United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 07-1997**
	)	**Issued: April 21, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Detroit, MI, Employer	)	

Appearances:
Shelley Stasson, 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 July 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 14, 2006 and April 13, 2007 merit decisions denying his emotional condition claim and the Office's June 26, 2007 decision denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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; and (2) whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 20, 2006 appellant, then a 57-year-old maintenance mechanic, filed a claim alleging that he sustained an emotional condition in the performance of duty on January 9, 2006.

On the claim form, Louis Ciavone, appellant's supervisor, stated: "Employee was missing from his assignment for seven hours. When asked about his whereabouts he became hostile and abandoned his job." Appellant stopped work on January 10, 2006.

Appellant submitted a statement in which he claimed that on January 9, 2006 he clocked in at about 7:30 a.m. but was not given a work assignment. At some point after 2:45 p.m. on that date, Mr. Ciavone asked him where he had been all day. Appellant asserted that Mr. Ciavone told him that he had not seen him on "the floor" and that Mr. Ciavone became upset after appellant told him that he was mistaken about his work activities that day. He claimed that Mr. Ciavone ordered him to his office for a disciplinary discussion and alleged that he called him a liar and insisted that he had given him a work assignment.[1] Appellant asserted that Mr. Ciavone's "threatening demeanor and actions" during the meeting caused him to experience stress and that he was "threatened with reprimand and removal" because Mr. Ciavone made a mistake.

Mr. Ciavone asserted that at 7:40 a.m. on January 9, 2006 he gave appellant the assignment of base lining number 24 of the automated flat sorting machines. He claimed that he did not see appellant on the workroom floor until 3:00 p.m. when he asked him what work he had performed between 7:40 a.m. and 3:00 p.m. Mr. Ciavone alleged that appellant started "yelling and cursing" at him about "what other people were not doing" and he asked appellant to come to his office for a discussion. He advised appellant that he would have him removed from the building if he continued to "cuss and yell" at him. After initially refusing to appear, appellant eventually came to Mr. Ciavone's office and told him that he did not want to speak to an "incompetent supervisor."[2] Mr. Ciavone alleged that appellant left his office, returned after a short period and "started cussing" at him and then left his office again.

In an undated statement received by the Office on January 30, 2006, a coworker asserted that on January 9, 2006 he observed appellant pointing his finger in Mr. Ciavone's face and screaming, "You are an incompetent lying mother fucker." The coworker indicated that appellant continued to repeat this statement despite being asked to calm down. In a January 20, 2006 statement, a coworker stated that appellant has "blow-ups" whenever he is asked to perform any type of maintenance task and that when he has such blow-ups he "curses [and] get[s] very loud, almost seemingly threatnative [sic]." In a January 20, 2006 statement, a coworker stated that on numerous occasions she had witnessed appellant "yelling, cussing [and] throwing tubs on the workroom floor." She asserted that he was "very rude and loud."

In January 2006 statements, one coworker indicated that on January 9, 2006 he saw appellant on the third floor of the work site throughout the day and two others stated that they observed him responding to several calls for a mechanic on that date. In a January 20, 2006 statement, a coworker asserted that appellant told him at 8:15 a.m. on January 9, 2006 that he still had not received a work assignment. In an undated statement, a coworker stated that on

[1] Appellant claimed that Mr. Ciavone initially denied his request to have his union representative present but noted that his representative did attend the meeting.

[2] Mr. Ciavone stated that, at appellant's request, he arranged for another supervisor, Rudy Marks, to attend the meeting. He also indicated that appellant's union representative was present at the meeting.

January 9, 2006 he heard Mr. Ciavone tell appellant that he was "calling security on him to put him out of the building." In a January 20, 2006 statement, a coworker indicated that on January 9, 2006 Mr. Ciavone asked appellant where he had been and what he had been doing. Appellant responded by stating that he "has been here and that he has been working."

Appellant submitted several medical reports indicating that he could not work after mid January 2006. On February 1, 2006 the Office requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted a statement in which he alleged that, on January 9, 2006, he assumed that he should answer calls for maintenance work on "area assurance" duty because he was not given any specific assignment by Mr. Ciavone. At 2:45 p.m. on January 9, 2006, while he was working on number 24 of the automated flat sorting machines, he told Mr. Ciavone that he was on area assurance duty. Appellant asserted that Mr. Ciavone asked him where "he had been hiding all day" and indicated that he responded that he had been "on the floor." He claimed that Mr. Ciavone asked for his badge and threatened to take him off the clock and to take away his pay for the day. Mr. Ciavone indicated that he was going to give him a letter of warning and "yelled back at him" that he was calling security to have him placed out of the building. Appellant stated that he told Mr. Ciavone that he was a liar and an incompetent supervisor. He felt intimidated by Mr. Ciavone's presence[3] and believed that his job was in danger.[4]

In a March 8, 2006 decision, the Office denied appellant's emotional condition claim. It found that an employment factor had been established with respect to the discussion between appellant and Mr. Ciavone on January 9, 2006 concerning his "whereabouts throughout the course of the January 9, 2006 work shift." The Office found, however, that appellant had not submitted sufficient medical evidence to show that he sustained a medical condition due to this established employment factor.

Appellant requested a review of the written record by an Office hearing representative. In an April 6, 2006 statement, he asserted that on January 9, 2006 Mr. Ciavone spoke to him in a "loud and angry voice." Appellant indicated that he told Mr. Ciavone on January 9, 2006 that he had to leave the office because he did not know how he would react to taking Xanax for his anxiety. He asserted that Mr. Ciavone took a bottle out of his jacket and responded, "Big deal, I take them everyday."

In an August 14, 2006 decision, the Office hearing representative denied appellant's claim, finding that he had not established any compensable employment factors. The representative found that appellant had not established an employment factor on January 9, 2006, as there was no evidence that Mr. Ciavone had acted in an abusive or threatening manner.

[3] Appellant indicated that he felt intimidated because Mr. Ciavone, who was five inches taller, stood two feet away from him during their discussion.

[4] Appellant asserted that in late 2005 he requested a work order to replace some bushings on a console but that, to his knowledge, management did not replace the bushings.

In a February 22, 2007 statement, appellant requested reconsideration of his claim. He indicated that in 2002 and 2005 he filed grievances as the employing establishment subjected him to racial and gender discrimination. In 2001, a supervisor, Ms. Slickers, subjected him to sexual harassment.[5]

In a February 8, 2007 statement, a coworker indicated that on January 9, 2006 he could hear "yelling coming from the front" of number 25 of the automated flat sorting machines. He noted that appellant and his supervisor were next to number 26 of the automated flat sorting machines. The coworker stated: "I heard [appellant's] supervisor tell him that he was calling security to have him removed from the building. I did not hear [appellant] swearing or screaming at his supervisor." In a February 8, 2007 statement, another coworker stated that on January 9, 2007 Mr. Ciavone "initiated the loud conversation" with appellant who "responded in a loud fashion." The coworker indicated that it was not unusual for people to speak loudly because the workroom floor was "an extremely loud environment." He noted that he had never heard appellant use "off-color language" when directly addressing individuals but that he may have used it in other circumstances.[6]

In an April 13, 2007 decision, the Office affirmed its August 14, 2006 decision. It found that the new witness statements submitted by appellant were not sufficient to establish the existence of an employment factor on January 9, 2006.

On June 13, 2007 appellant requested reconsideration of the Office's April 13, 2007 decision. In a June 26, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

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

[5] Appellant submitted several documents which appear to relate to these matters. In February 9, 2001 letter, appellant claimed that Ms. Slickers reached into his pocket, pulled out his cigarettes and asked: "What are we smoking today?" He also asserted that on October 24, 1995 Mr. Ciavone issued an order "to override a safety switch" and generally alleged that Mr. Marks' actions were abusive.

[6] Several coworkers stated that appellant was always answering calls and performing maintenance tasks. Appellant also submitted commendation letters from employing establishment customer service managers.

[7] 5 U.S.C. §§ 8101-8193.

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]

A claimant 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.[9] This burden includes the submission of a detailed description of the employment factors or conditions which the employee believes caused or adversely affected the condition or conditions for which compensation is claimed.[10]

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.[11] 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.[12]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. 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 employment factors under the Act.

Appellant has alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. He claimed that on January 9, 2006 a supervisor, Mr. Ciavone, subjected him to harassment and discrimination by unreasonably inquiring about his whereabouts and work activities on that date. Appellant asserted that Mr. Ciavone never gave him a specific work assignment on January 9, 2006 and that he was properly carrying out his on-call work duties on that date. He claimed that on January 9, 2006 Mr. Ciavone acted in a threatening manner and used abusive language.

[8] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[9] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[10] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[12] *Id.*

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[13] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[14]

Appellant has not submitted sufficient evidence to show that Mr. Ciavone subjected him to harassment or discrimination on January 9, 2006. The evidence reveals that at about 3:00 p.m. on January 9, 2006, Mr. Ciavone inquired where appellant had been and what he had been doing between about 7:40 a.m. and 3:00 p.m.[15] A witness asserted that both appellant and Mr. Ciavone spoke in a loud tone of voice during their discussion, but the witness acknowledged that it was common for people to speak loudly because the work environment was extremely noisy.[16] None of the witnesses of record indicated that Mr. Ciavone made abusive comments or otherwise acted in an abusive manner on January 9, 2006. In fact, one witness identified appellant as having acted abusively on that date. In a contemporaneous statement, a coworker asserted that on January 9, 2006 he observed appellant pointing his finger in Mr. Ciavone's face and screaming, "You are an incompetent lying mother fucker." The coworker indicated that appellant continued to repeat this statement despite being asked to calm down.

Appellant further alleged that Mr. Ciavone harassed him on January 9, 2006 by threatening him and calling security to remove him from the building. Two witnesses asserted that Mr. Ciavone advised appellant that he would call security and have him removed from building, but there is no indication that security was called and appellant left the building of his own accord.[17] Appellant has not explained how a statement by Mr. Ciavone that security would be called constituted harassment. As noted it appears that he directed abusive language at Mr. Ciavone and continued to use such language after being asked to calm down. Appellant

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

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

[15] Mr. Ciavone indicated that he had given appellant a specific assignment in the morning to work on a particular mail sorting machine but did not observe him working on that machine. Appellant asserted that he did not receive such a specific assignment but he did not submit sufficient evidence to support his claim.

[16] Another witness stated that he heard yelling coming from near a mail sorting machine but he did not indicate who was yelling or what was said.

[17] He indicated that he advised appellant that he would have him removed from the building if he continued to "cuss and yell" at him.

alleged that he feared for his job, but the Board has held that a claimant's job insecurity is not a compensable factor of employment under the Act.[18]

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination. He has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[19] Appellant alleged that his supervisors made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided insufficient evidence to establish that the statements actually were made or that the actions actually occurred.[20] Thus, he has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that on January 9, 2006 Mr. Ciavone improperly threatened him with disciplinary action and mishandled his work assignments.[21] He also claimed that in late 2005 management ignored his request to replace some bushings on a console and that on October 24, 1995 Mr. Ciavone issued an order "to override a safety switch." Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, improperly handled work assignments and wrongly dealt with safety matters, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[22] Although the handling of disciplinary actions, the assignment of work duties and the handling of safety matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[23] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[24]

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[18] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986). Appellant indicated that in 2002 and 2005 he filed grievances in which he alleged that the employing establishment subjected him to racial and gender discrimination and that in 2001 a supervisor, Ms. Slickers, subjected him to sexual harassment. In addition to the fact that he only vaguely described these matters, he did not submit any evidence, such as a final decision of a grievance, to show that he was subjected to harassment or discrimination as alleged. Appellant generally alleged that the actions of Mr. Marks, a supervisor, were abusive. However, he did not indicate which actions of Mr. Marks he felt were abusive. Appellant claimed that Mr. Ciavone made a statement regarding his use of Xanax, but he did not establish that this statement was actually made.

[19] *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).

[20] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[21] As noted above, appellant asserted that Mr. Ciavone did not give him a specific work assignment in January 9, 2006.

[22] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[23] *Id.*

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

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. He did not submit any documents, such as a final decision of a grievance, to show that Mr. Ciavone or other management officials committed error or abuse regarding these claimed incidents. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

For the foregoing reasons, 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.[25]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[26] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[27] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[28] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[29]

ANALYSIS -- ISSUE 2

On June 13, 2007 appellant checked a box on an appeal request form indicating that he was requesting reconsideration of the Office's April 13, 2007 decision. He did not submit any evidence or argument in support of his reconsideration request. Therefore, the Office properly found in its June 26, 2007 decision that appellant's reconsideration request did not provide any basis for reopening his case for further review of the merits of his claim.

Appellant has not established that the Office improperly denied his request for further review of the merits of its April 13, 2007 decision under section 8128(a) of the Act, because he did not submit evidence and argument showing that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

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

[26] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[27] 20 C.F.R. § 10.606(b)(2).

[28] *Id*. at § 10.607(a).

[29] *Id*. at § 10.608(b).

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. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 26, April 13, 2007 and August 14, 2006 decisions are affirmed.

Issued: April 21, 2008
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