

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

H.D., Appellant

and

**U.S. POSTAL SERVICE, LOYOLA STATION
POST OFFICE, New Orleans, LA, Employer**

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**Docket No. 07-1602
Issued: February 13, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from the February 21, 2007 decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the denial of his emotional condition claim. On March 27, 2007 the Office issued a nonmerit decision denying reconsideration of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained an emotional condition as a result of his federal employment duties; and (2) whether the Office properly denied further merit review of his claim pursuant to 5 U.S.C. § 2128.

FACTUAL HISTORY

On September 9, 2004 appellant, then 42-year-old mail handler, filed an emotional disease claim, Form CA-2, alleging that his depression was caused by sexual harassment and bullying from coworkers. He stated that Wallace Spath, acting supervisor, stalked him 89 times

and exposed himself in the restroom of the employing establishment. Appellant stated that he was bullied and called a homosexual by management, clerks, mail handlers, letter carriers and truck drivers. He also alleged that Paulette Gabriel, supervisor, told him that he must retire from the employing establishment or be transferred to another station because he filed too many harassment reports.

Appellant attached several pages of drawings and statements. He stated that in late 1998 or early 1999 Melvin Handy, a supervisor, stood behind him for a long period of time and then inappropriately leaned against him while pretending to reach for mail. This incident made appellant want to commit suicide. A false rumor that he was homosexual began circulating throughout the employing establishment in 1999, which caused him bouts of depression, anxiety disorder, panic disorder, fear of embarrassment and obsessive compulsive disorder. In 2004, Mr. Spath started staring at and stalking him after he filed an Equal Employment Opportunity (EEO) claim. He circled appellant in the workroom 89 times, as many as 3 times in one day. Mr. Spath kept meeting him at the urinals and twice exposed himself while pretending to have problems with his zipper. Appellant filed EEO complaints against Mr. Handy for the 1999 inappropriate touching incident, against Mr. Spath for a sexual proposition in 2003 and retaliation in 2004 and against various other people for bullying. He alleged that the mechanics harassed him on a daily basis by using sexual slurs and bullying him. At other times, the employees in the flats unit surrounded and faced away from him and stood in a mooning position for 2 to 20 minutes. Appellant alleged that the human resources manager gave a supervisor, Mr. West, permission to inappropriately touch him near the time clock and ordered workers in the flats unit to harass him. Three to five times in August 2004 Jerry Miller, supervisor, stood in front of appellant's workstation for 25 minutes in a mooning position and farted on him.

On September 24, 2004 the employing establishment controverted appellant's claim. Ms. Gabriel stated that several investigations had been conducted into his allegations against Mr. Spath and they had been found to be without merit. She denied that appellant was told that he had to retire or be transferred. Ms. Gabriel offered him a temporary reassignment to another facility to address his sexual harassment claims, but he indicated that he had no problem staying at the employing establishment. She noted that appellant's duties did not require him to come into contact with all of the types of employees he named in his allegations, which prior investigations had proved to be unfounded. Ms. Gabriel stated that his light-duty job could not be perceived as stressful because he had no deadlines or quotas and had no overtime or traveling duties. After appellant's employment injury on January 4, 2000,¹ he was given a modified position that required him to sit and lift flat mail weighing less than a pound from one container into another. Ms. Gabriel stated that there was no staffing shortage, that appellant's workload did not increase in his limited-duty position and that he was permitted to work at his own pace and take breaks when he felt they were needed.

On October 5, 2004 the Office informed appellant that he needed to provide more specific information to establish his claim. On November 17, 2004 he stated that the employing establishment was not following the physical restrictions against bending and reaching arising

¹ The Office accepted appellant's claims for right shoulder and hand strains, lumbar strain and right carpal tunnel syndrome under file numbers 162010130 and 160346776.

out of his previous employment injuries, which led to stress and strain. Appellant's job required him to move heavy bulk mail from "cages," which made his back sore and led to increased stress. Because of this stress, other things were able to affect his mind and body. Appellant also alleged that jealous coworkers verbally harassed him and tried to kill him by rolling containers over his feet and into his knees because he had a part-time light-duty position, but that his supervisors took no steps to stop this behavior.

On February 7, 2005 Dr. Craig Maumus, a psychiatrist stated that appellant had been diagnosed with an unspecified psychosis and post-traumatic stress disorder (PTSD).

By decision dated March 3, 2005, the Office denied appellant's emotional condition claim. The Office found that appellant had not established that any of the alleged incidents occurred in the performance of duty and therefore there were no compensable factors of employment.

On March 15, 2005 appellant was examined by Dr. Rand Metoyer, a Board-certified anesthesiologist, who noted that he had psychological factors affecting his physical condition.

On March 19, 2005 appellant requested an oral hearing. He stated that Mr. Spath's stalking behavior wore him down and stressed him to the point of suicide. Appellant contended that, when he complained to Ms. Gabriel, she used trick questions to make him look like a liar, which also caused him stress. His psychological problems began in his youth, when he was emotionally and physically abused by his father and attacked by neighborhood children. During four years in the Marine Corps appellant was sexually harassed because people mistakenly thought that he was homosexual.

Appellant stated that he was sexually harassed at the employing establishment from his first day there. His emotional condition began when a rumor that he was gay was spread by a coworker and perpetuated by several people in the culling unit. Supervisors Cabrina Hales and Reggie Sampson ignored his complaints and teased him when he asked them to intervene. Another supervisor, Mr. Handy, became angry at him for his complaints and sexually touched him 10 times before appellant bid out of the unit. Appellant replaced Norman Turl, a coworker, who sexually harassed him and sabotaged his equipment because he was angry that appellant took his position. He was permanently injured because of Mr. Turl's sabotage and transferred to a new unit, where he was again sexually harassed by coworkers. The new supervisor, Mr. Spath, did not discipline the coworkers and called appellant a sexually derogatory term. He then retaliated against appellant for informing the employing establishment that he was sleeping in the locker room by delaying completion of workers' compensation paperwork. Because appellant's whole unit was calling him "gay" he filed an EEO claim. He alleged that his coworkers put feces on his chair, hit him with a tow motor, ran him down with a truck, sexually propositioned him and exposed themselves to him.

The employing establishment submitted several documents related to appellant's employment, including several undated internal complaints, EEO claim processing documents and his federal claim against the employing establishment.

On August 25, 2006 Dr. John Boutté, a clinical psychologist, conducted a psychological pain evaluation. He reported that appellant was cooperative and that his dress, speech quality and speech content were within normal limits. Dr. Boutté found appellant's mood to be predominantly depressed and his affective expression blunted, but found no evidence of delusions, preoccupations, ruminations, obsessions, phobias, illusions, hallucinations or suicidal or homicidal ideation. He stated that appellant's Beck Depression Inventory score reflected a level of severe depression in the two weeks prior to the evaluation. The Patient Pain Profile indicated that appellant had clinically significant depression, anxiety and somatization. Dr. Boutté stated that these symptoms would interfere with any physical pain treatment program and recommended cognitive behavioral psychotherapy to address them. He diagnosed pain disorder with psychological factors and a medical condition; major depression, moderate severity and anxiety disorder. Dr. Boutté noted that appellant had a history of schizophrenia, depression and suicide attempts and that he had avoidant personality traits, severe problems with social environment and moderate occupational problems.

By decision dated March 3, 2005, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an emotional condition in the performance of duty.

On December 7, 2006 the Office hearing representative conducted an oral hearing. Appellant stated that he worked at the employing establishment until September 26, 2006 when he went on disability retirement and that his EEO claims had been resolved. He stated that his coworkers teased him by calling him a homosexual and that the supervisors did not stop them for fear of becoming unpopular. Appellant stated that, because of a previous employment injury to his back and right shoulder, he was limited to six hours of work per day and restricted from bending. He alleged that the employing establishment did not honor his bending restrictions because he had to reach low in all of his duties.

On December 22, 2006 appellant submitted additional evidence, including medical records from the Veterans Administration (VA) hospital where he received treatment. On January 29, 2004 Albert Allain, a psychology technician, reported that appellant self-referred for PTSD treatment. He reported that appellant was exposed to prolonged and severe physical and emotional abuse from his father and, to a lesser extent, other family members. Appellant described a pattern of perceived harassment, mistreatment and persecution in the military and at the employing establishment because of his light skin color. Mr. Allain stated that these perceptions were deep-seated and of paranoid proportions. He noted that appellant manifested features of severe depression, including tearfulness, pervasive negative preoccupation, low self-esteem and tiredness of life. Appellant described himself as intensely angry and increasingly isolated. He stated that he had imaginary siblings that talked to him and that he saw people who wished to harm him out of the corner of his eye. Mr. Allain stated that appellant's condition was complex, but gave a provisional diagnosis of severe recurrent major depression and mood-incongruent psychotic features. He found that appellant was not appropriate for the PTSD program and referred him to the mental hygiene clinic for further evaluation.

In a February 2, 2004 report, Dr. Maumus stated that appellant felt that he had been harassed for most of his life because he was a light-skinned African American. Appellant stated that he still saw and talked to his imaginary siblings and that he talked to himself all the time. He was on medication to treat his depression during the two previous years, but he did not feel it

had helped. Dr. Maumus diagnosed psychosis, underlying depression and underlying noncombat PTSD and prescribed anti-psychotic medication. On March 12, 2004 he reported that appellant continued to feel picked on, though he appeared to be less agitated. Appellant stated that he needed to get a tape recorder so that he could prove his case against his “predators.” Dr. Maumus referred appellant to a social worker for counseling.

On March 23, 2004 Melinda Flynn, a social worker, reported that appellant expressed intense all-encompassing feelings of paranoia and delusions of persecution. Appellant stated that he viewed people around him as predators and that, when he heard people talking, he believed they were talking about him. On April 21, 2004 he told Ms. Flynn that the management team of the employing establishment and other groups were plotting against him. Appellant was “minimally amenable” to discussing whether these observations were based on paranoia.

On October 22, 2004 Dr. Maumus stated that appellant reported feeling calmer and less stressed since taking leave from the employing establishment. On November 22, 2004 appellant reported that the employing establishment was harassing him. Because the rumor that he was homosexual had spread to his family, he believed that everyone was making fun of him and talking about him. Dr. Maumus found that appellant was very paranoid, with increased homosexual concerns and that his depression was less overt. On January 3, 2005 he noted that appellant’s paranoia was less overt and that his impulse control had improved. On May 3, 2005 appellant informed Dr. Maumus that he was prepared to return to work because he no longer felt as paranoid as he used to. He was apprehensive, however, that someone might do something to him or talk badly of him. Dr. Maumus found that appellant was more anxious than depressed and had mild, generalized paranoia.

Appellant submitted the January 24, 2006 settlement reached in his case against the employing establishment. He waived all claims against the employing establishment arising out of his employment relationship through January 4, 2006. The employing establishment agreed not to oppose appellant’s request for disability retirement. The agreement did not constitute an admission by the employing establishment of liability, fault or wrongdoing. Appellant also submitted the September 8, 2006 notice from the Office of Personnel Management approving his disability retirement application and finding that he was disabled due to his paranoid schizophrenia.

By decision dated February 20, 2007, the Office hearing representative affirmed the Office’s denial of appellant’s claim. She found that none of appellant’s allegations were corroborated by evidence of record. The Office hearing representative noted that the settlement agreement between appellant and the employing establishment was not an admission of any wrongdoing. She stated that appellant’s allegations relating his depression to the pain he experienced when he was required to work outside of his restrictions should be addressed under his back claim.

On March 22, 2007 appellant requested reconsideration. He stated that Mr. Spath was standing at a 90 degree angle to appellant when he exposed himself in the restroom.

By decision dated March 27, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence he submitted was cumulative and therefore not sufficient to warrant a merit review of the file.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim of 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.²

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 in which an injury or illness has some connection with the employment but does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that a disability results from an employee's emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act.³ The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of his work or his fear and anxiety regarding his ability to carry out his duties.⁴ By contrast, when disabilities are related to, but do not arise out of, employment they are not covered by the Act.⁵

When working conditions are alleged as factors in causing 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 may be considered by a physician when providing an opinion on causal relationship and which are not deemed factors of employment and thus may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁶ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.⁷ As a rule, a claimant's

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

³ 5 U.S.C. §§ 8101-8193.

⁴ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁵ *Id.*; see also *Peter D. Butt, Jr.*, 56 ECAB 117(2004).

⁶ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁷ *Charles D. Edwards*, 55 ECAB 258 (2004).

allegations alone are insufficient to establish a factual basis for an emotional condition claim but rather must be corroborated by the evidence.⁸

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. Mere perceptions and feelings of harassment will not support an award of compensation.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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. 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

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that his condition was caused or adversely affected by his employment.¹¹ Neither the 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 a causal relationship.¹²

ANALYSIS -- ISSUE 1

Appellant alleged that his emotional condition was caused by sexual harassment from coworkers and supervisors and the employing establishment's failure to honor the physical limitations associated with previous employment injuries. The Office denied his claim on the grounds that his allegations were uncorroborated. Therefore, the issue to be determined is whether appellant has established that any of the employment factors are compensable under the Act.

Appellant alleged several instances of physical and verbal sexual harassment, both from coworkers and supervisors, which spanned several years. He indicated that he was verbally harassed by coworkers in each position he held and that supervisors either ignored his complaints or participated in the verbal harassment. Appellant stated that coworkers started a rumor that he was homosexual and regularly teased and taunted him on that basis. He alleged that Mr. Handy,

⁸ *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Arthur F. Hougens*, 42 ECAB 455 (1991); and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

⁹ *Beverly R. Jones*, 55 ECAB 411 (2004).

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

¹¹ *See Charles D. Edwards*, *supra* note 7.

¹² *Ronald K. Jablanski*, 56 ECAB 616 (2005). *See also Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

a supervisor, inappropriately leaned against him in late 1998 or early 1999 in retaliation for his complaints about the teasing of his coworkers. Appellant alleged that a subsequent supervisor, Mr. Spath, stalked him in the workroom, verbally harassed him and exposed himself at the urinals in the restroom. He stated that other coworkers sabotaged his equipment, put feces on his chair, hit him with a tow motor, ran him down with a truck, sexually propositioned him, exposed themselves to him and stood around his workstation with their backs to him in a mooning position. Appellant stated that various supervisors and management officials gave orders or permission for this behavior to occur. He provided no evidence other than his own statements for any of these allegations.

The Board has held that, for harassment to give rise to a compensable disability, there must be evidence to establish 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.¹³ The employing establishment stated that appellant's claims against Mr. Spath and other employees had been investigated and found to be without merit. His EEO claims and federal claim based on these same allegations were resolved by a settlement agreement in which the employing establishment admitted to no wrongdoing. The medical evidence from the VA hospital reported some of appellant's allegations, but did not establish the occurrence of any of the alleged events. Because he provided no corroborating evidence of his claims, such as statements from witnesses or administrative findings of fact, the Board finds that he has not established any of the alleged instances of harassment as compensable factors of employment.

Appellant alleged that the employing establishment did not honor his physical restrictions from a previous employment injury to his back and shoulder. He stated that, despite his medical restriction against bending, all of his duties required him to reach low. Appellant stated that this caused pain in his back, which led to increased stress, making him more susceptible to other mental and physical stressors. The employing establishment stated that his position was within his physical limitations and that he was not pushed to work beyond them. While being required to work beyond one's physical limitations may constitute a compensable employment factor, such activity must be substantiated by the record.¹⁴ Appellant did not provide any objective evidence to establish this allegation, such as a copy of his working restrictions or a description of which duties required him to violate those duties. The Board therefore finds that he has not established his allegation of working beyond his physical limitations as a compensable employment factor.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty. Because he has established no compensable factors of employment, the Board will not consider the medical evidence of record.¹⁵

¹³ *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

¹⁴ *Philip L. Barnes*, 55 ECAB 426 (2004); *Robert W. Johns*, 51 ECAB 137 (1999); *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁵ *Margaret S. Krzycki*, *supra* note 6.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.¹⁶ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.¹⁷ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁸

When reviewing an Office decision denying merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant met none of the regulatory requirements for a review of the merits of the Office's February 21, 2007 decision. On March 22, 2007 he requested reconsideration on the basis of new evidence: namely, the position in which Mr. Spath was standing when he allegedly exposed himself. This evidence is not relevant to appellant's claim because it does not establish a compensable factor of employment. As there was no relevant and pertinent new evidence for the Office to consider, he was not entitled to review under the third section of 10.606(b)(2).²⁰

The Board notes that appellant did not raise new relevant arguments or present evidence that the Office erroneously applied or interpreted a specific point of law. He also did not advance any relevant legal arguments not previously considered by the Office. Appellant is thus not entitled to further review on the merits of his case under the first two subsections of section 10.606(b)(2).²¹

Because appellant did not meet any of the statutory requirements for a review of the merits of his claim, the Office properly denied the March 22, 2007 request for reconsideration.

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.608(b).

¹⁹ *Leslie M. Mahin*, 55 ECAB 311 (2004).

²⁰ 20 C.F.R. § 10.606(b)(2)(iii).

²¹ *Id.* at § 10.606(b)(2)(i) and (ii).

CONCLUSION

The Board finds that appellant did not establish that he sustained an emotional condition as a result of his federal employment duties. The Board also finds that the Office properly denied further merit review of his claim pursuant to 5 U.S.C. § 2128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 27 and February 21, 2007 are affirmed.

Issued: February 13, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board