United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 06-1986**
	)	**Issued: January 18, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Richard Heavey, Esq., for the appellant
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 August 25, 2006 appellant filed a timely appeal from a July 14, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative affirming the denial of his emotional condition claim and denying his request for subpoenas. 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 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 abused its discretion in denying appellant's request for subpoenas.

FACTUAL HISTORY

On May 18, 2005 appellant, then a 52-year-old letter carrier in a permanent rehabilitation assignment, filed a claim alleging that his stress and depression conditions were a result of a May 3, 2005 Equal Employment Opportunity (EEO) mediation meeting. He stated that his

manager threatened him and subjected him to abusive treatment.[1] Appellant stopped work on May 3, 2005 and has not returned. Medical evidence submitted with the claim included a May 2005 note from Dr. Kishanial Chakrabarti, a psychiatrist, noting an aggravation of appellant's anxiety and depression since he received correspondence in relation to his case; a June 21, 2005 excuse slip from Dr. Alba De Simone, Ph.D., a psychologist; and a July 14, 2005 fitness-for-duty examination pertaining to appellant's inability to work due to his depression and anxiety conditions.

The employing establishment controverted the claim on the grounds that appellant's transfer from his Logan Airport duties to the Department of Revenue Services section amounted to "other duties" properly within his work restriction. Appellant was not assigned to work outside his restrictions and, during the May 3, 2005 EEO mediation, appellant was told he could continue his prior assignment at Logan Airport so long as he acknowledged that it was not a bid assignment.[2] In a May 3, 2005 statement, Joseph L. Sokolski, the manager, noted that he informed appellant at the EEO mediation meeting that he would not be able to return to his prior assignment at Logan Airport unless it was understood that he did not own that position. He explained that the airport position was established after September 11, 2001, it was not a union position and was open to other employees. Mr. Sokolski stated that appellant was adamant that it was his position, became very belligerent and left the meeting stating he was seeking medical attention. A union representative stepped out with appellant and appellant returned to the meeting. Mr. Sokolski indicated that they discussed other matters pertaining to the EEO complaint and appellant apologized for his earlier behavior.[3]

In statements dated June 9 and July 13, 2005, Gerardo Navarro, appellant's supervisor, denied that management singled out or harassed appellant. He stated that appellant was assigned other duties within his restrictions. During the May 3, 2005 mediation, appellant was upset with management's decision that he was not going back to his prior assignment at Logan Airport until he acknowledged that it was not a bid assignment.

In a June 21, 2005 statement, John Fanning, appellant's union representative, addressed the May 3, 2005 mediation. Appellant asked Mr. Sokolski why he had not been returned to his permanent rehabilitation position. Mr. Sokolski stated, "Because you filed this thing" and pointed to the EEO complaint in front of him. Mr. Fanning indicated that appellant became visibly upset, accused the manager of threatening him and advised that he was going to a doctor.

By decision dated July 28, 2005, the Office denied appellant's claim for compensation as the evidence was not sufficient to establish that his injury arose within the performance of duty.

[1] Appellant had sustained injuries to his shoulder, back and hip during a previous work-related incident and had been placed in a permanent rehabilitation position as a result.

[2] The May 3, 2005 mediation arose as a result of appellant's filing of an EEO complaint alleging that his transfer from Route 28014 (Logan Airport) to the task of pulling green cards at the Department of Revenue Services section amounted to discrimination based on his disability and was in violation of postal regulations regarding changing/modifying rehabilitation job offers.

[3] This involved an issue pertaining to overtime and appellant's request for administrative leave.

On August 9, 2005 appellant requested an oral hearing. In a September 21, 2005 letter, appellant's attorney requested a subpoena be issued to Mr. Fanning for his appearance and testimony at the hearing. He asserted that Mr. Fanning's testimony would establish that appellant was threatened by Mr. Sokolski during the mediation meeting. By letter dated January 20, 2006, the Office hearing representative denied the subpoena request as a statement from Mr. Fanning was already of record. Appellant's attorney was informed that appeal rights regarding the subpoena denial would be issued with the final decision.

The oral hearing took place on March 29, 2006. Appellant testified that he was notified on March 18, 2005 that he was being taken off of his rehabilitation assignment at Logan Airport and moved to the Department of Revenue Services section to pull green cards from mail during tax season. He had worked at the rehabilitation assignment since September 11, 2001 and assumed the position was permanent. Appellant was told that his reassignment was temporary due to the needs of the employing establishment during tax season and that the reassignment would last through April 15, 2005 or about one month. He stated that the clerks in the Department of Revenue Services section filed a grievance against him because they were not allowed to work overtime while he was there. Appellant filed an EEO complaint in the matter as he felt humiliated that he was not allowed to work overtime. During the EEO mediation, when he asked why he was not back at his prior assignment since the tax season was over, the manager put his finger on the EEO complaint and said it was "because you filed this thing." Appellant stated that he "blew a fuse somehow" and started shaking. He stood up because he was threatened by the manager's comment and left the meeting after a verbal exchange with Mr. Sokolski during which time he swore. Appellant testified that Mr. Sokolski told him that the rehabilitation assignment at Logan Airport was not a bid assignment and that the only thing his rehabilitation offer guaranteed was his start and stop times. He testified that management would let him go back to his airport duties if he "admitted that they could pull me off it, whenever their hearts desired," which was unacceptable.

Mr. Fanning appeared at the hearing and testified on appellant's behalf. He reiterated his earlier statement that during the mediation Mr. Sokolski "grabbed the (EEO) papers and said because you filed this thing right here, that [i]s why you [a]re not in your job." Mr. Fanning confirmed that Mr. Sokolski told appellant that his rehabilitation offer only guaranteed his hours and that he could do whatever he wanted with appellant. He opined that these comments were hurtful and intimating. Mr. Fanning further questioned why management had placed Clinton Dunn in appellant's position at the airport.[4]

Appellant's attorney stated that appellant was in a permanent rehabilitation assignment due to a previous work-related injury. He contended that management erred and abused its authority when it took appellant off the Logan Airport duty and replaced him with Mr. Dunn, who was not qualified for the job. He asserted a June 12, 2000 arbitration decision supported his position that the employing establishment's actions in this case were erroneous.

A copy of the June 12, 2000 arbitration decision was submitted to the record. An arbitrator sustained a class action grievance that the employing establishment had violated its

[4] Mr. Dunn replaced appellant in his duties at Logan Airport.

rules and regulations and the National Collective Bargaining Agreement when it assigned work to a part-time flexible clerk outside her rehabilitation job position.[5] The facts indicate that the plaintiff had a very specific rehabilitation assignment but also performed duties on a routine and continuing basis external to those specified in her rehabilitation agreement. The arbitrator found that the plaintiff was restricted to the tasks outlined in her specific job description of the rehabilitation assignment. In order to assign or change her specific tasks, a proper medical compliance review for task additions and modifications was in order.

Additional evidence submitted during the hearing included a March 17, 2006 affidavit from Wayne L. Post, Chief Steward, advising that Mr. Dunn had a nondriving status and was not permitted to drive postal vehicles. In a March 20, 2006 medical report, Dr. Chakrabarti and Dr. De Simone opined that the employing establishment's actions with regard to changing appellant's rehabilitation job offer, in violation of its rules and regulations pertaining to changing appellant's rehabilitation job offer, was the precipitating event for his major depression and anxiety disorder.

A copy of appellant's June 10, 2003 revised rehabilitation job offer, signed by appellant the same date, was also submitted. It noted that appellant's position as a modified letter carrier was a permanent rehabilitation position and his job was to: "provide transportation to Route 25014 (Logan Airport), Deliver Express mail, Work CFS, and other Carrier duties assigned by the Manager within his restrictions listed below."

In a May 2, 2006 statement, the employing establishment contended that appellant had not established that he was threatened by his managers. It also maintained that appellant's clerical duty of removing return receipts from Department of Revenue Services mail was within his work restrictions. His assignment to such duty was neither erroneous or abusive as it was a duty to which appellant could be assigned under his job offer. In a May 3, 2006 statement, Mr. Sokolski stated that, although appellant was under a permanent rehabilitation assignment, management could have appellant perform other tasks within his job restrictions. He reiterated that the Logan Airport position was not an approved, legitimate position and that it did not belong to anyone. Appellant's skills were more valuable being utilized to process the mail for the Department of Revenue Services than to be sitting idle in a vehicle for seven hours a day. He supported management's position for assigning Mr. Dunn to the Logan Airport run and validated Mr. Dunn's credentials for such an assignment. He denied threatening appellant or putting his finger on the table and saying that appellant was kept in the Department of Revenue Services section because he filed an EEO complaint.

On May 22 and 30, 2006 appellant's attorney filed a motion to strike the employing establishment's responses as were provided after the allowed response time. He reiterated his argument that the employing establishment's actions of reassigning appellant and placing another rehabilitation employee in appellant's permanent rehabilitation position was error and in violation of the June 12, 2000 arbitration decision. He also maintained that Mr. Dunn was unqualified to replace appellant as he did not have the proper license. In a May 19, 2005

[5] The record is devoid of any indication as to category of persons which comprised the class action or whether the scope of the grievance reached the employing establishment nationally or just the locality in which the grievance arose.

statement, Mr. Dunn stated that he worked the Logan Airport duty exclusively for over a year and his rehabilitation job description listed such duty two to three weeks after appellant left the job. He further advised his driver's license had been suspended in 1996 and denied taking pain medication for his work-related injuries at work.

On June 2, 2006 the Office received a statement from the employing establishment which advised that it had asked for and was granted an extension until May 5, 2006 to file comments on the hearing. It further advised that Mr. Dunn had a valid driver's license through 2009, which could be produced upon request.

By decision dated July 14, 2006, the Office hearing representative affirmed the July 28, 2005 decision.

On appeal, appellant's attorney argues that the employing establishment committed error and abuse in removing appellant from the Logan Airport duty and appellant has demonstrated that he was threatened by management officials during the course of employment.[6]

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.[7] 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.[8]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[9] However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[10] In determining whether the employing establishment has erred or acted abusively, the Board will

[6] Appellant's attorney further argued that the Office hearing representative never considered his motion to strike the employing establishment's post-hearing submissions. The Board, however, notes that the Office hearing representative found that the employing establishment's post-hearing submissions were timely received pursuant to a May 12, 2006 extension.

[7] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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

[9] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[10] *See William H. Fortner*, 49 ECAB 324 (1998).

examine the factual evidence of record to determine whether the employing establishment acted reasonably.[11]

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.[12] 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.[13]

ANALYSIS -- ISSUE 1

Appellant, a permanent rehabilitation employee, was transferred from his duties at Logan Airport to pull green cards from mail in the Department of Revenue Services section to meet the needs of the employing establishment during tax season, which the employing establishment confirmed. He thought, however, that the reassignment was temporary and he would be returned to his Logan Airport duties. Instead, the employing establishment gave the Logan Airport duties to another permanent rehabilitation employee, Mr. Dunn. The Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable.[14] Appellant did not attribute his emotional condition to his work duties at the Department of Revenue Services section. Rather, at the hearing, he attributed his emotional condition to not being returned to Logan Airport. Appellant alleged that the employing establishment erred and was abusive in removing him from his permanent rehabilitation assignment, which included the Logan Airport duty. He further alleged that he was threatened by his manager and subjected to abusive treatment during the May 3, 2005 mediation meeting.

Appellant alleged that the employing establishment erred and was abusive in removing him from his permanent rehabilitation assignment at Logan Airport. An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor; or the manner in which a supervisor exercises his supervisory discretion;[15] or mere disagreement of supervisory or management action,[16] as a rule, fall outside the scope of coverage provided by the Act. An employee's frustration from not being permitted to work in a particular environment is not

[11] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[12] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[13] *Id.*

[14] *Trudy A. Scott*, *supra* note 7.

[15] *Margaret J. Toland*, 52 ECAB 294 (2001).

[16] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

compensable.[17] An assignment of work is an administrative or personnel matter of the employing establishment and coverage can only be afforded where there is a showing of error or abuse.[18]

On appeal, appellant's attorney contends error and abuse was committed by the employing establishment with respect to removing appellant from Logan Airport and reassigning such duty to Mr. Dunn. The attorney noted that appellant's rehabilitation job offer contained a catch-all provision in the phrase "and other carrier duties assigned by the manager within the restrictions listed." He argued that the June 12, 2000 arbitration award supported his position that the employing establishment had no authority to reassign appellant from Logan Airport to the Department of Revenue Services section without first going through a medical review process and restructuring the job offer. Regarding the June 12, 2000 arbitration award, the Board has held that findings of other administrative agencies are not dispositive of proceedings under the Act, which is administered by the Office and the Board.[19] Although the June 12, 2000 arbitration decision advised that it comprised a class action, there is no indication as to category of persons which comprise the class, whether appellant was included in the class or whether the scope of the grievance reached beyond the locality in which the grievance arose. In the arbitration decision, the plaintiff had specific work tasks outlined in her rehabilitation job offer and the employing establishment assigned her to work outside the delineated job assignments. The arbitrator ruled that, if the employing establishment wanted to continue plaintiff in positions outside of her rehabilitation assignment, it must have a medical compliance review of such tasks. If the tasks were deemed medically compatible, it was to modify the rehabilitation job description to incorporate such changes. In the present case, however, appellant's rehabilitation job offer contained the provision that other job duties could be assigned within his medical restrictions. There is no evidence that appellant's assignment of pulling green slips in the Department of Revenue Services section violated his work restrictions.

Appellant's frustration over being removed from the Logan Airport duties relates to an administrative matter regarding the type of work he was assigned. He did not submit sufficient evidence to establish that the employing establishment acted unreasonably in removing appellant from the Logan Airport duty and in assigning him to pulling green slips at the Department of Revenue Services section. Although appellant's attorney argues that the employing establishment erred in assigning the Logan Airport duty to Mr. Dunn, the record is void of any evidence of error or abuse in the employing establishment's decision not to reassign the Logan Airport duty to appellant. Denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they constitute his desire to work in a different position.[20] During the May 3, 2005 mediation, appellant was told he could resume the Logan Airport duty if he acknowledged that it was not a bid assignment. The evidence establishes that appellant's frustrations do not relate to the performance of his regular

[17] *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

[18] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[19] *See Richard L. Ballard*, 44 ECAB 146 (1992).

[20] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

or specially assigned duties; rather it is based on an administrative disagreement with the employing establishment regarding the manner in which it issued job assignments. He has not established that the employing establishment's administrative actions in these matters were unreasonable under the circumstances presented. The arguments pertaining to the employing establishment's decision to assign Mr. Dunn the Logan Airport duty is irrelevant to appellant's claim as it is an administrative matter pertaining to Mr. Dunn, not appellant. Thus, appellant has not established a compensable employment factor with regard to these allegations.

Appellant alleged that, during the May 3, 2005 mediation, his manager threatened him and subjected him to abusive treatment. Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the evidence of record, may constitute factors of employment.[21] A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[22] The Board finds that appellant has not substantiated his allegations of abuse. The evidence of record supports during the EEO mediation that appellant became upset, swore and left the mediation for a period of time after learning that he would not be able to return to his assignment at Logan Airport. Mr. Fanning's statement and testimony support that this occurred after Mr. Sokolski told appellant he was not being returned to the Logan Airport duty because he filed an EEO complaint. Appellant considered Mr. Sokolski's statement to be a threat. However, he did not submit evidence to substantiate this allegation. The evidence of record does not establish as factual appellant's contention that he was threatened or verbally abused by his supervisor. It appears that each party in the mediation may have engaged in some heated discussions that would be consistent with a dispute resolution process. The evidence does not rise to the level of compensable verbal abuse.[23] In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[24] Appellant, as noted, submitted no evidence to substantiate that the employing establishment erred or abused its authority in not returning him to the Logan Airport duty. The Board finds that appellant has not established a compensable employment factor under the Act with respect to the claimed threat or abusive treatment by his manager during the EEO mediation.

The Board finds that appellant has not established any compensable employment factors under the Act. Therefore, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[25]

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[21] *Marguerite Toland*, *supra* note 15.

[22] *Katherine A. Berg*, 54 ECAB 262 (2002).

[23] *See Carolyn S. Philpott*, 51 ECAB 175 (1999) (mere fact that a supervisor raised his voice during the course of a conversation does not warrant a finding of verbal abuse); *Christophe Jolicoeur*, *supra* note 16 (a heated discussion between the employee and a supervisor regarding the supervisor's authority to perform supervisory functions did not rise to the level of a compensable employment factor).

[24] *Michael L. Deas*, 53 ECAB 208 (2001).

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

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[26] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[27] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[28] Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the request must be in writing and sent to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[29] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[30] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[31]

ANALYSIS -- ISSUE 2

Appellant requested that a subpoena be issued to Mr. Fanning. He explained that Mr. Fanning could establish that appellant felt threatened and was in fact threatened by management during the EEO mediation. The hearing representative found that Mr. Fanning's statement was already of record and did not substantiate appellant's allegation that he was threatened by management during the EEO mediation. Thus, the hearing representative concluded that there was no evidence submitted as to why Mr. Fanning should be present at an oral hearing. As noted above, the Board reviews the hearing representative's decision to

[26] 5 U.S.C. § 8126(1).

[27] 20 C.F.R. § 10.619; *Gregorio E. Conde*, *supra* note 8.

[28] *Id.*

[29] 20 C.F.R. § 10.619(a)(1).

[30] *See Gregorio E. Conde*, *supra* note 8.

[31] *Claudio Vazquez*, 52 ECAB 496 (2001); *Martha A. McConnell*, 50 ECAB 128 (1998).

determine if there was an abuse of discretion. The Board finds that the record does not establish an abuse of discretion in this case.[32]

CONCLUSION

The Board finds that appellant has not established a compensable factor of employment in the performance of his duties. The Board further finds no abuse of discretion in the denial of appellant's subpoena request.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2007
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

[32] In any event, the Board notes that Mr. Fanning appeared and testified at appellant's hearing.