

**United States Department of Labor
Employees' Compensation Appeals Board**

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Orange, NJ, Employer**

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**Docket No. 07-1580
Issued: November 19, 2007**

Appearances:
Thomas Harkins, Esq., 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 May 22, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated March 2, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

This issue is 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.

FACTUAL HISTORY

On December 6, 2005 appellant, then a 37-year-old manager of customer services, filed a Form CA-1, traumatic injury claim, alleging that on December 5, 2005 his preexisting emotional condition was aggravated when the postmaster became abusive during an interview. He stopped

work that day.¹ In a disability slip dated December 5, 2005, Dr. Harold Pascal, a psychiatrist, advised that appellant could not work due to aggravation of a preexisting emotional condition due to an incident with the postmaster.

The employing establishment controverted the claim. In a December 7, 2005 statement, Gary Thompson, the postmaster, noted that at 12:30 p.m. on December 5, 2005 he called appellant and Louis F. Ruggieri, National Association of Postal Supervisors (NAPS) representative, into his office for a predisciplinary interview with appellant. He stated that appellant refused to answer questions asked of him, stated that he did not want Mr. Ruggieri to be his representative, advised that he was sick and went home. Mr. Thompson provided a list of the questions he asked appellant, which were in regard to overtime. In a December 8, 2005 statement, Mr. Ruggieri noted meeting with appellant and Mr. Thompson on December 5, 2005. He stated that, when appellant was informed that it was a predisciplinary interview and that Mr. Ruggieri was his representative, appellant stated that he did not choose Mr. Ruggieri and, therefore, did not consider the meeting to be valued and would not answer the questions. Mr. Ruggieri concluded, "To be concise, we reached an obstacle that I never encountered before and I believe both [appellant] and the [postmaster] were upset."

By letter dated December 16, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It advised him of the evidence needed to support his claim. Appellant was given 30 days to respond.

In a January 17, 2006 decision, the Office denied the claim finding that there were no compensable factors of employment.

On January 8, 2007 appellant, through his attorney, requested reconsideration. He submitted a disability slip dated December 12, 2005 in which Dr. Pascal advised that appellant could not work. On December 19, 2005 Dr. Pascal advised that he had seen appellant on December 5, 2005 in severe distress, noting that he reported that on December 3, 2005 Mr. Thompson told him that he was "f***ing dead" and other employees reported that Mr. Thompson told them the same thing. He indicated that appellant stated that Mr. Thompson became verbally abusive at the December 5, 2005 meeting which caused flashbacks. Dr. Pascal noted that appellant had been under his care for over three years and that he had been unable to get off work to attend therapy sessions since October 2005. He diagnosed post-traumatic stress disorder, major depressive disorder with anxious overtones and sleep disorder. Dr. Pascal concluded that "the systematic verbal abuse which [appellant] has experienced in the hands of his superior was the proximate cause of his disabling psychiatric and physical condition from December 5, 2005 to the present." On January 4, 2006 he diagnosed severe post-traumatic stress disorder and major depressive disorder and advised that appellant could not work. In progress

¹ The instant claim was adjudicated by the Office under file number 022510030. In an August 17, 2005 decision, Docket No. 05-1083, file number 022031206, the Board determined that the case was not in posture as to whether it sustained a recurrence of disability on February 24, 2003 of an accepted cervical and thoracic subluxation and acute post-traumatic stress disorder. In a September 12, 2006 decision regarding a claim filed on February 20, 2003, the Board found that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. Docket No. 06-177, file number 022036993.

notes dated February 2 to May 1, 2006, Dr. Pascal reiterated his findings and advised that appellant could not work.

In a February 2, 2006 statement, appellant alleged that since October 31, 2005 he had not been receiving psychotherapy because Mr. Thompson would not allow him to leave work to see his doctor. He alleged that, on December 3, 2005, on the work floor, Mr. Thompson pointed a finger at him and stated that he was “f***ing dead” and also made the statement to Mr. Ruggieri and Keith Hemming, a letter carrier, who was nearby. Appellant stated that he was also upset about a telephone call from Mr. Thompson and that, at the meeting on December 5, 2005, he requested a different NAPS representative. When he stood to leave, Mr. Thompson ordered him to sit down, stating that the meeting was a predisciplinary interview and that he would record that appellant refused to answer the questions posed. Appellant alleged that Mr. Thompson became “extremely hostile, unprofessional and intimidating with his tone, language and movements towards me.”

In a January 17, 2007 statement, regarding appellant’s psychotherapy appointments, Mr. Thompson stated that he asked appellant to schedule them on his days off or before or after work. He denied the workroom floor incident of December 3, 2005 and noted that he did not curse at appellant. Mr. Thompson indicated that the meeting held on December 5, 2005 was to address appellant’s poor performance. When appellant stood up at one point, Mr. Thompson requested that he stay seated until the interview was completed. He noted that Mr. Ruggieri was present during the entire meeting. Mr. Ruggieri provided a January 18, 2007 statement in which he recalled that appellant did not want him as his representative. He told appellant that he was uncertain whether he could choose who represented him but would find out. Mr. Ruggieri did not recall Mr. Thompson ever cursing at appellant at any time or at any place in the employing establishment. At the December 5, 2005 meeting appellant refused to recognize it as a predisciplinary interview and refused to answer questions. In a statement dated January 25, 2007, Mr. Hemmings, a letter carriers’ union representative, advised that he did not recall Mr. Thompson ever cursing appellant at any time or any place in the employing establishment.

In a March 2, 2007 decision, the Office denied modification of the January 17, 2006 decision.

LEGAL PRECEDENT

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

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*,³ the Board

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

³ 28 ECAB 125 (1976).

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 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 under the Act, 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 with probative and reliable evidence. Grievances and Equal Employment Opportunity (EEO) complaints, by themselves, do not establish that work place harassment or unfair treatment occurred. Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO Commission standards. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰

⁴ 5 U.S.C. §§ 8101-8193.

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

⁶ *Lillian Cutler*, *supra* note 3.

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).

The Board has recognized the compensability of verbal altercations or abuse when sufficiently detailed by the claimant and supported by the record. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹¹ The mere fact that a supervisor or employee may raise his or her voice during the course of a conversation does not warrant a finding of verbal abuse.¹²

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related emotional condition. Appellant initially alleged that he experienced stress at a meeting held on December 5, 2005 when the postmaster, Mr. Thompson called appellant into his office for a predisciplinary interview. Administrative and personnel matters are not considered factors of employment absent error or abuse by the employing establishment.¹³ An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.¹⁴ Investigations and counseling sessions, like the December 5, 2005 meeting, are administrative matters of the employer and are not covered under the Act unless there is evidence of error or abuse.¹⁵ The Board finds that in this case Mr. Thompson acted within his supervisory discretion by calling a meeting on December 5, 2005 with appellant and Mr. Ruggieri to discuss appellant's handling of overtime. A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact, erroneous or abusive. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike the actions taken.¹⁶ Mr. Thompson explained why the meeting was held, and Mr. Ruggieri stated that he attended the meeting as appellant's representative. Appellant alleged that Mr. Thompson became verbally abusive at the meeting. However, his allegation was not supported by the statements of Mr. Ruggieri, who was present on that date. Mr. Ruggieri noted that appellant objected to the meeting, to his representation of him and that he would not answer Mr. Thompson's questions. Mr. Ruggieri did not support appellant's allegation of verbal abuse by Mr. Thompson. There is no evidence of record to establish that the December 5, 2005 meeting was erroneous or that Mr. Thompson was abusive in his interactions with appellant. This is not a compensable factor of employment.¹⁷

¹¹ *Peter D. Butt*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004).

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

¹³ *Kim Nguyen*, *supra* note 9.

¹⁴ *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁵ *See Andrew Wolfgang-Masters*, 56 ECAB ____ (Docket No. 05-1, issued March 22, 2005).

¹⁶ *See Michael A. Deas*, 53 ECAB 208 (2001).

¹⁷ *See Roger W. Robinson*, 54 ECAB 846 (2003).

Appellant contended that on December 3, 2005 Mr. Thompson cursed at him and repeated his remark to Mr. Ruggieri and Mr. Hemmings. There is, again, no evidence of record to support appellant's allegations. Mr. Thompson denied cursing at appellant and both Mr. Ruggieri and Mr. Hemmings provided statements noting that Mr. Thompson had never cursed at appellant. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁸ There is no evidence that appellant's allegations are factual. This is not a compensable employment factor.

Appellant alleged that Mr. Thompson did not allow him to leave work for therapy appointments. Generally, actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee. Approving or denying a leave request is an administrative function of a supervisor.¹⁹ Here appellant submitted no evidence to establish his allegation as factual. He has not established a compensable factor.

Appellant did not submit sufficient probative evidence to establish a compensable factor of employment. He failed to establish that he sustained an emotional condition in the performance of duty.²⁰

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹⁸ *James E. Norris*, *supra* note 10.

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

²⁰ Because appellant failed to establish a compensable employment factor, it was not necessary to consider the medical evidence. *Marlon Vera*, 54 ECAB 834 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 27, 2007 and finalized on March 2, 2007 be affirmed.

Issued: November 19, 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