United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 07-1408**
	)	**Issued: November 13, 2007**
U.S. POSTAL SERVICE, SPRING HILL STATION, Brooksville, FL, Employer	)	

Appearances:
Dean T. Albrecht, 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 May 2, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated September 13 and November 22, 2006 which denied his emotional condition claim and a February 26, 2007 decision denying 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.

ISSUES

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

FACTUAL HISTORY

On May 24, 2005 appellant, then a 44-year-old city carrier, filed a Form CA-2, occupational disease claim, alleging that numerous attacks by employing establishment

management caused severe stress, depression and anxiety. He was first aware of his condition on April 11, 2005 and its relationship to his employment on May 19, 2005 and stopped work on May 7, 2005. In support of his claim, appellant submitted a diary documenting 78 alleged incidents that occurred from September 23, 2002 to March 14, 2005 and included allegations involving seven supervisors: Chris Fox, Mike Fernandez, James Brooks, Shawn Waldron, Victor Cruz, Rick Hughes and Bob Curran. He alleged that they acted improperly in denying overtime dating from September 2002 to December 2004, in following him on his route, giving him a number of investigative interviews and official discussions, issuing several letters of warning and write-ups, posting medical documentation on May 9, 2003 and March 5, 2005, placing appellant on absent without leave, forcing him to work off his route and to work an overburdened route, not giving appellant the route of his choice, issuing letters of debt and withholding monies from his paycheck without notice, denying leave under the Family Medical Leave Act and denying official time to see his union steward, requesting medical documentation, refusing to give him proper forms and giving appellant a 7-day paper suspension on March 14, 2005. He also alleged that he was yelled at on the workroom floor by Mr. Fernandez on September 3, 2003 and by Mr. Brooks on January 9, 2004. He alleged a pattern of harassment and submitted documents regarding these allegations including grievances and settlements, leave requests, time sheets and employing establishment and union statements, correspondence and memoranda including investigative reports and disciplinary actions.

In treatment notes dated April 11 and 25, 2005, Dr. Walter E. Afield, a Board-certified psychiatrist, diagnosed gastroesophageal reflux disease by history, with depression and anxiety incidental to severe stress. On May 16, 2005 a seven-day suspension was rescinded.

By letter dated June 14, 2005, the Office informed appellant of the evidence needed to support his claim. In a letter of controversion received by the Office on June 27, 2005, Ed Curran, manager of the Spring Hill Station, stated that appellant had a poor attitude and had been difficult to work with and made it difficult to keep open communication, seeking union representation two to three times weekly. Mr. Curran noted that appellant failed to cooperate with investigative interviews, used stone-walling tactics and had been the subject of numerous instructions, discussions and corrective actions. He recognized that the station had a staff shortage but stated that appellant routinely failed to meet scheduled leave and return times and tended to blame others for any problems.

By decision dated October 25, 2005, the Office found that appellant had not sustained an injury in the performance of duty.

On October 31, 2005 appellant requested a review of the written record. In a February 17, 2006 statement, Bob Carleton, postmaster, stated that appellant required too much time to deliver his route due to poor work habits and that he had behavioral issues. Repeated attempts were made to address and correct his shortcomings but, that appellant had not been receptive to any criticism. He noted that appellant had received investigative interviews and disciplinary action prior to April 2, 2003. Mr. Carleton countered each of appellant's 78 allegations, noting that because of his poor performance actual street observations were required, that employees were required to provide medical documentation, that appellant made abnormal, frequent requests for union representation and was uncooperative during investigative interviews. Appellant's interviews would require two to three hours while other employees

would merely last 15 minutes. Regarding appellant's choice of route, Mr. Carleton stated that he could not perform the route without assistance to complete the route and, therefore, it was management's decision to move him to a route with which he was familiar. Mr. Carleton noted that the employing establishment improperly paid appellant too much money. However, when this was corrected in his next paycheck appellant insisted on receiving a demand letter and then repaying the overpayment. Mr. Carleton included charts demonstrating appellant's work performance and stated that appellant's complaints were usually worked out with the union but that his desire was to create turmoil and hardship for management. In letters dated March 12, 2006, appellant's union representatives, Michael B. Waldron and Steve Halkias and his representative, Dean T. Albrecht, disagreed with Mr. Carleton's response.

By decision dated March 24, 2006, an Office hearing representative found that appellant's allegations of verbal abuse was not compensable but found that the employing establishment improperly withheld monies from appellant's pay because it did not give him prerecoupment notice. The hearing representative, however, denied the claim on the grounds that the medical evidence did not establish that appellant's emotional condition was caused by this compensable factor of employment.

On June 18, 2006 appellant, through his representative, requested reconsideration. He stated that two factors had been established, verbal abuse and withholding monies and submitted various notes regarding labor management meetings. In a May 20, 2006 report, Dr. Afield opined that a threat made to appellant and yelling by his supervisor caused his emotional condition.

In a September 13, 2006 letter, the Office denied modification of the March 24, 2006 decision. The Office, however, misidentified the accepted factor of employment, stating that the alleged verbal incident of September 3, 2003 constituted a compensable factor.

On October 2, 2006 appellant's representative requested reconsideration and submitted an August 25, 2006 arbitration decision finding that a February 19, 2005 letter of warning was to be removed from appellant's personnel folder. In an October 10, 2006 letter, he alleged that two factors of employment had been established and that the August 25, 2006 arbitration decision established error and abuse. He submitted a September 27, 2006 arbitration award finding that management was aware of appellant's protected grievance activity and demonstrated union animus and open hostility to appellant's union activities. It was noted that Mr. Curran improperly escorted appellant from the building on April 27, 2005, one day after a grievance meeting on April 26, 2005. The arbitrator found that the February 19, 2005 letter of warning was issued improperly because it was not based on appellant's poor performance. The letter of warning and a March 15, 2005 suspension were issued within months of proven anti-union activity at the employing establishment. The two disciplinary actions and escorting appellant from the building on April 27, 2005 constituted illegal discrimination and retaliation.[1]

[1] The decision also discussed events that occurred after the filing of the instant claim. These are not relevant to the instant claim that pertains to claimed employment factors that occurred from September 23, 2002 to March 14, 2005.

By decision dated November 22, 2006, the Office denied modification of the prior decisions.

On December 10, 2006 appellant's representative requested reconsideration and submitted July 7, 2005 test results from Dr. Afield. In reports dated November 13 and December 1, 2006 Dr. Afield advised that, when the employing establishment withheld payment from appellant, it brought back feelings from his early childhood which left him with a great fear and reaction to conflict with authority figures, intense anger at being deprived of his rightful earnings without reason and great distress at being treated unfairly. Dr. Afield noted that as a child appellant had to work to support his family and the withholding of his pay caused a resurgence of depression and post-traumatic stress symptomatology. This was further exacerbated by altercations with management when he was verbally attacked. Dr. Afield also opined that the events outlined in the September 27, 2006 arbitration decision also contributed to appellant's emotional condition.

In a February 26, 2006 decision, the Office denied appellant's reconsideration request finding Dr. Afield's reports cumulative.

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 stress-related 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 stress-related condition.[2]

In emotional condition claims, 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. 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.[3]

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*,[4] the Board explained that there are distinctions as to the type of employment situations giving rise to a

[2] *Leslie C. Moore*, 52 ECAB 132 (2000).

[3] *Lori A. Facey*, 55 ECAB 217 (2004).

[4] 28 ECAB 125 (1976).

compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[5] When an employee experiences emotional stress in carrying out his or 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.[6] A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.[7]

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.[8] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[10]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. The evidence of record establishes error on the part of the employing establishment by withholding monies from appellant's pay without proper notice. This constitutes a compensable factor of employment. The Board also finds that the employing establishment violated appellant's privacy by posting his medical documentation on May 9, 2003 and March 5, 2005. This constitutes a compensable employment factor.

The majority of appellant's other contentions, that the employing establishment engaged in improper disciplinary actions, mishandled his overtime, improperly followed him on his route, did not give him the route of his choice and required him to provide medical documentation for

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

[6] *Lillian Cutler, supra* note 4.

[7] *Roger Williams*, 52 ECAB 468 (2001).

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

[9] *Kim Nguyen*, 53 ECAB 127 (2001).

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

leave, are administrative matters, which absent error or abuse, do not arise within the performance of duty.[11] Reactions to disciplinary matters, such as letters of warning or suspensions are not compensable unless it is established that the employing establishment acted abusively in such capacity.[12] Similarly, actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment as they too are administrative functions of the employer and not duties of the employee. Approving or denying a leave request is an administrative function of the employing establishment,[13] as is assigning and monitoring work.[14] The denial by an employing establishment of a request for a different job constitutes an employee's desire to work in a different position.[15] The Board finds that appellant has not established that these administrative or personnel matters, which are unrelated to his regular or specially assigned work duties, fall within coverage of the Act as there is no evidence to show that the employing establishment committed error or abuse regarding these matters.[16] While appellant submitted copies of numerous grievances and of their resolutions regarding these matters, in assessing the evidence, the Board has held that grievances by themselves do not establish that workplace harassment or unfair treatment occurred.[17] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[18] The settlements in this case consisted of dispute resolutions without findings of fault. The Board notes that the determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under the Act.[19]

Appellant also failed to establish that the two claimed events of verbal abuse are compensable. While the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to compensability.[20] Appellant's allegation that he was yelled at by Mr. Fernandez on September 3, 2003 and Mr. Brooks on January 9, 2004 do not rise to the level of verbal abuse contemplated by the Act. Both Mr. Curran and Mr. Carleton explained that management's responses to appellant's actions were based on his poor performance. The Board finds that the fact that Mr. Fernandez and Mr. Brooks raised their voices in response to appellant's actions do not

[11] *Kim Nguyen, supra* note 9.

[12] *See Joe M. Hagewood*, 56 ECAB ____ (Docket No. 04-1290, issued April 26, 2005).

[13] *See David C. Lindsey, Jr.*, 56 ECAB ____ (Docket No. 04-1828, issued January 19, 2005).

[14] *Beverly R. Jones*, 55 ECAB 411 (2004).

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

[16] *Charles D. Edwards, supra* note 8.

[17] *Michael E. Deas*, 53 ECAB 208 (2001).

[18] *Lori A. Facey, supra* note 3.

[19] *Dianna L. Smith*, 56 ECAB ____ (Docket No. 04-2256, issued May 6, 2005).

[20] *Michael E. Deas, supra* note 17.

warrant a finding of verbal abuse. These two incidents do not constitute compensable factors of employment.[21]

The Board, will remand the case to the Office to make factual findings regarding appellant's allegations regarding overwork and to consider the September 27, 2006 arbitration award. Mr. Carleton acknowledged that the employing establishment was short-handed and the September 27, 2006 decision is relevant to the issue of whether appellant was harassed by management. 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.[22] It has not done so regarding these two implicated factors. On remand the Office should make findings of fact regarding these two implicated employment factors as to whether they are compensable under the Act and, if so, consider the additional factors, if any, with the two factors found in this case and then base its decision on a review of the medical evidence.[23]

After such further development as it deems necessary, the Office shall issue an appropriate decision

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment. In view of the Board's disposition of the first issue, the question of whether the Office properly denied merit review by its April 3, 2007 decision is moot.

[21] *See Joe M. Hagewood, supra* note 12.

[22] *Lori A. Facey, supra* note 3.

[23] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and September 13, 2006 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: November 13, 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