

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

C.G., Appellant)

and)

U.S. POSTAL SERVICE, TILLMAN'S CORNER)
POST OFFICE, Mobile, AL, Employer)

**Docket No. 08-1535
Issued: December 18, 2008**

Appearances:
John A. Moore, 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 1, 2008 appellant filed a timely appeal from a February 4, 2008 decision of the Office of Workers' Compensation Programs that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a stress-related condition causally related to his federal employment.

FACTUAL HISTORY

On September 19, 2006 appellant, then a 61-year-old manager of customer service, filed a Form CA-2, occupational disease claim, alleging that he sustained job-related stress, depression and Meniere's disease due to unfair treatment at the employing establishment. He stopped work on April 13, 2006 and did not return. In a September 5, 2006 statement, appellant advised that in the late 1990s he was diagnosed with Meniere's disease and sustained a 70 percent loss of hearing with tinnitus in his right ear. He stated that he was singled out after

his station failed an audit, alleging that on March 21, 2006 his Meniere's disease returned after he read an e-mail from Joey Sherman, the acting postmaster, discussing the failed audit. Appellant indicated that two other stations failed but did not receive any e-mail. On April 7, 2006 he received an e-mail from Stephen R. Willette, manager of customer service operations, who notified him of a scheduled investigative interview on April 10, 2006 to discuss the audit. Appellant stated that other managers did not receive an interview. He went on annual leave and upon his return went on sick leave at his physician's recommendation.¹ Appellant alleged that Mr. Willette harassed him by requesting additional medical documentation to support his leave request, discussing appellant's need to retire, requiring weekly telephone calls regarding his continued absence and inappropriately giving him a letter of warning about his failure to maintain a regular schedule.

On May 2, 2006 Daniel L. Koch, Ph.D., a licensed clinical psychologist, advised that appellant was being evaluated for depression. He provided a psychological evaluation dated May 22, 2006, noting that appellant had been evaluated on May 1 and 8, 2006. Dr. Koch advised that appellant needed hearing aids that required adjustment and provided test results. He diagnosed cognitive disorder, not otherwise specified. By report dated July 17, 2006, Dr. Koch advised that appellant had an auditory evaluation and received hearing aids but could not adequately discriminate speech, which was a significant impairment.

By letter dated August 17, 2006, Mary Ann Richards, district manager of customer service and sales, advised appellant that his leave under the FMLA had expired and that she had heard that he planned to retire the following summer. On September 6, 2006 Dr. Koch reported that appellant was having nausea due to vertigo which was exacerbated by the stress of being told by a manager at work that he could no longer be on sick leave when he had months of accrued sick leave.² He advised that this threatened appellant and he was at a loss to understand why he could not take medically necessary sick leave.

In a September 29, 2006 statement, Mr. Willette denied appellant's assertion that he was singled out, advising that he had discussions with each manager whose station failed the audit. He opined that each manager was held accountable for performance and that it was his responsibility as a senior manager to ensure that his employees did not abuse sick leave requests. Mr. Willette noted that he had discussions with appellant about his attendance and future plans, including whether he was coming back to work or if he planned to retire. Moreover, it was employing establishment policy to require medical documentation to support sick leave. Mr. Willette noted that management did not tell appellant he had no further sick leave but that his FMLA leave had expired. He further advised that the letter of warning had been removed from appellant's record. Mr. Willette advised that his job as manager required that he have conversations with his employees regarding performance and attendance issues and that this was not harassment.

¹ At some time appellant applied for and was granted leave under the Family and Medical Leave Act (FMLA).

² An August 17, 2006 letter from the district manager of customer service and sales, advised appellant that his leave under the FMLA had expired.

By letters dated October 16, 2006, the Office informed appellant of the evidence needed to support his claim and asked that the employing establishment respond.

In a November 16, 2006 report, Dr. Koch advised that, until the extent of appellant's hearing loss and mild cognitive impairment was assessed, he was unable to work. Appellant also submitted one page of an acknowledgement that he had filed a complaint under the Equal Employment Opportunity (EEO) Commission on October 11, 2006.

By decision dated December 15, 2006, the Office found that appellant had established a compensable employment factor, that on or about April 10, 2006 he had a meeting with Mr. Willette concerning his unit's failure to pass an audit. It denied the claim on the grounds that the medical evidence did not establish that appellant's emotional condition was caused or aggravated by this employment factor.

On November 27, 2007 appellant requested reconsideration and submitted additional evidence, reiterating his allegations that harassment at the employing establishment had exacerbated his Meniere's disease. He submitted a March 21, 2006 e-mail describing the deficiencies found by the audit at the employing establishment. An April 7, 2006 e-mail from Mr. Willette advised appellant that an investigative interview would be held the following Monday to discuss the audit. In a July 24, 2006 letter, Mr. Willette advised appellant to attend an investigative interview on July 28, 2006 regarding his failure to maintain regular attendance. The August 8, 2006 letter of warning was issued based on appellant's absence from July 31 to August 4, 2006. In an October 17, 2007 statement, James Coleman advised that he sat in on an investigative interview on April 10, 2006 regarding Tillman's Corner station's failure in an audit. He noted that two other employing establishments also failed the audit. In a November 8, 2007 statement, John A. Moore advised that he was a witness during investigative interviews by telephone between appellant and Mr. Willette from July 28 to August 18, 2006 in which appellant's sick leave and retirement were discussed. He stated that he witnessed appellant having dizzy spells after each telephone interview. In statements dated November 26, 2007, appellant's wife, discussed appellant's Meniere's disease. She noted that he suffered an attack on March 21, 2006 after receiving an e-mail regarding the audit failure. Appellant's wife that Mr. Willette threatened to fire her husband and made him call in weekly. After each call, appellant would suffer a Meniere's attack which eventually led to loss of hearing in his right ear.

In a letter dated April 27, 2006, Dr. Koch advised that appellant was being placed on sick leave as of April 27, 2006 for approximately 30 days. Dr. Mark R. Gacek, Board-certified in otolaryngology, provided a February 2, 2000 operative report for a right endolymphatic shunt with augmentation procedure for right Meniere's disease with intractable vertigo. In a March 13, 2000 treatment note, he noted loss of hearing on the right and control of vertigo. Dr. Gacek provided treatment notes dated May 31, 2006 through January 4, 2007, documenting treatment for Meniere's disease. On May 21, 2007 he noted that appellant had been under his care for Meniere's disease and advised that "the symptoms of vertigo and tinnitus can be brought on by stress."

In statements dated January 4 and 22, 2008, Mr. Willette reiterated that appellant had not been singled out but merely held accountable for his performance, as were all managers. He held discussions with all managers whose units failed the audit and that any discussions with

appellant about his retirement were for future planning purposes, noting that he had worked at the employing establishment for over 40 years and was eligible to retire. Sharon McIntosh provided an October 17, 2007 statement concerning an audit being completed at the Bayside station. In letters dated May 1, 2006 and May 31, 2007, Mr. Willette requested that appellant provide medical documentation that explained the nature of his illness to substantiate his sick leave.

By letter dated January 25, 2008, appellant reiterated that work factors exacerbated his Meniere's and caused stress. In a January 25, 2008 statement, Mr. Moore advised of the four telephone calls between appellant and Mr. Willette.

In a February 4, 2008 decision, the Office denied modification of the December 15, 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.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁴ 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.⁵

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*,⁶ the Board 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.⁷ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁸ 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

³ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Id.*

⁶ 28 ECAB 125 (1976).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *See Robert W. Johns*, 51 ECAB 137 (1999).

assignment or other requirement imposed by the employing establishment or by the nature of the work.⁹ 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.¹⁰

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.¹¹ 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.¹²

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. 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.¹³ With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEO Commission, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁴

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.¹⁵ 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

⁹ *Lillian Cutler*, *supra* note 6.

¹⁰ *Roger Williams*, 52 ECAB 468 (2001).

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² *Kim Nguyen*, 53 ECAB 127 (2001).

¹³ *James E. Norris*, 52 ECAB 93 (2000).

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

¹⁵ *Dennis J. Balogh*, *supra* note 4.

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁶

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁷ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁸ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁹

ANALYSIS

The Office accepted a compensable factor in that appellant was required to attend an investigative interview on April 10, 2006 regarding his station's failure of an audit. Appellant was in the performance of his regular managerial duties under *Cutler*. However, he failed to establish that he was harassed at the meeting or at any other time. Appellant failed to submit sufficient evidence to establish that occurred, as alleged.

Regarding his contention that he was singled out and harassed by receiving e-mails and while interviewed regarding the audit, the manner in which a supervisor exercises his or her discretion falls outside the coverage of the Act. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.²⁰ Mr. Willette explained that, as a senior manager, it was his responsibility to discuss performance with his managers. He noted that appellant was not singled out as he had discussions with all managers whose stations failed the audit. Appellant therefore did not establish that he was harassed regarding this matter.

As to appellant's contention that he was harassed about his absence and inappropriately required to provide documentation for his sick leave, the handling of leave requests and attendance matters are administrative functions of the employer and not duties of the employee.²¹ Such matters are not compensable unless the evidence establishes error or abuse on the part of

¹⁶ *Id.*

¹⁷ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁸ *Leslie C. Moore*, *supra* note 2; *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

²⁰ *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

²¹ *Joe M. Hagewood*, 56 ECAB 479 (2005).

management. The Board finds that it was not error on the part of Mr. Willette to request appropriate medical documentation to support appellant's sick leave request. Similarly, the telephone conversations between appellant and Mr. Willette concerned his absence and a discussion of options such as when he would return to work or whether he would retire. The evidence establishes that the injury was reasonable and does not constitute error or abuse or harassment under the Act.²² While appellant submitted statements from his wife and coworkers, these do not establish that Mr. Willette acted unreasonably or otherwise harassed him.²³ He has not submitted sufficient evidence to establish that Mr. Willette acted unreasonably or abusively regarding the audit investigation or his absence from work. Hence, the Board finds that appellant's allegations pertain to his perception of being harassed. As appellant did not establish as factual a basis for his perceptions of discrimination or harassment at the employing establishment, he did not establish that harassment and/or discrimination occurred.²⁴ The evidence instead suggests that the employee's feelings were self-generated and are not compensable under the Act.²⁵

Regarding the letter of warning, reactions to disciplinary matters taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively in such capacity.²⁶ In this case, Mr. Willette advised that the letter of warning was withdrawn. The mere fact that personnel actions were later modified or rescinded, does not, in and of itself, establish error or abuse.²⁷ Appellant did not establish a compensable factor of employment in this regard.

The record also supports that appellant filed an EEO claim. In assessing the evidence, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred²⁸ and in this case, the record does not contain a final EEO decision.

As appellant established a compensable factor of employment under *Cutler*, the medical evidence must be analyzed.²⁹ He submitted reports from Dr. Koch, his psychologist, who diagnosed a cognitive disorder and advised that stress had exacerbated appellant's Meniere's disease such that he could not work. Dr. Gacek, a treating otolaryngologist, advised that the symptoms of vertigo and tinnitus "can be brought on by stress. To be of probative medical value, a physician's opinion regarding the cause of an emotional condition must relate the

²² *Beverly R. Jones*, *supra* note 14.

²³ *James E. Norris*, *supra* note 13.

²⁴ *Id.*

²⁵ *See Gregorio E. Conde*, 52 ECAB 410 (2001).

²⁶ *Joe M. Hagewood*, *supra* note 21.

²⁷ *Dennis J. Balogh*, *supra* note 4.

²⁸ *Michael L. Deas*, 53 ECAB 208 (2001).

²⁹ *See Dennis J. Balogh*, *supra* note 4.

condition to the specific incidents or conditions of employment accepted as factors of employment, must be based on a complete and accurate factual history and must contain adequate medical rationale in support of the conclusions.³⁰ Neither physician, however, related appellant's diagnosed conditions to the accepted employment factor. Furthermore, Dr. Gacek couched his opinion regarding the relationship of stress and vertigo and tinnitus in equivocal terms. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.³¹ The medical evidence is insufficient to establish that appellant's diagnosed conditions were caused or contributed to by the accepted employment factor.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an employment-related stress-related condition causally related to the accepted employment factor.

³⁰ *Mary J. Ruddy*, 49 ECAB 545 (1998).

³¹ *Patricia J. Glenn*, 53 ECAB 159 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2008 is affirmed.

Issued: December 18, 2008
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