United States Department of Labor
Employees' Compensation Appeals Board

RAYMOND G. TWEEL, Appellant	)	
and	)	**Docket No. 06-494**
	)	**Issued: July 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Raymond G. Tweel, 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

JURISDICTION

On December 30, 2005 appellant filed a timely appeal from a December 9, 2005 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the rescission of appellant's emotional condition claim and found that appellant had not established any compensable factors of employment. 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The issues are: (1) whether the Office properly rescinded its acceptance of appellant's claim for an emotional condition; (2) whether appellant has established any compensable factors of employment.

FACTUAL HISTORY

On June 11, 2004 appellant, then a 48-year-old clerk, filed a claim alleging an emotional condition caused by supervisory harassment, both at work and outside of work. He first realized that his emotional condition was caused or aggravated by his employment on May 11, 2004 when he stopped work. Appellant alleged that he was subject to supervisory harassment after he

reported managerial problems to higher officials. He accused his supervisor, W. Carl Varnum, of creating a hostile work environment and sharing confidences with his coworkers. Appellant stated that his supervisor yelled at him anytime he expressed his opinion and that he met with Debbie Morris, the plant manager, about his supervisor's conduct. He alleged that on May 11, 2004 Mr. Varnum had yelled at him during a meeting and then followed appellant into a public establishment after he left work on sick leave.

In an undated statement, Mr. Varnum responded to appellant's allegations. He had been appellant's supervisor for 11 years and they had been friends for 15 years. Mr. Varnum noted that appellant served as a longtime union steward who was defeated in an election for area vice-president in November 2003. When appellant became upset with management decisions or certain procedures, he would come to a supervisor's office and express an opinion on how to run the floor or operations. When appellant did not get his way, he began contacting upper management regarding issues he had with the immediate supervisors. Mr. Varnum indicated that he held a meeting with appellant and Ms. Morris regarding the scheduling of work. Appellant was told that scheduling should be left to the supervisors on the floor. Mr. Varnum noted that the employing establishment was eliminating manual letter dispatch and that appellant knew this job change would affect him in terms of the type of jobs and work tours available. On May 11, 2004 Mr. Varnum met with appellant in his office concerning appellant's letter about getting off the overtime desired list. Appellant stated that management did not know how to use overtime to get work done and raised his voice about a coworker who was being used on overtime. Mr. Varnum noted that appellant had been offered overtime on numerous occasions, but would only accept eight-hour assignments. He indicated that appellant had yelled and pointed at him during the conversation and then went back to work. Appellant took sick leave approximately 15 minutes after leaving his office. Mr. Varnum left the building approximately one hour later for a meal and noted appellant's car parked outside an establishment with gambling machines. He entered the building and observed appellant using a gambling machine. Mr. Varnum noted that he had since seen appellant playing golf on several occasions.

Appellant responded, noting that, for the prior two years, he was threatened with the elimination of his changes in work hours which would affect his life and finances. He contended that the supervisors were giving out unnecessary overtime and alleged harassment and hostile treatment by his supervisor for whistle-blowing. Appellant filed a grievance in the matter, but it was unresolved. Appellant stated that as a union representative he tried to solve what he viewed as problems. In describing alleged mismanagement, appellant stated that his supervisors did not resolve issues that he felt required attention. As examples of harassment, appellant stated that he was assigned work that more junior employees should perform and that his supervisor had violated confidences, such that it turned other employees against him. Appellant alleged that Mr. Varnum yelled at him and treated him like he was "nothing" and that the plant manager took no action. During the May 11, 2004 meeting, he had asked Mr. Varnum to stop yelling at him and, later, informed another supervisor that he could not continue work and was leaving sick. After he left work, Mr. Varnum allegedly followed appellant into a public place of business and continued harassing and publicly humiliating him. Appellant opined that this was management's plan to get "rid" of him since they were aware that he was under a physician's care for nervousness, anxiety, depression and stress.

In an August 5, 2004 attending physician's report, Dr. David Patick, a Board-certified internist, diagnosed major depression, anxiety disorder and fatigue from appellant's inability to rest. He opined that appellant was disabled from May 12 through August 9, 2004. Dr. Patick stated that appellant's condition was caused or aggravated by his employment based on appellant's explanations of workplace problems of constant change, disruption to his personal life, hostility and a threatening work atmosphere. In an August 18, 2004 report, Dr. Patick noted that appellant's disability would extend until September 9, 2004.

By letter dated October 29, 2004, the Office advised appellant that it accepted his claim for a major depressive disorder, recurrent episode, moderate and anxiety state. He was advised that he would receive compensation for the period May 11 to August 6, 2004. An attached statement of accepted facts listed as events considered to be related to appellant's duties: "official union activity as a steward for the period claimed." The Office found the fact that the employing establishment was making job changes and that appellant encountered his supervisor at a social event did not arise in the performance of duty. The Office also found that appellant did not establish his allegation that Mr. Varnum constantly yelled at him.

The Office subsequently reopened the matter under section 8128 of the Federal Employees' Compensation Act.[1] By decision dated November 10, 2004, the Office rescinded the October 29, 2004 acceptance finding that it was made in error. The Office explained that, although appellant had established a compensable employment factor of performing duties as a union steward, there was insufficient medical evidence submitted to establish an injury in the performance of duty. The Office reiterated that the following incidents were not considered as compensable employment factors: the employing establishment made job changes; appellant encountered a supervisor off station at a social location; and appellant had a meeting with his supervisor and the plant manager. The Office again found that appellant did not establish his allegation that Mr. Varnum constantly yelled at him.

Appellant requested review of the written record. In an accompanying statement, he stated that during the past 12 years, he had served 6 years as a union vice president, took a break for 3 years, and then returned to his position as vice president for the union for another 3-year term. Appellant spent most of the time trying to correct things, which included the use of unnecessary overtime. He spoke with managers about individuals who were not performing their work, the unnecessary use of overtime, and other issues that he felt needed correction. Appellant alleged that his supervisor created a hostile work environment by informing certain individuals that appellant had complained about them. He lost a union election in November 2003 and attributed it to a supervisor who had revealed such confidences. Once appellant no longer held a union position, appellant stated that he felt free to still try and resolve problems. If he caught his supervisor in a lie, he would "blow up at me and jump all over me verbally." On May 11, 2004 appellant met with Mr. Varnum to discuss removal from the overtime desired list. In a copy of the letter to his supervisor, he wrote: "In my opinion, overtime is not always given 'as needed,' per the local agreement, but sometimes with certain individuals, just because they want it. Therefore, in order to help create more of a need for those who are getting overtime when they

[1] 5 U.S.C. § 8128.

are not really needed, I wish to have my name removed from the ODL … as of May 11, 2004." Appellant alleged that Mr. Varnum became angry because he had voiced his opinion about the supervisor's misuse of overtime. As he discussed why he wanted off the list, appellant alleged that Mr. Varnum raised his voice in anger and became hostile. Appellant stated that, as Mr. Varnum "seemed to be getting more threatening to me, I finally left the office and started back toward my workstation." He became nervous and uneasy and could no longer perform his duties. Appellant reported that he was leaving sick and clocked out. After leaving work, he stopped at a place where he could calm down before going home. Appellant stated that Mr. Varnum showed up and continued harassing and publicly humiliating him in front of people he knew. The operator of the establishment called him outside where he saw Mr. Varnum with another supervisor, Greg Howard. Mr. Varnum allegedly told Mr. Howard that he wanted him to witness appellant at this location. He submitted a statement from Roberta L. Boyd, who noted that, on the morning of May 12, 2004, between midnight and 1:00 a.m., a man came to her place of work, walked over to and hovered over appellant with an angry look on his face. The man asked appellant in a harsh tone if he was still sick and, when appellant replied yes, he stormed out of the building.

Appellant submitted copies of a June 4, 2004 Step 1 grievance and a June 15, 2004 Step 2 grievance. In additional medical reports, Dr. Patick attributed appellant's diagnosed major depression, anxiety disorder, stress and fatigue to appellant's fear of the workplace and management based on the treatment he received.

In an April 12, 2005 letter, the employing establishment controverted the claim.

By decision dated May 9, 2005, an Office hearing representative set aside the November 10, 2004 decision. She stated that the original decision accepting the claim was premature and that the subsequent decision had commingled the issues of performance of duty and causal relationship. The Office hearing representative found that the evidence submitted by appellant did not clearly identify with specificity those actions or incidents that occurred while he was performing any representational functions such that the factual evidence did not support that his activities occurred while in the performance of duty. The Office hearing representative also noted the deficiencies in appellant's claim and determined that he should be given an opportunity to provide further relevant evidence.

By decision dated June 16, 2005, the Office rescinded its October 29, 2004 acceptance of the claim. It found that appellant did not establish any compensable factors of employment.

On July 5, 2005 appellant requested a review of the written record. He submitted statements from several coworkers. Larry Floyd, a coworker, stated that he had witnessed "on many occasions [Mr.] Varnum yelling at [appellant] and treating him in an unprofessional manner." In March 2004, Mr. Varnum made threatening statements to Mr. Floyd, directed at appellant, regarding some telephone calls appellant made. Since May 2004 other employees had told Mr. Floyd how Mr. Varnum had been "bad-mouthing" appellant on a daily basis. David Daniel, president of the local union, stated that, for at least a year prior to May 2004, he had received numerous calls from employees working at the distribution center asking him why appellant was trying to cut out overtime. When Mr. Daniel inquired as to the source of this information, the employees indicated that they were told this by supervisors. Mr. Daniel asserted

that this created a hostile work environment for appellant. He indicated that negotiations regarding administering overtime were incomplete and should have been held in confidence.

On October 31, 2005 Mr. Varnum advised that the employing establishment was undergoing changes that could impact employees in the manual sections and there had been ongoing discussions for approximately two years. As appellant was the senior person in his section, he would be the last person impacted by any job changes. Mr. Varnum indicated that during this time he and appellant were friends and often played golf. He acknowledged that, on occasion, he would raise his voice to people but stated that a military service-connected hearing loss caused him to speak loudly. Following the May 11, 2004 meeting, Mr. Varnum stated that he left for a meal approximately one hour after appellant left sick and happened to drive by a gambling establishment and saw appellant's car. He entered the establishment, observed appellant gambling, approached him and asked whether he was sick. When appellant did not answer him, Mr. Varnum left the club and called another supervisor, Mr. Howard. Mr. Varnum stated that he was concerned that appellant left work claiming to be sick but had not gone home. In a November 27, 2005 statement, appellant stated his disagreement with Mr. Varnum.

By decision dated December 9, 2005, an Office hearing representative affirmed the June 16, 2005 decision, finding that appellant failed to establish any compensable factors of employment.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.[2] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[3] It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[4] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.[5] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[6]

ANALYSIS -- ISSUE 1

The Office rescinded its acceptance of appellant's emotional condition claim on the basis that he failed to establish a compensable work factor arising in the performance of duty. The Office also determined that appellant had not otherwise established his claim for an emotional

[2] *Linda L. Newbrough*, 52 ECAB 323 (2001); *see also* 20 C.F.R. § 10.610.

[3] *Linda L. Newbrough, supra* note 2*; Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993).

[4] *Linda L. Newbrough, supra* note 2.

[5] *Id.; Gareth D. Allen*, 48 ECAB 438 (1997).

[6] *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

condition.[7] The Board finds that the Office met its burden of proof to rescind acceptance of appellant's claim by offering new legal rationale in support of its determination.

The Office accepted that appellant had established a compensable factor of employment, that being his duties in his representational functions on behalf of the union. The record reflects that prior to November 2003, appellant served in various capacities with the local union. However, appellant was not specific as to those events or instances that arose when he was engaged in representational functions on behalf of the union and its members. With respect to whether union activities are related to employment, the general rule is that union activities are personal in nature and are not considered to be within the course of employment.[8] The Board has recognized an exception to the general rule: employees performing representational functions which entitle them to official time are in the performance of duty and entitled to all benefits of the Act if injured in the performance of those functions. The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer.[9] Although appellant has generally contended that he was harassed and subjected to a hostile work environment as a result of reporting problems at work to higher officials, he was not specific which of these actions or incidents occurred while he was performing representational functions so as to bring his union activities into the performance of duty. Where an employee fails to identify specific employment factors he believes are responsible for his condition, he does not meet his burden of proof in establishing his claim for compensation. Such failure prevents the Office from performing its adjudicatory function of determining the truth of the allegations and whether the factors that caused his condition arose within the coverage of the Act.[10]

LEGAL PRECEDENT -- ISSUE 2

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[11] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act.[12] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[13] When an employee experiences emotional stress in carrying out his or

[7] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004).

[8] *Charles D. Gregory*, 57 ECAB ___ (Docket No. 05-252, issued January 18, 2006); *see Jimmy E. Norred*, 36 ECAB 726 (1985).

[9] *Charles D. Gregory*, *supra* note 8; *see Marie Boylan*, 45 ECAB 338 (1994).

[10] *Samuel F. Mangin, Jr.*, 42 ECAB 671 (1991).

[11] 28 ECAB 125 (1976).

[12] 5 U.S.C. §§ 8101-8193.

[13] *See Robert W. Johns*, 51 ECAB 137 (1999).

her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[14]

ANALYSIS -- ISSUE 2

The Office properly determined that appellant's reaction to being voted out of union office was not considered a factor arising within the course of employment. Appellant attributed this loss to Mr. Varnum sharing certain confidences with other employees. The Board finds that appellant has not submitted sufficient evidence to support this allegation as factual. Appellant's reaction resulted from his personal frustration at not being able to work in a particular environment or to hold a certain position.[15] Mr. Daniel noted that he had received calls from employees concerning whether appellant was trying to cut out overtime. The source of this information was listed as the supervisors. Mr. Daniel did not specify Mr. Varnum as the supervisor who provided such information to the employees nor is it readily apparent from the record that such information, even if divulged, was of a confidential nature.

Appellant's actions after January 2004, when he stated that he was no longer performing union functions, cannot be said to have arisen in the course of any representational function. Rather, he acknowledged taking it upon himself to inform management personnel when he disagreed with certain decisions or actions. Regarding appellant's disagreement with the manner in which Mr. Varnum performed his duties as a supervisor, appellant did not specify the times or instances of any alleged misdeeds. The Board has held that the manner in which a supervisor exercises his or her discretion generally falls outside the coverage of the Act. This principle recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.[16] Appellant has not submitted sufficient evidence to support his allegations concerning alleged mismanagement, assignment of work or divulging confidential information by Mr. Varnum or other supervisors. Appellant acknowledged a disagreement with Mr. Varnum on how the overtime desired list was administered and implemented. This issue gave rise to their meeting on May 11, 2004, after appellant submitted a letter to Mr. Varnum requesting that his name be removed from the list. Mr. Varnum noted that he and appellant disagreed as to the use of overtime and appellant raised concern about a coworker. Both men stated that the other raised his voices during the meeting.

[14] *Lillian Cutler, supra* note 11.

[15] Disability is not covered where it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position; *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler, supra* note 7.

[16] *Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

Appellant alleged that Mr. Varnum yelled at him and generally treated him in a hostile and threatening manner. The Board has recognized the compensability of verbal abuse in certain circumstances. This, however, does not imply that every statement uttered in the workplace will give rise to compensability.[17] Appellant failed to submit sufficient evidence to establish instances of verbal abuse on the part of Mr. Varnum during the May 11, 2004 meeting.[18] Mr. Floyd merely stated that on occasion he had witnessed Mr. Varnum yelling at appellant and that Mr. Varnum had made threatening statements to him concerning appellant. He failed to provide any specific information about the nature of these incidents or those alleged by appellant from which a finding of error or abuse on the part of Mr. Varnum can be made. Mr. Floyd's statement that other unidentified employees had told him about Mr. Varnum "bad mouthing" appellant is not evidence that appellant was harassed. Mr. Floyd did not witness any of the incidents specified by appellant or provide specific information as to the dates or times that such conversations occurred or the parties involved. Appellant has not submitted sufficient evidence that confidential discussions with either his supervisor or other management personnel were discussed with employees and he has not established a factual basis for his perceptions of harassment.[19]

The evidence is not sufficient to establish that appellant was harassed by Mr. Varnum after leaving the employing establishment premises on May 11, 2004. Appellant alleged that his supervisor harassed him on May 11, 2004 by following him to a gambling establishment after he left work on sick leave. This matter arose at a time after appellant was off duty and does not relate to his regular or specially assigned duties. There is some suggestion in the evidence that the supervisor may have been investigating appellant's possible misuse of sick leave. Mr. Varnum noted contacting another supervisor to witness that appellant appeared to be gambling not long after he had left work. Monitoring work performance and matters pertaining to leave use is an administrative function of the employer and, therefore, not compensable unless shown to be erroneous or abusive.[20] Appellant has presented no evidence to establish error or abuse on the part of his supervisors in monitoring his use of leave. The evidence does not establish that it was unreasonable for Mr. Varnum to make inquiry about appellant's health upon finding appellant at a gambling establishment shortly after he left work on unscheduled sick leave.

Appellant also asserted that Mr. Varnum kept "tabs" on him outside of work. The record reflects that both appellant and Mr. Varnum acknowledged being friends at one time and played golf. The record indicates that someone claiming to work at the employing establishment made inquiry into whether appellant had golf times after he stopped work on May 11, 2004. This information, without any further explanation, is not enough to establish harassment or error or abuse on the part of Mr. Varnum. This allegation does not relate to appellant's regular or specially assigned duties. The evidence does not establish the identify of the individual making

[17] *Denise Y. McCollum*, 53 ECAB 647 (2002).

[18] *See Peter D. Butt, Jr.*, 56 ECAB ___ (Docket No. 04-1255, issued October 13, 2004).

[19] *James E. Norris*, 52 ECAB 93 (2000).

[20] *Debora L. Hanna*, 54 ECAB 548, 551 (2003).

such inquiry. Assuming it was Mr. Varnum, there is no evidence of error or abuse on his part in any investigation of leave use.

The record reflects that certain changes were being made in mail distribution which would affect the manual distribution of mail. The Board has held that the assignment of work duties is an administrative function of the employer and that there is insufficient evidence of error or abuse with respect to these changes.[21] Appellant's reaction to the possibility of reassignment to another position or work tour is not considered to be in the performance of duty as it does not relate to his regular or specially assigned job duties. His allegations in this regard are vague. Any frustration arising from his preference to hold a certain position or to work in a specific work environment, as noted, must be considered as self-generated. He failed to provide evidence of error or abuse in this matter.[22] The evidence of record is not sufficient to establish a compensable employment factor. The Office properly rescinded acceptance of his claim for an emotional condition.[23]

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for an emotional condition and that appellant has not established any compensable factor of employment.

[21] As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee. *Felix Flecha*, 52 ECAB 268 (2001). An administrative or personnel matter will be considered to be an employment factor, however, where the evidence discloses error or abuse on the part of the employing establishment. *James E. Norris*, *supra* note 19.

[22] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. *David Cuellar*, 56 ECAB ___ (Docket No. 05-429, issued July 18, 2005).

[23] As the Office properly rescinded acceptance of the claim and because, after the proper rescission, appellant did not otherwise establish any compensable employment factors, it is not necessary for the Board to consider the medical evidence of record. *See Alberta Dukes*, 56 ECAB ___ (Docket No. 04-2028, issued January 11, 2005).

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board