United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
	)	**Docket No. 07-2061**
and	)	**Issued: February 8, 2008**
	)	
U.S. POSTAL SERVICE, ISTROUMA STATION, Baton Rouge, LA, Employer	)	

Appearances:
Appellant, pro se
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 13, 2007 appellant filed a timely appeal of an October 13, 2006 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition in the performance of duty, and an April 18, 2007 nonmerit decision, finding that he had abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly determined that he abandoned his hearing request.

FACTUAL HISTORY

On March 24, 2006 appellant, then a 32-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced stress, anxiety, headache and elevated blood pressure as a result of racial comments made by two coworkers about him. He alleged that the coworkers stated in a loud voice that a "white boy" did not know what he was

doing. They also stated that Vicky Wax, a deceased coworker, was not afraid of going into an African-American neighborhood either and that she was murdered by a black man. Appellant stopped work on March 24, 2006. He submitted a March 31, 2006 note of Jacque D. Gregory, a licensed clinical social worker, who stated that appellant had a return appointment scheduled in one week. Appellant was advised not to return to work until further notice. On the claim form, Ebony Lastrades, a supervisor, controverted the claim. She stated that appellant's allegations did not agree with written statements from other employees on the clock at the time of the alleged injury.

By letter dated April 21, 2006, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the factual and medical evidence he needed to submit to support his claim of injury.

In a May 22, 2006 letter, appellant further described the alleged harassment. He stated that, after helping a customer locate a parcel, he advised James Wesley, a carrier on the customer's route, about this situation. Appellant alleged that in a loud voice, Clinton Johnson, a coworker, told Marvin Dorsey, a union steward, that the employing establishment was sending a white injured employee in his black truck on Mr. Wesley's route to spy on him even though the employee did not know what he was doing. Appellant contended that this statement was directed towards him because he was the only white injured employee with a black truck at the employing establishment. He alleged that Mr. Johnson was recently caught taking his mail truck home and assumed that appellant had exposed this. Appellant told Mr. Johnson that he had not been on his route for any reason in over two months. He advised Mr. Johnson that he would go wherever his supervisors sent him or anywhere he wished to go for lunch. Mr. Johnson told appellant to stay off his route. Appellant asked him to stop threatening him. Mr. Johnson stated that, if anything were to happen to appellant, he did not see it. He yelled at appellant, telling him to get out of his work area. Appellant walked away to prevent Mr. Johnson from becoming physical. He contended that he had not said anything to provoke Mr. Johnson and assumed that his only problem with him was based on his race. Appellant listed Mr. Wesley, Charles Fields and Glenn Aguillard, a coworker, as witnesses to this incident. He immediately spoke to Ms. Lastrades about the situation. She spoke to Mr. Johnson, Mr. Dorsey and appellant. Appellant stated that no action was taken by either Ms. Lastrades or Debra Maryland, a manager. During a previous incident with Mr. Johnson, a threat assessor was called in which he characterized as a joke. Appellant contended that he could not work in an environment where he felt threatened. He alleged that the verbal assault by Mr. Johnson was intended to intimidate him and interfere with his job performance.

In a May 10, 2006 medical report, Dr. Johnny L. Simpson, an attending psychiatrist, provided a history that in March 2006 appellant experienced stress at work due to being threatened by a coworker. He advised a supervisor about the threat, but no action was taken. Dr. Simpson diagnosed generalized anxiety disorder, major depressive episode and somatization disorder by history. He opined that the situation at work aggravated appellant's current illness, stating that appellant was more likely to decompensate under stress as a result of a preexisting anxiety disorder and coping skills. Dr. Simpson stated that appellant should continue with individual therapy and remain off work until his condition improved. His symptoms were causing moderate to severe impairment.

In an April 24, 2006 letter, Mr. Gregory stated that appellant remained under treatment for generalized anxiety disorder and major depression. His condition had worsened since March 24, 2006 due to a hostile work environment. Mr. Gregory stated that, since appellant had been threatened by a coworker, his antidepressant medication had been increased. He noted appellant's concern about the consequences of returning to work and additional threats by a coworker. Mr. Gregory consulted with Dr. Simpson, and determined that appellant could not be released to return to work at that time. In letters dated April 5 and May 19, 2006, he noted that appellant remained in treatment and was taking medication. Appellant had been advised by Dr. Simpson not to return to work. On April 5, 2006 Mr. Gregory stated that, when appellant returned to work, he should have accommodations that did not place him under undue stress or aggravate his situation. Mr. Gregory's notes addressed the treatment of appellant's generalized anxiety disorder and major depression. On March 24, 2006 Mr. Gregory stated that appellant was stressed out at work due to a veiled threat made by a coworker. The coworker believed that appellant was following him when appellant was asked to complete a task in the man's work area.

By decision dated May 31, 2006, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. It found that he failed to submit sufficient evidence establishing that he was harassed by his coworkers.

On June 26, 2006 appellant requested an oral hearing before an Office hearing representative.

In a decision dated August 11, 2006, the hearing representative set aside the May 31, 2006 decision and remanded the case to the Office. He found that the Office failed to submit appellant's allegations to the employing establishment for review and comment as required by the Office's procedures.

In a September 11, 2006 letter, Mack A. Harmon, Jr., a manager, provided statements of employees he interviewed regarding appellant's allegation of verbal harassment. Frank Martin remembered Mr. Johnson only asking appellant to leave his work area. Mr. Aguillard recalled that Mr. Johnson and appellant had words. Mr. Fields stated that he did not remember how the incident started. Freddie Ruffin did not know anything about the incident. Joel Davis left the building when the incident arose. Mr. Wesley stated that when Mr. Johnson and appellant got into an argument, appellant believed, Mr. Johnson was talking about his wife. He stated that Mr. Johnson was just trying to tell appellant to be careful when riding around on his route. Mr. Dorsey tried to talk to appellant to explain that the conversation was not about him or any of his family members. He stated that he thought everything was okay but when he returned from his route on the day in question he found out that appellant had left work.

In a September 12, 2006 statement, Ms. Lastrades related that on March 24, 2006 she heard Mr. Johnson scream get out of my work area and saw appellant leaving Mr. Johnson's work area. She asked appellant what was going on. Appellant stated that he overheard Mr. Johnson making comments about a white boy to Mr. Dorsey, which appellant believed was directed at him. Ms. Lastrades spoke to Ms. Maryland and Mr. Dorsey. She refused to sign appellant's CA-1 form because she had not investigated the incident. Appellant became upset when Ms. Lastrades asked him if Mr. Johnson had said anything to him directly. He accused her

of taking Mr. Johnson's side, which she denied. Ms. Maryland advised Ms. Lastrades that appellant left the premises. Ms. Lastrades stated in June 2006 that Mr. Fields informed her that appellant had asked him to change his story. He refused to do so.

By decision dated October 13, 2006, the Office found that appellant did not sustain an emotional condition in the performance of duty. He failed to establish that he was harassed by his coworker.

On November 7, 2006 appellant requested an oral hearing.

By letter dated March 1, 2007, the Office informed appellant that his hearing would be held on April 2, 2007 at 2:30 p.m. in the United States Federal Building on 600 South Maestri Street, Suite 617, New Orleans, Louisiana. Appellant did not appear at the scheduled hearing.

In a decision dated April 18, 2007, the Office found that appellant had abandoned his request for a hearing. It stated that he had received written notification of the hearing 30 days in advance of the hearing and had failed to appear. The Office stated that there was no indication in the file that appellant contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

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 factors of his federal employment.[1] To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; 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. In the case of *Lillian Cutler*,[3] 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.[4] 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.[5] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence

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

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

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

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

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 and 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.[6] 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.

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.[7] 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.[8]

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an 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.[9] Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.[10] However, 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.[11]

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to being verbally harassed by Mr. Johnson, a coworker, on March 24, 2006. He contended that Mr. Johnson directed a comment about him to Mr. Dorsey, based on his race. Appellant alleged that Mr. Johnson stated that he was an incompetent "white boy." He stated that Mr. Johnson accused him of spying on him while Mr. Johnson was on his route. Mr. Johnson also threatened him by telling him to stay off his route and instilling fear for his life, noting that a former coworker had been murdered. Mr. Johnson yelled at him to get out of his work area. Appellant noted that, following a previous

[6] *Lillian Cutler, supra* note 3.

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

[8] *Id.*

[9] *Lillian Cutler, supra* note 3.

[10] *Michael L. Malone*, 46 ECAB 957 (1995).

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

incident with Mr. Johnson, a threat assessor was called in but this was "a joke." He contends that neither Ms. Lastrades nor Ms. Maryland took any action against Mr. Johnson. The Board notes that verbal abuse or harassment may give rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[12] Appellant stated that Mr. Wesley, Mr. Fields and Mr. Aguillard witnessed the March 24, 2006 incident. However, Mr. Wesley stated that appellant mistakenly believed that Mr. Johnson was talking about his wife. He explained that Mr. Johnson was just trying to tell appellant to be careful when riding around on his route. Mr. Wesley stated that the comments about the deceased coworker were made in a general conversation that appellant took the wrong way. Mr. Fields did not remember how the incident started. Mr. Aguillard stated only that appellant and Mr. Johnson had words. Neither Mr. Fields nor Mr. Aguillard provided a specific description of the March 24, 2006 incident. Mr. Martin recalled Mr. Johnson asking appellant to leave his work area. He did not state that Mr. Johnson yelled at appellant in making the request. Mr. Ruffin did not know anything about the alleged incident. Mr. Davis left the building when the incident took place, but did not specifically describe the incident. Mr. Dorsey tried to explain to appellant that the conversation he had with Mr. Johnson was not about him or any of his family members.

None of the witness statements from appellant's coworkers is sufficient to substantiate his allegation of harassment by Mr. Johnson.

Moreover, Dr. Simpson's May 10, 2006 report and Mr. Gregory's letters which provide a history that appellant was threatened by a coworker, are insufficient to establish appellant's allegation of harassment by Mr. Johnson. Neither Dr. Simpson nor Mr. Gregory actually witnessed the alleged threat rather, they merely provided a history of the incident as related by appellant. The Board noted that appellant did not specifically describe any prior alleged harassment by Mr. Johnson. Ms. Lastrades stated that she heard Mr. Johnson yell get out of my work area to appellant.[13] She related that appellant did not state that Mr. Johnson had directly made the comment about being a "white boy" to him. Ms. Lastrades noted that Mr. Fields informed her that he refused appellant's request that he change his story. Based on the evidence of record, the Board finds that appellant has not established a factual basis for his allegations of harassment by Mr. Johnson. Appellant did not provide probative evidence that verbal abuse or

[12] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[13] Not every statement uttered in the workplace will give rise to coverage under the Act. A raised voice in the course of a conversation does not, in itself, warrant a finding of verbal abuse. *See Paul A. Stewart*, 54 ECAB 824 (2003).

harassment occurred as alleged.[14] Therefore, he did not establish a compensable employment factor with respect to harassment.[15]

As appellant has not established any compensable factors of his employment, the Board finds that he did not sustain an emotional condition in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary [of Labor] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

With respect to abandonment of hearing requests, Chapter 2.1601.6.e of the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]."[16]

The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.[17]

ANALYSIS -- ISSUE 2

By decision dated October 13, 2006, the Office found that appellant did not sustain an emotional condition in the performance of duty. Appellant timely requested an oral hearing. In a March 1, 2007 letter, the Office notified appellant that an oral hearing was to be held on April 2, 2007. On appeal, he claims that he did not attend the scheduled hearing as he did not receive notice of the hearing.

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[14] *James E. Norris*, 52 ECAB 93 (2000).

[15] *See Jamel A. White*, 54 ECAB 224 (2002).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999). *See also Chris Wells*, 52 ECAB 445 (2001).

[17] *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

Although appellant asserts that he did not receive notice of the hearing, the Board finds that notice of the hearing was sent to appellant's address of record. There is no record of appellant having a change of address. Additionally, the return address used in appellant's appeal is identical to his address of record where the notice was sent. In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.[18]

The evidence establishes that appellant did not request a postponement of the hearing, failed to appear at the hearing and failed to provide adequate explanation for his failure to appear within 10 days. The Board therefore finds that appellant abandoned his request for a hearing in this case.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.[19] The Board further finds that the Office properly determined that appellant abandoned his hearing request.

[18] *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the mailbox rule. It arises when the record reflects that the notice was properly addressed and duly mailed. *Nelson R. Hubbard, id.*

[19] As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of his emotional condition, any medical evidence relating appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2007 and October 13, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 8, 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