United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 07-924**
	)	**Issued: September 4, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Linda Temple, 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 February 20, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated August 7, 2006 which affirmed the denial of his claim for an emotional condition. He also appealed a December 5, 2006 decision which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On April 18, 2005 appellant, then a 49-year old letter carrier, filed a traumatic injury claim alleging that he experienced anxiety and stress at work on that date when management threatened to enforce his scheduled shift start time of 7:30 a.m., which was one hour before his

agreed upon 8:30 a.m. start time. He stopped working on April 18, 2005 and returned in June 2005.

In a statement, appellant noted that, on April 18, 2005, he arrived at work after 8:00 a.m., after driving his son to school. Russ Martin, his supervisor, provided him with one hour of auxiliary assistance so that he could return to the station by the 5:00 p.m. window as required by employing establishment policy. Appellant indicated that he needed additional assistance and requested that Mr. Martin take parcels that were directed to one of his stops, as he usually did at the beginning of the week. He alleged that Mr. Martin became visibly upset and denied taking his parcels in prior weeks. Appellant believed he was being treated unfairly and alleged that Mr. Martin threatened to call the postmaster and enforce his scheduled starting time of 7:30 a.m. He further alleged that Mr. Martin stated in a threatening manner "let's see how you'll handle that."

Appellant submitted reports from Dr. Conrad P. Weller, a Board-certified psychiatrist, dated April 19 to May 20, 2005. Dr. Weller treated appellant for severe anxiety and emotional and behavioral instability that developed after his supervisor informed him that he could no longer accommodate his work schedule. In an April 20, 2005 note, Gilbert Cabanas, a shop steward, noted that one year earlier appellant changed his start time from 7:30 a.m. to 8:30 a.m. so that he could take his disabled child to school. He noted that Mr. Martin and the station manager, Doug Fiedler, agreed to the change. On April 18, 2005 Mr. Martin confronted appellant about his request for auxiliary assistance and informed him that his start time would be 7:30 a.m. He noted that Mr. Fiedler advised that he would contact the postal inspector to resolve the issue. In an April 22, 2005 witness statement, Reinaldo Saltares, a coworker, noted that on April 18, 2005 he overheard Mr. Martin informing appellant that he could require him to come in at 7:30 a.m. A May 20, 2005 note from Jim Good, the union president, indicated that appellant had a child who he transported to school each day. Appellant advised that for the last year and a half the employing establishment accommodated his request to report to work at 8:30 a.m. instead of the scheduled start time of 7:30 a.m. He reported that on April 18, 2005 Mr. Martin advised that he would provide appellant with one hour of auxiliary assistance with his route and appellant requested additional assistance because of the excessive volume of mail. Appellant indicated that Mr. Martin did not think he needed additional assistance and alleged that Mr. Martin threatened to move his start time back to 7:30 a.m.

In a statement, Mr. Martin noted that on April 18, 2005 he provided appellant with one hour of auxiliary assistance so that he could return to the station by 5:00 p.m. as mandated by employing establishment policy. Appellant indicated that one hour of assistance was inadequate. Mr. Martin advised that appellant's route required 8 hours and 40 minutes to complete and he was providing 1 hour of auxiliary assistance. He permitted appellant to delay delivering two feet of flats on Monday which would take an additional 30 minutes off his delivery time. Mr. Martin believed that he was being more than fair with appellant and indicated that perhaps appellant should begin his tour of duty earlier. For the prior three years he had accommodated appellant with an 8:30 a.m. start time so that he could meet his family needs and also provided auxiliary assistance on most days. Mr. Martin advised that the late start time was a temporary situation until appellant could bid on a 10:00 a.m. mail route. He stated that several such routes became available but appellant did not bid on them. Mr. Martin also noted granting other leave requests, even when leave for these periods was full, so that appellant could assist his children.

In a June 1, 2005 decision, the Office denied appellant's claim finding that the evidence did not show that his emotional condition arose in the performance of duty.

On January 12, 2006 appellant requested an oral hearing. The hearing was held on May 16, 2006. In a June 17, 2005 statement, he addressed the events of April 18, 2005. Appellant submitted additional statements from Mr. Good and Mr. Saltares. A December 27, 2005 witness statement from Jim Hamilton noted that on April 18, 2005 he heard Mr. Martin raise his voice in a threatening manner at appellant regarding changing his start time. Other statements from Jamie L. Cullaro, a former station manager, and Lawrence Goss, III, a former manager of customer service, indicated that they had no knowledge of the April 18, 2005 incident.

The employing establishment submitted a postal inspection interview with Mr. Fiedler dated May 16, 2005. Mr. Fiedler noted that appellant was liked by the customers on his mail route but brought his personal issues to work. He advised that the employing establishment had a strict policy that carriers must be off the street by 5:00 p.m. Mr. Fiedler indicated that appellant was often provided with assistance to assure that he was off the street by 5:00 p.m. in conformance with this policy. He advised that all carriers had a start time of 7:30 a.m. except Monday when the start time was 7:00 a.m. However, appellant was allowed to report at 8:30 a.m. to accommodate a personal situation. Mr. Fiedler noted that appellant's late start time was a temporary solution and appellant assured management that he would bid on a collection route with a later start time; however, he failed to do so. On April 18, 2005 appellant curtailed approximately three feet of mail and his supervisor provided him with one hour of assistance. Mr. Fiedler stated that appellant requested additional assistance although the volume recording system indicated that he did not require additional assistance. Mr. Fiedler advised that Mr. Martin's duties included assessing the carrier workload and determining if any assistance was needed and that appellant disagreed with his supervisor's determination.

In a postal inspectors memorandum dated June 1, 2005, an investigation disclosed that on April 18, 2005 appellant reported to work at 8:30 a.m. and his supervisor, Mr. Martin assessed his workload and provided one hour of street assistance along with instructions to curtail some standard mail for delivery the next day. Appellant disagreed with Mr. Martin's assessment and requested additional assistance. The investigator noted that Mr. Martin informed appellant that, if he conformed to his established report time of 7:30 a.m., he would be able to return to the office by 5:00 p.m. Also submitted was a statement from Rick Redding, manager of customer service, dated June 2, 2005, who indicated that the employing establishment was aware of appellant's disabled child. Mr. Martin and Mr. Fiedler had a verbal agreement with appellant which permitted him to report to work at 8:30 a.m. until he could bid for a job which would be more accommodating to his family situation. Mr. Redding advised that appellant had not pursued several opportunities that would permit him to work a schedule better suited to his personal needs. On April 18, 2005 appellant and Mr. Martin had disagreed on the time it would take to complete his route. The inspector found that Mr. Martin did not threaten appellant but advised him that his accommodations should be reviewed. Mr. Redding conferred with Mr. Martin and Mr. Fiedler and with appellant's union representative and advised that he would change appellant's starting time to 8:30 a.m. to resolve the problem but advised that he could revisit the matter in the future.

By decision dated August 7, 2006, the hearing representative affirmed the June 1, 2005 decision.

By letter dated October 11, 2006, appellant requested reconsideration. He asserted that his emotional condition was caused by the loud, threatening and abusive manner in which Mr. Martin informed him of a potential shift change. Appellant indicated that he has provided witness statements which support the erroneous behavior of management. He advised that he never considered bidding on another collection route because it would have moved the end tour to 6:30 p.m. and not permit him to care for his child after school.

By decision dated December 5, 2006, the Office denied appellant's reconsideration request on the grounds that the argument submitted was repetitious and cumulative of evidence already on file and considered in prior decisions.

LEGAL PRECEDENT -- ISSUE 1

To establish his claim that he sustained an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

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*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5] There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.

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

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

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

[5] *Lillian Cutler, supra* note 2.

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.[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]

ANALYSIS -- ISSUES 1

Appellant alleged that his supervisor threatened to change his work shift start time from 8:30 a.m. to 7:30 a.m. He alleged that he was harassed on April 18, 2005 when he arrived at work after taking his son to school. Appellant noted that Mr. Martin, his supervisor, provided one hour of auxiliary assistance with his route; however, appellant believed this to be inadequate. He alleged that Mr. Martin threatened to call the postmaster and mandate a change in his starting time to 7:30 a.m. and stated "let's see how you'll handle that." To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[8] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[9]

The factual evidence fails to support appellant's claim regarding harassment. The employing establishment contended that at no time did management harass appellant or single him out for a shift change. Mr. Martin noted that on April 18, 2005 he provided appellant with one hour of auxiliary assistance so that he would return to the station by 5:00 p.m. Mr. Martin advised that appellant's route required 8 hours and 40 minutes to complete and he was providing 1 hour of auxiliary assistance in addition to permitting him to delay delivering two feet of flats which would take an additional 30 minutes off his delivery time. He indicated that, for the prior three years, he had accommodated appellant with an 8:30 a.m. start time in order that he could meet the needs of his family. Mr. Martin advised that the late start time was a temporary situation until appellant could bid on a 10:00 a.m. mail route. Mr. Fiedler, the station manager, advised that the employing establishment had a strict policy that the carriers must be off the street by 5:00 p.m. and asserted that appellant was often provided with assistance to assure that he was off the street by 5:00 p.m. He noted that appellant was allowed to report at 8:30 a.m. to accommodate a personal situation. Mr. Fiedler indicated that on April 18, 2005 appellant

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

[7] *Id.*

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

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

curtailed approximately three feet of mail and his supervisor provided him with one hour of assistance. Appellant requested additional assistance although the volume recording system indicated that he did not require additional assistance. Mr. Fiedler advised that Mr. Martin was responsible for assessing carrier workloads and determining if assistance was needed. Additionally, a postal inspection report dated June 1, 2005 confirmed the information provided by Mr. Martin and Mr. Fiedler.

The Board finds that appellant has not established harassment by his supervisor.[10] Appellant alleged that his supervisor singled him out and discriminated against him by threatening a change in shift and engaged in actions which he believed constituted harassment. However, he provided insufficient evidence to establish his allegations.[11] Mr. Martin and Mr. Fiedler provided reasonable explanations for their actions, noting that appellant's work shift start time was 7:30 a.m., but appellant was temporarily accommodated with a work shift start time of 8:30 a.m. to care for his child. The factual evidence fails to support appellant's claim that he was harassed by Mr. Martin. Rather, it establishes that appellant's supervisor accommodated his situation by permitting him to come to work at 8:30 a.m. and also providing one hour of auxiliary assistance on a regular basis.[12] Thus, he has not established a compensable employment factor under the Act with respect to the claimed harassment or discrimination.

To the extent that appellant alleged a verbal abuse by Mr. Martin the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[13] The Board finds that the evidence of record does not support that appellant's superior verbally abused him. Appellant submitted witness statements from Mr. Saltares and Mr. Hamilton who indicated that on April 18, 2005 he heard Mr. Martin state in an angry voice that he could mandate appellant to come in by 7:30 a.m. and see how appellant would handle that. The evidence reflects that Mr. Martin had accommodated appellant by permitting him to arrive at work at 8:30 a.m. instead of his scheduled start time of 7:30 a.m. and offered him one hour of auxiliary assistance. Appellant disagreed with his supervisor's decision. Mr. Martin denied that he threatened or abused appellant. There is no corroborating evidence to support that the supervisor erred or acted abusively. Appellant has not otherwise shown how supervisory comments or actions rose to the level of verbal abuse or otherwise fell within coverage of the Act.[14]

Appellant alleged that the employing establishment threatened to change his work shift from 8:30 a.m. to 7:30 a.m. and that this schedule change would interfere with the continuing

[10] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

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

[12] *See Michael A. Deas*, 53 ECAB 208 (2001).

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

[14] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

care of his disabled child. However, an employee's frustration over not being permitted to work a particular shift or to hold a particular position is not covered under the Act.[15] Changes in work days, hours, positions, locations and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in duty shift, *i.e.*, a compensable factor arising out of and in the course of employment or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.[16] The assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[17] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[18]

The record establishes that appellant's start time was 7:30 a.m. However he was accommodated by his supervisors and allowed to start at 8:30 a.m. in order to care for his family. He has not submitted sufficient evidence to establish any change in his tour of duty. The record establishes that his supervisor explained, as noted above, the reason for any potential change was appellant's inability to deliver his mail route and return to the window by 5:00 p.m. as required by office policy. Appellant asserted that this would interfere with his care for his child. There is no evidence of any shift change. Mr. Redding, manager of customer service, noted that he changed appellant's official start time to 8:30 a.m. to resolve the issue. Further, to the extent that appellant asserts that the shift change would result in inconvenience to his daily commute to work this would not be a factor arising in the performance of duty.[19] The Board finds that the evidence does not establish that appellant's supervisors erred or were abusive in this matter. Appellant has not established a compensable employment factor under the Act.

For these reasons, appellant has not met his burden of proof to establish his claim as he has not established any compensable factors of employment.[20]

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

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

[17] *Id.*

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

[19] *See also George H. Clark*, 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004).

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

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[21] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[22] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

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

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[23]

ANALYSIS -- ISSUE 2

Appellant's October 11, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

With his reconsideration request, appellant reiterated his allegations. However, his letter did not show how the Office erroneously applied or interpreted a point of law, nor did it advance a point of law or fact not previously considered by the Office. The Office had previously considered appellant's allegations and appellant did not set forth a particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law with regard to his claim.[24] Appellant also did not submit any relevant new evidence with his reconsideration request.

The Board, therefore, finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his October 11, 2006 request for reconsideration.

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[21] 5 U.S.C. § 8128(a).

[22] 20 C.F.R. § 10.606(b).

[23] 20 C.F.R. § 10.608(b).

[24] *See Brent A. Barnes*, 56 ECAB ___ (Docket No. 04-2025, issued February 15, 2005) (evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 5 and August 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 4, 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