United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 06-1479**
	)	**Issued: April 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
William Hackney, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2006 appellant filed a timely appeal from a merit decision of an Office of Workers' Compensation Programs' hearing representative dated October 6, 2005, who affirmed the denial of his claim and a nonmerit decision of the Office dated April 28, 2006, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the nonmerit issue.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of his federal duties; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 5, 2004 appellant, then a 54-year-old city carrier, filed an occupational claim (Form CA-2) alleging that he sustained stress-related chest pain. An October 5, 2004 report

from an emergency medicine physician[1] indicated that appellant had chest pain with no positive objective findings, angina and anxiety disorder during and after an "investigative interview." The physician opined, by placing a checkmark in the appropriate box, that appellant's condition was caused or aggravated by his employment. Appellant was found totally disabled from October 5 to 6, 2004 and referred to a psychologist. He did not return to work.

In an October 19, 2004 medical report, Dr. David J. Krull, a Board-certified family practitioner, opined that appellant was totally disabled from his job "because of the stress" and that "he may be a threat to lose control emotionally and cause physical harm."

In an October 29, 2004 statement, appellant reported that he returned to duty in November 2003 after being disabled by a fractured hip sustained in a nonwork-related automobile accident. During his absence, 60 additional stops were added to his route and that his request for a route count was denied. He alleged that he endured daily harassment by Supervisors Luke A. Romano and Norm Wilkins for requesting a route count and for filing Equal Employment Opportunity (EEO) complaints. Appellant had increased workloads, his requests for help were denied, he was issued letters of warnings for unsatisfactory performance and his supervisors watched him on his route and unfairly criticized his work performance. He alleged that an October 5, 2004 investigative interview caused him stress because management had come to his route and stated that he should have had "undertime."

In a November 9, 2004 statement, Mr. Romano, manager of customer service, disagreed with appellant's allegations. He advised that, while appellant was out of work, a route count and inspection of appellant's route showed a 15 percent decrease in volume and a decrease in mail casing volume resulting from automation. Because appellant's route did not have any increased deliveries, it required an adjustment, due to the volume drop and decreased casing time required, which was equal to about 60 additional deliveries. The union agreed with the route change. On returning to work, appellant was extremely "put out" about his route adjustment and adopted a confrontational demeanor with Supervisors Wilkins and Roger Parker. The investigation showed that appellant's modified route could be completed within eight hours. Never the less appellant requested assistance or additional time on a near daily basis, regardless of the day's workload or when he left to deliver his route. Mr. Romano asserted that appellant began to waste time, which resulted in official discussions regarding his performance and letters of warning. He stated that appellant also filed EEO complaints against Supervisors Wilkins and Parker based on race. On October 2, 2004 Supervisor Jacqueline Woods was assigned to appellant's zone and spoke with appellant about the additional 15 minutes, over and above 8 hours, he indicated was necessary to complete his work. Although Ms. Woods instructed appellant to call her from the street to advise her of his progress, he failed to do so. That afternoon, Ms. Woods observed appellant making his last delivery at 3:17 p.m., approximately 23 minutes earlier than scheduled and nearly 1 hour less time than he had insisted was required. Since appellant made his last delivery at 3:17 p.m., he should have returned to the office no later than 3:25 p.m., because it was a 6 minute drive back. Instead he arrived at the office at 3:42 p.m., using an additional unexplained 17 minutes. On October 5, 2004 Ms. Woods conducted an investigative interview with appellant concerning his performance on October 2, 2004.

[1] The physician can not be identified as the signature is illegible.

By decision dated November 22, 2004, the Office denied appellant's claim. The Office found that appellant had not established a compensable work factor.

Appellant requested an oral hearing, which was held on July 12, 2005. He reiterated his contentions and also claimed that in October 2004 Mr. Parker yelled at him on the workroom floor saying that he "can[no]t do anything right" and that he should "tell [his] customers out there that you can[no]t do the route in [eight] hours." Appellant stated that the outburst occurred in October 2004 on Mr. Parker's last day of work prior to his transfer and was prompted by appellant's request for assistance. He stated that he got so upset that he thought he was having a heart attack. Appellant related that a shop steward, Bob Ketzel, came over and told Mr. Parker that "If you was going to yell at this man, you should have took him in the office." He alleged that had his workload not increased, he could have performed the job.

Appellant submitted several statements from coworkers. Richard Winchester stated that, since appellant filed an EEO complaint, he had been under very strict discipline by management. Dave Claver stated that management yelled at appellant for asking a simple question and treated him differently from others. Charles L. Miller, stated that management harassed appellant and management monitored appellant. One coworker, who cased appellant's mail, stated that only appellant's mail was precased daily in order to get him on the street early to avoid giving him help on the street. The coworker additionally opined that appellant got a great deal of harassment from management when he requested help.

Another coworker stated that since appellant filed an EEO complaint, management gave him a very difficult time. She advised that on January 22, 2004 at approximately 2:45 p.m., she saw Mr. Parker answer a call from appellant and heard him yelling into the telephone that he was not going to give appellant any help, that appellant was not doing his job and that he was expected to be off the clock by 4:00 p.m. The coworker indicated that Mr. Parker then hung up on appellant.

In a May 13, 2004 letter, Bob Tesso, a union president, indicated that on April 27, 2004 at approximately 8:45 a.m., Mr. Parker "shouted" out on the workroom floor to ask if Mr. Tesso wanted to help appellant. Mr. Tesso indicated that as he approached appellant, he indicated that he could not move and when Mr. Parker asked whether he should call 911, he responded "yes." He also opined that the employing establishment had fabricated the facts in appellant's case and that an investigation into the matter would bring out the true facts.

In an August 10, 2005 statement, the employing establishment responded to the hearing transcript and asserted that progressive administrative actions were taken by three different supervisors (Mr. Wilkins, Mr. Parker and Ms. Woods) to correct appellant's performance deficiencies. Although appellant testified that Mr. Parker yelled at him everyday in October 2004, Mr. Parker was transferred to another station effective October 1, 2004. It also advised that there was no Mr. Ketzel and that Mr. Tesso had passed away in July 2004. The record contains several letters of warning for unsatisfactory performance, the denial of appellant's request for a special route count copies of EEO complaints, including a September 10, 2004 grievance settlement in which the time that the grieved action would remain in appellant's file was reduced from two to one year contingent on no further violations and several medical reports from Dr. Walter E. Afield, a Board-certified psychiatrist.

By decision dated October 6, 2005, an Office hearing representative affirmed the denial of appellant's claim finding that he had not established a compensable work factor. The hearing representative found that although appellant alleged that Mr. Parker yelled at him on October 4, 2004, which was the "straw that broke the camel's back" leading to his work stoppage and disability beginning October 5, 2004, the inciting incident for appellant's work stoppage appeared to be the investigative interview on October 5, 2004.

On March 22, 2006 appellant requested reconsideration. In support of his allegation that Mr. Parker yelled at him on October 4, 2004, he advised that he was submitting four exhibits of the employing establishment's payroll records which showed that Mr. Parker was at the same workstation as appellant on October 4, 2004. The payroll records were alleged to contain the last four digits of appellant's social security number after he made corrections to employee "clock rings." Appellant additionally alleged that witness statements showed that Mr. Parker abused him in front of his fellow employees. The exhibits of the employing establishment's payroll records were not of record.

By decision dated April 28, 2006, the Office denied reconsideration of the October 6, 2005 decision.

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

[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).

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.[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]

With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[8] An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that he was given 60 additional stops on his route, was unable to complete his route within eight hours and was harassed by his supervisors after he requested a route count and filed EEO complaints. He also alleged that his supervisors were verbally abusive in response to his requests for additional street time. The Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether the alleged incidents and conditions of employment are compensable under the terms of the Act.

Appellant's primary allegation is that he had stress due to an increased workload. A heavy workload may be a compensable work factor, if there is probative and reliable evidence to support the allegation.[10] In this case, the evidence of record does not establish appellant's allegations of an increased workload as a compensable work factor. The employing establishment indicated that appellant was given 60 additional stops as an appropriate adjustment based on a route inspection which showed a decreased route volume and casing time. Despite appellant's allegations that the route could not be performed in eight hours, there is no probative evidence showing that appellant's workload had increased to the point where it was excessive and would establish a compensable work factor. He did not provide any evidence that his route had an excessive workload or otherwise support his allegation. Accordingly, the Board finds that appellant has not established a compensable work factor regarding overwork.

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

[7] *Id.*

[8] *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[9] *Helen P. Allen*, 47 ECAB 141 (1995).

[10] *Bobbie D. Daly*, 53 ECAB 691 (2002); *Sherry L. McFall*, 51 ECAB 436 (2000).

Appellant alleged that he was harassed by his supervisors when he requested a route inspection. The Board has found that a disability is not compensable where it results from appellant's frustration from not being able to work in a particular environment or to hold a particular position.[11] Appellant's desire for a route inspection following the addition of 60 stops is an administrative matter and is not a compensable factor under the Act absent a showing of error or abuse.[12] The evidence submitted by appellant does not show that the agency erred or abused its discretion in denying his request for a route inspection. The record contains a letter from the employing establishment to appellant citing their reasons for denial of the route inspection to appellant, which noted that a special route count is not granted when a valid inspection indicated the need for the additional stops and the performance of the carrier submitting the request is unsatisfactory. Additionally, there is no evidence that the employing establishment erred in denying appellant's requests for help to complete his route as the record reflects that the additional 60 deliveries on appellant's route could be performed in an eight-hour day.

Appellant alleged that his supervisors harassed him after he requested help and filed EEO complaints. The record establishes that the employing establishment denied appellant's request for additional time, monitored his route, conducted investigative interviews and issued disciplinary actions with regard to his performance deficiencies. An employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his duties and that employees will at times dislike actions taken.[13] Furthermore, the Board has held that discussions of job performance, monitoring and assignment of work are administrative functions that do not fall under the coverage of the Act absent a showing of error or abuse.[14]

Appellant has not established that the employing establishment acted unreasonably with regard to these administrative matters. He alleged that his supervisors denied his requests for help, improperly monitored him and issued unreasonable disciplinary actions. Appellant submitted no evidence showing that those administrative functions were abusive or unreasonable. Rather, evidence demonstrates that his work and performance on the job was monitored but it does not suggest that any such monitoring was unreasonable. He alleged that the investigative interview on October 5, 2004 was stressful. The record reflects that appellant was interviewed with respect to his activities on his route on October 2, 2004 and subsequently issued a letter of suspension. However, as noted above, the Board has held that discussions of job performance and monitoring do not fall under the coverage of the Act absent a showing of error or abuse.[15] There is no evidence that appellant's supervisor abused his discretion or was

[11] *See Lillian Cutler*, *supra* note 3.

[12] *See Ernest J. Malagrida*, 51 ECAB 287 (2000).

[13] *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[14] *See Donney T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[15] *See Donald E. Ewals*, 51 ECAB 428 (2000).

unreasonable in either monitoring appellant on October 2, 2004 or discussing appellant's performance of October 2, 2004 with appellant. Instead, evidence from the employing establishment indicates that appellant's route was monitored on October 2, 2004 and that the route was completed in less than eight hours but that he did not promptly return to the employing establishment. Appellant has failed to establish compensable work factors with respect to these allegations.

Regarding his allegations of harassment, appellant asserted that his supervisors harassed him after he filed EEO complaints and were verbally abusive in response to his requests for additional street time. Several coworker statements were provided. While the majority of the coworker statements are sympathetic to appellant's contentions, such statements lack sufficient detail to permit a finding instances of harassment or hostility occurred at a particular time and place. To establish that an incident occurred as alleged, the evidence must be sufficiently specific as to person, time and place.[16] The evidence supports, that one coworker heard Mr. Parker yell at appellant on January 22, 2004 in response to his telephone request for additional street time and saw Mr. Parker hang up on appellant. The evidence also supports that on April 27, 2004 Mr. Parker shouted out to Mr. Tesso on the workroom floor if he wanted to help appellant. To the extent that appellant alleged verbal abuse by Mr. Parker, 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.[17] The record does not establish how the statements by Mr. Parker rose to the level of verbal abuse. Moreover, the employing establishment disputed appellant's testimony that a yelling incident occurred in October 2004 as alleged noting Mr. Parker had been transferred to another location effective October 1, 2004. Mr. Tesso's statement supports that Mr. Parker shouted to Mr. Tesso, not appellant, on April 27, 2004 and asked if he wanted to help appellant. However, there is nothing to establish how such a statement could be construed as harassment or verbal abuse directed towards appellant. As such, it does not rise to the level of a compensable employment factor. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[18] The Board finds that appellant's harassment allegations do not rise to a level of a compensable employment factor but instead constitute his perception of harassment. As appellant did not establish as factual a basis for his perceptions of discrimination or harassment by the employing establishment, he did not establish that harassment or discrimination occurred.[19] The evidence instead suggests that the employee's feelings were self-

[16] *See David W. Shirey*, 42 ECAB 783 (1991), *Mildred D. Thomas*, 42 ECAB 888 (1991).

[17] *Charles D. Edwards*, 55 ECAB 258 (2004).

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

[19] *Id.* Appellant also referenced grievances and submitted a grievance settlement which made no findings on the merits of the grievance. However, mere allegations by a claimant are insufficient without evidence corroborating the allegations. *Joe E. Hendricks*, 43 ECAB 850 (1992); *see also David C. Lindsey, Jr.*, 56 ECAB ___ (Docket No. 04-1828, issued January 19, 2005) (grievances and EEO complaints by themselves do not establish that workplace harassment or unfair treatment occurred); *Dennis J. Balogh*, 52 ECAB 232 (1992) (the mere fact that personnel actions were later modified or rescinded, does not, in and of itself, establish error or abuse).

generated and thus not compensable under the Act.[20] Appellant has not established compensable work factors with respect to these allegations.

For the foregoing reasons, the Board finds that appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[21]

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[22] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[23]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[24] The Board also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[25]

ANALYSIS -- ISSUE 2

On reconsideration, appellant contested the employer's statement that Mr. Parker was not present at the time of the alleged harassment on October 4, 2005. The Board has held that, while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.[26] Although appellant indicated that he was submitting payroll records to show that Mr. Parker was at his workstation on October 4, 2005, no payroll records were received into the record. Thus, this argument does not have a reasonable color of validity. Appellant additionally disagreed with the hearing representative's evaluation of witness

[20] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

[21] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *Karen K. Levene*, 54 ECAB 671 (2003); *see also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[22] 20 C.F.R. § 10.606(b)(2).

[23] *Id*. at § 10.608(b).

[24] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[25] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[26] *Vincent Holmes*, 53 ECAB 468 (2002).

statements regarding Mr. Parker. This argument is essentially repetitive of appellant's previous assertions on his view of the claim and does not constitute a relevant new argument not previously considered. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(2) as he has not established that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office.[27]

With respect to the third element, the submission of relevant and pertinent new evidence not previously considered by the Office, appellant has not submitted any new evidence although he alluded to copies of payroll records. Inasmuch as appellant did not submit any "relevant and pertinent new evidence," he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[28]

As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office and did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

CONCLUSION

The Board finds that 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 reconsideration as he failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office.

[27] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

[28] *Id*. at § 10.608(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2006 and October 6, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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