, cursing and safety violations" in his employment. Appellant

indicated that he first became aware of the injury and its relation to his work on January 1, 2001. Appellant did not stop work; however, both appellant and the employing establishment indicated that leave was used in order to avoid conflicts or confrontations. The employing establishment also indicated that appellant's job was changed to avoid conflicts and confrontations.

In a letter dated August 4, 2003, the Office requested additional supportive factual and medical evidence.

Appellant provided an August 4, 2003 report from Dr. David B. McDermott,[1] who noted that appellant reported stressful circumstances at home and recently discussed frustration about getting an objective hearing of his (work concerns), feeling like he was a "whistle blower." Appellant reported allegations of sexual intimidation and sexual harassment, which he stated had occurred over the past three years. Dr. McDermott diagnosed appellant with an anxiety disorder with some issues of major depression caused and exacerbated by the stressful conditions of employment appellant described. Dr. McDermott stated that, when appellant's emotional condition was active, he was totally disabled. However, when appellant's emotional condition was inactive, appellant was partially disabled. Several physical therapy reports were also provided.

In an August 18, 2003 letter, the employing establishment advised that appellant's allegations of "hollering, cursing and swearing" directed at him were not corroborated after investigations by supervisors and Workplace Crisis Intervention Team. The letter also challenged appellant's allegation of multiple safety violations and advised that appellant filed one such report in the prior three years. The letter further stated that appellant was not willing to work with management or his union on safety issues, he was no longer a member of the Safety and Health Committee because he refused to communicate with the union's Area Vice President and that appellant refused to work with anyone with whom he had disagreements or differences. The letter also noted that appellant was reassigned in order to reduce his claim of stress.

In a January 26, 2004 decision, the Office denied appellant's emotional condition claim finding that appellant failed to establish a compensable factor of employment.

In a letter dated February 5, 2004 and postmarked February 6, 2004, appellant requested an oral hearing. In a February 20, 2004 letter, the Office advised appellant that should he wish to request to subpoena witnesses or documents, such a request must be made no later than 60 days from the date of his initial request for a hearing.

A hearing was held on September 27, 2004, during which appellant stated that "the internal investigation was not released to me. If the Department of Labor [could] obtain a copy, this would prove his case." After the hearing representative clarified that appellant had received a copy of his case file and had copies of statements from coworkers, appellant was provided 30 days in which to submit additional information. The record included an August 18, 2003 letter from the employing establishment which denied appellant's Freedom of Information Act (FOIA) request for the investigation report and associated documents. The letter cited the grounds and legal reasoning for such refusal and provided appeal rights.

[1] The record does not contain Dr. McDermott's credentials.

At the hearing, appellant testified that the employing establishment ignored his reports of safety violations. He submitted copies of safety reports to support his allegation that the employing establishment was not taking appropriate action. A coworker, Robert O. Nault, testified regarding numerous safety problems and violations, which were alleged to have occurred daily. Mr. Nault also alleged that Darrell Libby, a coworker, used derogatory terms on the public announcement (PA) system, like "dock rat," and would use the PA system to page a deaf employee. He also claimed that profanity was a daily occurrence in the workplace.

Appellant testified about his voluntary appointment to the safety committee. He cited a letter in which the union terminated his position on the committee effective May 3, 2002 for failure to interact with the union. Appellant alleged that "everyone from that date on" violated his rights to be actively involved in safety and health programs and asserted that he was not allowed to participate in any safety program. He testified about the alleged hostile and unsafe work environment and submitted documents regarding the employing establishment's workplace violence policy. Appellant stated that the employing establishment investigated his complaints, but he disapproved of the conduct of the investigation. He stated that a meeting of mail handlers was held on July 8, 2003 in which management agreed that profanity had occurred in the workplace, that it was not acceptable and that "everyone's slate [was] clean" from that day forth, but future misconduct would not be tolerated. Appellant testified that he was subjected to verbal abuse and harassment by coworker Mr. Libby and others. He related an incident whereby he had written up Mr. Libby for a safety violation and for which Mr. Libby accused him of harassment. Appellant stated that Mr. Libby then harassed a forklift driver, Eugene Kelly, by writing him up for the same safety violation which appellant had issued to Mr. Libby. In an April 7, 2004 statement, Mr. Kelly confirmed the incident. Appellant also claimed that Mr. Libby used derogatory terms like "dock rat" and "ramp commander."

Appellant also submitted several statements from employing establishment personnel. In an undated statement, received October 19, 2004, John McGrath, a retired supervisor, stated that some of appellant's issues were "threats to him, vulgar language and hostility in general." He stated that appellant's issues with employees had been ongoing for many years and that many supervisors, plant managers and investigators were involved. Mr. McGrath noted that one workplace intervention investigator had concluded that some of appellant's allegations had merit. He indicated that, in June 2003, all employees were warned that inappropriate language and behavior would not be tolerated.

In a May 8, 2003 statement, Ann Rideout, a coworker, stated that it was known among mail handlers and supervisor Mr. McGrath that appellant did not speak to either Mr. Libby or Debbie Rideout. She related a November 2002 incident occurring between appellant and Mr. Libby in which Mr. Libby had loudly said that there would be two weeks of vacation because Mr. Libby knew that appellant was going on vacation for two weeks. She also related an incident a "few years back," where Debbie Rideout yelled at appellant and appellant went home "on stress." In a September 27, 2003 statement, Ann Rideout related an incident which occurred in September 2003 in which Mr. Libby purposely sat in a chair appellant regularly occupied. She opined that Mr. Libby did it to harass appellant. In an October 10, 2003 statement, Ann Rideout recounted the July 8, 2003 mail handlers meeting. She related that a manager told the mail handlers that the investigation revealed some "pretty bad stuff" and that management was aware of employees using vulgar language and antagonizing or harassing each

other and that such behavior was not acceptable in the future and "everyone's slate is clean" regarding past behavior.

By decision dated December 23, 2004, the hearing representative denied appellant's claim for an emotional condition. The hearing representative accepted that, while there was no evidence to support that profanity was directed toward appellant, profanity was used on the workroom floor and, thus, appellant had established a compensable factor of employment with respect to exposure to inappropriate language. The hearing representative, however, found that the medical evidence failed to establish that an emotional condition arose from that factor. The hearing representative further found that appellant did not establish any other compensable factors of employment. The hearing representative found that appellant's request that the Department of Labor obtain a copy of the employing establishment's internal investigation constituted a subpoena request. The hearing representative denied such request on the grounds that the request was not timely and because the employing establishment gave reasons for its decision and allowed appellant appropriate recourse.

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]

Appellant 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

[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).

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 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 "hollering, shouting, swearing, cursing and safety violations," along with a pattern of coworker verbal harassment, by Mr. Libby in particular. By decision dated December 23, 2004, an Office hearing representative denied appellant's claim finding that the medical evidence was insufficient to establish that his emotional condition arose from the one established compensable employment factor -- exposure to inappropriate language. The Board will initially review whether appellant's alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged a pattern of coworker verbal abuse and harassment by Mr. Libby in particular. Verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances.[8] This, however, does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under the Act.[9] Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment.[10] While the Board has held that verbal altercations with a supervisor may, if proven, constitute a compensable factor of employment, not every utterance in the workplace is compensable. The Board must evaluate the reasonableness of the language given the circumstances surrounding the incident. The mere allegation of profanity is not enough, without evidence that the language was directed at appellant in an attempt to harass him.[11] The Board has therefore held that the use of the derogatory epithet "ape" directed at an employee by a supervisor could be compensable,[12] but the Board has found that isolated statements made in frustration such as "I could just kill

[6] *See Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004); *Norma L. Blank*, 43 ECAB 384 (1993).

[7] *Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004); *Norma L. Blank*, *supra* note 6.

[8] *Fred Faber*, 52 ECAB 107, 109 (2000).

[9] *Id.*

[10] *Marguerite J. Toland*, 52 ECAB 294, 298 (2001).

[11] *Daniel B. Arroyo*, 48 ECAB 204 (1996).

[12] *Abe E. Scott*, 45 ECAB 164 (1993).

you"[13] or the use of profanity such as "God damn people pleaser" which was used to describe the employee but not directed at the employee are not compensable.[14]

The evidence of record confirms that appellant had a difficult relationship with Mr. Libby and Debbie Rideout; however, the evidence is insufficient to establish either verbal abuse or a pattern of harassment. Appellant mentioned an incident with Mr. Libby when he wrote Mr. Libby up for unsafe operation of a vehicle and Mr. Libby then wrote up another coworker for the same violation.[15] A coworker confirmed two altercations between appellant and Mr. Libby, one verbal incident which occurred in November 2002 and one nonverbal incident in September 2003, when Mr. Libby took the chair in which appellant regularly sat and one verbal incident with Debbie Rideout. Appellant's former supervisor confirmed a general history of difficult relationships, but did not discuss any incidents which had occurred. While the record establishes that appellant had some difficult interactions with Mr. Libby and Debbie Rideout, appellant has not provided a sufficiently detailed account of any of the above incidents to establish verbal abuse nor do the above incidents establish a pattern of harassment. Accordingly, this amounts to appellant's dissatisfaction with perceived poor management and constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[16] Thus, appellant has failed to substantiate his allegation that he was subject to verbal assault and a pattern of harassment by his coworkers. The Board further notes that, although the Office hearing representative found that there was evidence that inappropriate language was part of the workplace environment, there is no evidence of record that such inappropriate language was directed at appellant.[17] Accordingly, appellant has not established a compensable factor of employment in that regard.

Appellant has alleged that he worked in an unsafe work environment and that the employing establishment did not properly handle his safety reports. To the extent that appellant is alleging an emotional reaction to the employing establishment's handling of his complaints about the safety of the workplace, appellant must submit probative evidence of error or abuse. It is well established that administrative or personnel matters, although generally related to the employment, are primarily administrative functions of the employer rather than duties of the employee.[18] 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.[19] Appellant has not presented evidence that the employing establishment acted abusively in handling his safety violation reports. Although appellant submitted voluminous documentation of alleged safety violations and a coworker testified as to the matters he

[13] *Leroy Thomas, III*, 46 ECAB 946 (1995).

[14] *Donna J. DiBernardo*, 47 ECAB 700 (1996).

[15] As noted, this incident was confirmed in the record.

[16] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[17] *See Leroy Thomas, III*, *supra* note 13; *see also Donna J. DiBernardo*, *supra* note 14.

[18] *Edward C. Heinz*, 51 ECAB 652 (2000); *Anne L. Livermore*, 46 ECAB 425 (1995).

[19] *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Dinna M. Ramirez*, 48 ECAB 308 (1997).

considered unsafe, there is no evidence that the employing establishment failed to address the safety concerns. The Board additionally notes that an employee's dissatisfaction with perceived poor management is not compensable under the Act.[20] To the extent that appellant is alleging that his safety reports caused him to be harassed by others in the workplace, appellant has not submitted any documentation that would indicate that this event occurred. Consequently, appellant has failed to implicate a compensable employment factor as a cause for his claimed emotional condition.

The Board finds that appellant failed to establish that his emotional condition was causally related to any compensable factors of employment. Unless he alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence.[21]

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[22] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[23] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained. Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[24]

ANALYSIS -- ISSUE 2

As noted above, the Office has the discretion to grant or reject requests for subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of

[20] *Michael Thomas Plante*, *supra* note 16.

[21] *See Gary M. Carlo*, 47 ECAB 299 (1996).

[22] 5 U.S.C. § 8126(1).

[23] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[24] 20 C.F.R 10.619(a)(1).

discretion.[25] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[26]

In this case, appellant requested at the hearing held on September 27, 2004 that the Department of Labor obtain a copy of the employing establishment's internal investigation which the employing establishment had previously refused to provide under appellant's FOIA request. The Office hearing representative interpreted appellant's request to be a subpoena request. To the extent that appellant requested a subpoena of such documents, the Board finds that the Office hearing representative did not abuse his discretion in denying appellant's subpoena request.

As previously noted, section 10.619(a)(1) provides that a subpoena request must be submitted in writing to the hearing representative no later than 60 days following the request for a hearing.[27] In a letter dated February 5, 2004 and postmarked February 6, 2004, appellant requested a hearing, which was held on September 27, 2004. To the extent appellant was alleging a subpoena request at the September 27, 2004 hearing, the hearing representative properly found that such request was not timely as it was not made within 60 days of the hearing request postmarked February 6, 2004.[28] The Office's February 20, 2004 letter advised appellant of the time requirement for requesting a subpoena. Moreover, in requesting a subpoena, a claimant must explain why the testimony or documents are relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[29] Here appellant did not show why information could not be obtained other than through the subpoena process.[30] The hearing representative properly noted that the employing establishment's August 18, 2003 letter had cited legal precedent and provided appropriate recourse in denying appellant's access to the requested document. Thus, the Board finds that the Office hearing representative properly exercised his discretion in denying appellant's request for a subpoena.

CONCLUSION

Appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for a subpoena.

[25] *See Gregorio E. Conde*, *supra* note 23.

[26] *Claudio Vazquez*, 52 ECAB 496 (2001).

[27] 20 C.F.R. § 10.619(a)(1).

[28] *Id.*

[29] *Id.*

[30] *Janet L. Terry*, 53 ECAB ___ (Docket No. 00-1673, issued June 5, 2002).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: October 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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