United States Department of Labor
Employees' Compensation Appeals Board

V.L., Appellant	)	
and	)	**Docket No. 06-1433**
	)	**Issued: October 23, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Bell, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated July 18, 2005, which denied his claim for an emotional condition. He also appealed a decision dated March 23, 2006 which denied further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

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 reconsideration without a merit reviews.

FACTUAL HISTORY

On May 5, 2003 appellant, then a 54-year-old mail handler, filed an occupational disease claim alleging that he developed emotional stress after management arbitrarily changed his nonscheduled days. He stopped working on September 17, 2002 and returned on

January 27, 2003. Appellant stopped completely on April 2, 2003.[1] He submitted a return to work slip from Dr. Michael Sugarman, a Board-certified psychiatrist, dated April 22, 2003, who noted that appellant could return to work on July 1, 2003. In a report dated April 28, 2003, Dr. Sugarman noted treating appellant on April 3, 2003 for depression and anxiety.

By letter dated June 16, 2003, the Office asked appellant to submit additional information including a detailed description of the employment factors or incidents that he believed contributed to his claimed illness and a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed emotional condition.

Appellant submitted reports from Dr. Sandhya R. Gudapati, a Board-certified psychiatrist, dated May 16 to July 9, 2003. Dr. Gudapati treated appellant for work-related stress and diagnosed post-traumatic stress disorder and depression.

In a July 24, 2003 decision, the Office denied appellant's claim finding that the evidence did not show that the claimed emotional condition occurred in the performance of duty.

In a letter dated August 1, 2003, appellant requested an oral hearing. The hearing was held on April 15, 2004.

Appellant submitted evidence including health care treatment notes reporting his status and documents pertaining to the employing establishment. In a routing slip dated April 8, 2002, M.D. Bassard, appellant's supervisor, noted that appellant worked for the postal service and his work hours were from 4:30 p.m. to 1:00 a.m. with weekends off. Appellant submitted a rehabilitation job offer, amended August 8, 2002, which offered him a modified mail handler position effective August 24, 2002, Grade 4, with a salary of $39,922.00. The tour started at 4:30 p.m. and the assigned days off were Tuesday and Wednesday. The position was as a video encoder and was subject to the work restrictions set forth by appellant's treating physician. On August 14, 2002 appellant rejected the job offer, noting that he had 34 years of seniority and earned Saturday and Sunday as his assigned days off. He asserted that Jill Herrel, a supervisor, harassed and discriminated against him by changing his days off to Tuesday and Wednesday. In a routing slip dated September 11, 2002, appellant advised July Alvarez-Rendon, the plant manager, that he received the amended job offer and rejected it until he could consult with his physician. He contended that the employing establishment improperly changed his days off. Appellant noted that he met with Terry Masushiege, director of operations, on September 10, 2002 and was threatened with disciplinary action if he did not report to the video encoder room on September 14, 2002. He submitted an undated grievance form in which he alleged that he was improperly denied his preferred off days without consideration of his seniority.

In a September 24, 2002 grievance form, appellant alleged that on September 17, 2002 as he proceeded to the new rehabilitation job in the video encoder room, Mr. Bassard instructed him to clock out and go home because he had been absent without leave (AWOL) from September 14 to 16, 2002. He had no prior notice of being AWOL. In a September 25, 2002 grievance,

[1] The record reflects that in 1985 appellant sustained a work-related hip injury, which was accepted by the Office and thereafter worked a permanent light-duty position.

appellant again alleged that on September 16, 2002 he was reassigned without his preferred off. In a grievance settlement dated September 27, 2002, the employing establishment withdrew the AWOL determination for September 14 to 16, 2002 and advised that appellant would be paid for September 17 to 19, 2002. In a grievance form dated October 3, 2002, appellant again alleged that his seniority was not considered when assigned nonscheduled days off. A February 14, 2003 letter from Patricia E. Sims, a union steward, indicated that she attended a meeting with Mr. Masushiege and appellant. Mr. Masushiege indicated that an injury compensation specialist orally instructed the employing establishment to change appellant's job offer and nonscheduled days. On May 11, 2003 appellant requested sick leave from April 3 to July 1, 2003. In a letter dated September 15, 2003, Sam Gagliano, a coworker, indicated that Mr. Masushiege informed him that light-duty people should be fired because they were not productive.

By a letter dated April 2, 2003, the employing establishment advised that effective April 5, 2003 appellant would adhere to the scheduled days off of Wednesday and Thursday. On May 21, 2004 John Oyenok, manager of plant support, noted that a reasonable accommodations committee met to discuss job assignments for light-duty, limited-duty and rehabilitation employees at the employing establishment. The committee reviewed medical documentation for each employee and the assignments each could perform. Mr. Oyenok advised that appellant was responsible for supplying the schedule and duties for the video encoding position. The assignment letters were sent by Ms. Herrel to the employees assigning them a position based on their limitations. Mr. Oyenok indicated that appellant rejected the job offer because he was unhappy with his nonscheduled workdays. He noted that appellant was not pressured to accept the position.

In a decision dated July 18, 2005, the hearing representative affirmed the July 24, 2003 decision.

In a letter dated March 2, 2006, appellant requested reconsideration.

In a March 23, 2006 decision, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

To establish his 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.[2] Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.

[2] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

In the case of *Lillian Cutler*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] 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 under the Act.[5] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[6] 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 under the Act. 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 Act. 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.[7]

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.[8] 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.[9]

To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[10] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere

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[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[6] *Lillian Cutler, supra* note 3.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Id.*

[8] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[9] *Id.*

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

perceptions of harassment are not compensable under the Act.[11] General allegations of harassment are not sufficient.[12] The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[13]

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to a change in his nonscheduled workdays to Wednesday and Thursday. The Office, found that appellant did not establish any compensable employment factors. The Board must, thus, initially determine whether appellant has established any compensable employment factors.

Appellant generally alleged that he was harassed and discriminated against when the employing establishment changed his nonscheduled workdays from Saturday and Sunday to Tuesday and Wednesday. He contended that based on 34 years of seniority, management assigned his days off in a discriminatory and arbitrary manner. For harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable.

The employing establishment submitted a statement from Mr. Oyenok, manager of plant support, who explained the process of how the employing establishment made job assignments for light-duty, limited-duty and rehabilitation employees. A committee reviewed the medical documentation submitted as to each employee's limitations and the job assignments they could perform. Management personnel contended that at no time they harass appellant or single him out for a change in nonscheduled workdays. In this case, appellant has not submitted sufficient evidence to establish disparate treatment by management with regard to his newly assigned work schedule. Although he alleged that he was singled out and discriminated against, he provided insufficient evidence to establish his allegations.[14] Appellant submitted statements from a coworker, Mr. Gagliano and Ms. Sims, a union steward. However, these statements are not specific to establish that Mr. Masushiege acted in a harassing or discriminating manner with record to appellant's assigned work tour. Mr. Oyenok noted that assignments were changed after a committee review of the medical documentation was performed which included examining the physical limitations of employees and a determination of what assignments they could perform in order to accommodate their medical restrictions.

Appellant also alleged that on September 10, 2002 Mr. Masushiege threatened him with disciplinary action if he did not report to the video encoder room on September 14, 2002.

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

[12] S*ee Paul Trotman-Hall,* 45 ECAB 229 (1993).

[13] *See Leroy Thomas, III,* 46 ECAB 946, 954 (1995); *Alton L. White,* 42 ECAB 666, 669-70 (1991).

[14] *See William P. George,* 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

In this case, appellant did not submit evidence or witness statements in support of his allegation. Mr. Oyenok denied that management threatened, harassed or pressured appellant to accept the position. Although appellant submitted a statement from a coworker, Mr. Gagliano, who asserted that Mr. Masushiege stated that light-duty employees should be fired because they were not productive, this statement is not specific as to when the statement was made and who was present. Furthermore, there is no evidence that any such statement was directed towards appellant or appellant's light-duty position. This vague and generalized statement attributed to Mr. Masushiege is insufficient to establish that appellant was threatened with disciplinary action. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

To the extent that appellant generally alleged a verbal or physical threat by the employing establishment on September 10, 2002, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[15] The Board finds that the facts of the case, noted above in the analysis of the allegation of harassment, does not reveal that appellant's superiors made any specific corroborated threats or acted unreasonably. Appellant has not otherwise shown how supervisory comments or actions rose to the level of verbal abuse or otherwise fell within coverage of the Act.

Appellant's primary allegation of harassment is that the employing establishment improperly changed his nonscheduled workdays effective September 14, 2002. However, an employee's frustration over not being permitted to work a particular shift or to hold a particular position is not covered under the Act.[16] Changes in workdays and hours, positions, locations and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty. However, a change in a duty shift does not arise as a compensable factor *per se*. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially-assigned job duties due to a change in duty shift, *i.e.*, a compensable factor arising out of and in the course of employment or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.[17] The assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[18] In this case, while appellant mentioned his change in nonscheduled days, he did not allege that he was unable to perform the duties of the position and thus he has not identified a compensable employment factor. Likewise, although appellant noted filing grievances over the matter, there is no evidence that any fact finder found error or abuse by the employing establishment in the assignment of a work schedule.

[15] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

[16] *Ruth C. Borden*, 43 ECAB 146 (1991).

[17] *Helen Allen*, 47 ECAB 141 (1995); *Peggy R. Lee*, 46 ECAB 527 (1995).

[18] *Id.*

Other allegations by appellant relate to administrative or personnel actions. In *Thomas D. McEuen*,[19] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[20]

Appellant's alleged that on September 14 to 16, 2002 he was wrongfully placed on AWOL. The Board notes that the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[21] The Board finds that the employing establishment acted reasonably in these administrative matters. In a grievance settlement dated September 27, 2002, the employing establishment removed the AWOL determination for September 14 to 16, 2002 and advised that appellant would be paid for September 17 to 19, 2002. However, the mere fact that the employing establishment lessened a disciplinary action does not establish that the employing establishment erred or acted in an abusive manner.[22] Appellant has presented insufficient evidence to establish error. Thus, he has not established administrative error or abuse in the performance of these actions and, therefore, they are not compensable under the Act.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[23] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[24] which provides that a

[19] *See Thomas D. McEuen, supra* note 7.

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

[21] *See Judy Kahn*, 53 ECAB 321 (2002).

[22] *See Linda K. Mitchell*, 54 ECAB 748 (2003).

[23] 5 U.S.C. § 8128(a).

[24] 20 C.F.R. § 10.606(b).

claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by the (Office); or
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[25]

ANALYSIS -- ISSUE 2

Appellant's March 2, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant requested reconsideration and provided no additional evidence or argument on his behalf. Therefore, he did not otherwise show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant, as noted above, did not submit any new evidence with his reconsideration request.

The Board finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his March 2, 2006 request for reconsideration.

[25] 20 C.F.R. § 10.608(b).

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.[26] The Board further finds that the Office properly denied appellant's request for reconsideration.[27]

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2006 and July 18, 2005 decisions of the Office are affirmed.

Issued: October 23, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[26] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[27] The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant on appeal; *see* 20 C.F.R. § 501.2(c).