United States Department of Labor
Employees' Compensation Appeals Board

JAN JAROSZYNSKI, Appellant	)	
and	)	**Docket No. 06-205**
	)	**Issued: April 10, 2006**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, San Diego, CA, Employer	)	

Appearances:
Jan Jaroszynski, 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 November 7, 2005 appellant filed a timely appeal of a November 18, 2004 merit decision of the Office of Workers' Compensation Programs denying his claim for an emotional condition. The record also contains a March 4, 2005 decision denying appellant's request for a hearing before an Office hearing representative. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established an emotional condition causally related to compensable work factors; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On September 7, 2004 appellant, then a 52-year-old custodian, filed an occupational disease claim (Form CA-2) alleging that he sustained stress, depression, seizure disorder and

hypertension as a result of his federal employment. The reverse of the claim form indicated that appellant stopped working on May 6, 2004.

In a narrative statement, appellant indicated that he sustained a work injury in 1992 and returned to work as a custodian requiring landscaping work without proper training. In 1996 appellant sustained another work injury and returned to work as a building monitor, a job he liked but "maintenance workers began to harass me" out of jealousy. He referred to Ted Tobey, Joseph Clay and Robert Bryant, supervisors, and alleged that he was subject to harassment. According to appellant, he "never had a stable position," was moved around to different jobs and "never given any promotions, pay raises, or allowed any opportunities to work overtime." Appellant indicated that on May 6, 2004 he was completely distraught and stopped working.

In a statement dated September 20, 2004, Mr. Bryant stated that he had never observed anyone harass appellant. He noted that appellant disliked Mr. Tobey but was always treated with dignity and respect. According to Mr. Bryant, appellant never applied for a promotion, he had received all appropriate pay raises, and with declining mail volume and revenue, employees were told not to work overtime. Mr. Clay submitted a November 10, 2004 statement, asserting that he never harassed appellant for any reason, and that employees were treated equally. He indicated that appellant had been told not to use employing establishment property for personal use, and on May 6, 2004, a coworker had told him that appellant was using the telephone to do his banking. Mr. Clay approached appellant about using an employing establishment telephone for personal use and appellant started yelling at him. Mr. Clay reported that appellant was so out of control that he had to call Mr. Bryant. With respect to the May 6, 2004 incident, there are witness statements indicating that appellant spoke in a loud voice and denied using the telephone for personal calls.

Appellant submitted a list of 19 incidents that he alleged supported his claim. These include that his schedule was changed in 2002 without explanation, that he was not schedule for holiday work and was at times restricted from using the rest room. Appellant stated that in March 2002 he was ordered to remove his coffee pot from the work area, that in March 2003 he was told not to shave in the rest room, and then two weeks later Mr. Tobey used harsh words such as stupid, idiot and lazy and accused him of lying. According to appellant, on October 8, 2003, he was told to perform the job of a coworker, Alice Gu, he was called a "lazy and unproductive employee" by Mr. Clay on January 16, 2004. With respect to the May 6, 2004, appellant stated that Mr. Clay yelled at appellant for half an hour.

In a decision dated November 18, 2004, the Office denied the claim for compensation, finding that appellant had not substantiated a compensable work factor.

By letter dated January 26, 2005, appellant requested an oral hearing before an Office hearing representative. In a decision dated March 4, 2005, the Office's Branch of Hearings and Review found that the hearing request was untimely. The Branch indicated that it had considered appellant's request and the issue in the case could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that he sustained an emotional condition in the performance of duty, a claimant 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 his work or his fear and anxiety regarding his 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]

ANALYSIS -- ISSUE 1

The allegations in this case are of harassment, as well as, of verbal abuse and erroneous administrative actions by the employing establishment. With respect to an allegation of

[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.)

harassment, the record does not contain sufficient probative evidence to substantiate the claim. There are, for example, no findings of harassment by an administrative agency, or other probative evidence that is sufficient to establish the allegation. It is not enough to merely allege harassment, there must be probative evidence of record to substantiate the claim.[6]

Appellant has also raised allegations with respect to verbal abuse by his supervisors. He alleged that he was called lazy by Mr. Clay, and in one incident was subject to harsh words by Mr. Tobey. The Board notes that not every statement uttered in the workplace will give rise to coverage.[7] The allegations are not supported by detailed descriptions of the alleged incidents, supporting witness statements or other probative evidence. There is no probative evidence that is sufficient to establish a specific incident of verbal abuse in this case.

With respect to appellant's allegations regarding lack of promotions, pay raises and overtime, these are administrative matters. 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.[8] 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.[9] Although appellant has alleged administrative error, the record does not contain probative evidence to support the allegation. Mr. Bryant submitted a statement indicating that appellant received appropriate pay raises, and explained the lack of promotion and overtime work. There is no evidence of record sufficient to establish a compensable work factor based on administrative error.

The record indicates that appellant stopped working on May 6, 2004 and he has discussed an incident on that date regarding his use of a telephone. The witness statements regarding the incident do not establish a compensable work factor. Appellant stated that Mr. Clay yelled at him for personal use of an employing establishment telephone. The Board has held that the raising of a voice during the course of a conversation does not, of itself, establish a compensable work factor.[10] Moreover, the witness statements report that it was appellant who raised his voice during the incident.

Based on the evidence of record, appellant has not alleged and substantiated a compensable work factor as contributing to an emotional condition. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.[11]

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[6] *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

[7] *See Karen K. Levene*, 54 ECAB 671 (2003).

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

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

[10] *Carolyn S. Philpott*, 51 ECAB 175, 179 (1999).

[11] *See Margaret S. Krzycki*, *supra* note 4.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12]

As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13]

ANALYSIS -- ISSUE 2

The merit decision denying appellant's claim was dated November 18, 2004. Appellant requested a hearing by letter dated and postmarked January 26, 2005. Since this is more than 30 days after the November 18, 2004 decision, appellant is not entitled to a hearing as a matter of right.

The Board has held that the Office, in its broad discretionary authority to administer the Act, has power to hold hearings in circumstances where no legal provision is made for such hearings, and the Office must exercise its discretion in such circumstances.[14] In this case, the Office advised appellant that he could submit additional relevant evidence on the issue through the reconsideration process. This is considered a proper exercise of the Office's discretionary authority.[15]

CONCLUSION

Appellant did not establish an emotional condition causally related to the compensable work factors. The Board also finds that the Office properly denied appellant's request for an oral hearing.

[12] 5 U.S.C. § 8124(b)(1).

[13] *See William F. Osborne*, 46 ECAB 198 (1994).

[14] *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann,* 26 ECAB 354 (1975).

[15] *See Mary E. Hite*, 42 ECAB 641, 647 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 4, 2005 and November 18, 2004 are affirmed.

Issued: April 10, 2006
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