United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 08-729**
	)	**Issued: September 25, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Lake Mary, FL, 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 January 14, 2008 appellant filed a timely appeal from the December 27, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative affirming a May 10, 2007 decision denying his emotional condition and denying his request for a subpoena. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

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 a subpoena.

FACTUAL HISTORY

On January 9, 2007 appellant, then a 54-year-old mail handler, filed an occupational disease claim alleging that his anxiety level was "so out of control" with his supervisors and coworkers that he was escorted out of the building on several occasions. He first realized the

disease or illness was caused or aggravated by his employment on December 30, 2006, when he stopped working.[1] The employing establishment controverted the claim.

Appellant submitted a January 7, 2007 statement alleging that his condition began sometime between 1971 and 1973 while serving in the Marine Corps. He was recently diagnosed with generalized anxiety disorder, panic disorder, agoraphobia and depression. Appellant alleged that his anxiety would worsen at work when he had negative interactions with staff on the workroom floor. He would try to avoid stressful situations as they would trigger anxiety and panic episodes. Appellant's last interaction with his supervisor caused him to go to the emergency room and see a psychiatrist. In an April 12, 2006 statement, he advised that on April 7, 2006, the fire alarm went off at work. Appellant was in the break room at the time and proceeded to go outside. He alleged that everyone returned inside and the alarm went off for a second time causing everybody to go outside again. Appellant alleged that his supervisor then instructed the mail handlers to return to their posts, despite the fact that the alarm was still ringing. He alleged that he "would go, when everyone else went." Appellant alleged that a Bernie R. Cote, supervisor, instructed him to go to his office and an incident occurred in which Mr. Cote was hit by the door. He stated that it later escalated to having a union steward present and his being escorted off the premises.

In an April 9, 2006 e-mail, Mr. Cote responded to the allegations regarding the incident on April 7, 2006. As they were waiting for the alarm to be disarmed he directed the mail handlers to go back into the plant and begin processing mail. Mr. Cote stated that appellant became "vociferous and disruptive" and stated, "why only the mail handlers?" He alleged that appellant refused to go unless all of the workers returned, whereupon he instructed appellant to follow him to the control center. However, appellant responded, "you do n[o]t want to go alone with me." Mr. Cote became threatened by appellant and requested that another supervisor accompany them. As he was entering a door into the building, he was struck in the chest by the door which appellant was holding. Thereafter, Mr. Cote stated that appellant's behavior resulted in a suspension and being escorted out of the building. Appellant had a history of angry outbursts which dated back to 2002 or 2003, which also resulted in his being escorted out of the building. The employing establishment provided additional statements from other employees, who were present at the time and who confirmed the events between appellant and Mr. Cote. The employing establishment also provided a copy of the charge of improper conduct regarding the incident, which was later changed to a letter of warning.[2]

In an August 3, 2006 statement, appellant alleged that an incident occurred on July 31, 2006 when he requested a (Form CA-7) for his wife from Mr. Cote and was informed by Mr. Martinez, a supervisor, that since he had "trouble with Mr. Cote," he should go to his supervisor or Mr. Martinez. The employing establishment provided an August 16, 2006 report from Ronda Carter, a transportation supervisor, regarding the CA-7 form incident on July 31, 2007. Ms. Carter noted that an investigation revealed that appellant and Mr. Cote had experienced several conflicts in the past and on July 31, 2006, Mr. Cote had contacted

[1] Appellant was approved for disability retirement benefits from the Veteran's Administration.

[2] The employing establishment provided a statement and information concerning an altercation between appellant and another supervisor on December 29, 2002, in which he was escorted from the building by police.

appellant's wife, who also worked at the employing establishment, at home to apprise her of the required documentation for her absence. Appellant confronted Mr. Cote regarding the call to his wife and behaved inappropriately. Ms. Carter concluded that their relationship was volatile and recommended that the two individuals work with conflict resolution to resolve any underlying animosity. She included a copy of a grievance related to the matter, which was denied. Mr. Cote also provided a July 31, 2006 statement, in which he described an altercation with appellant on that date regarding a telephone call he made to appellant's wife when she failed to report to work or call in sick. The employing establishment provided a statement and report, from coworkers Ms. Carter and Ed Shear, who witnessed the July 31, 2006 incident and noted that appellant was making threats and had refused to leave.

The Office also received a statement from appellant concerning a December 30, 2006 incident in which he alleged that Samuel Gonzalez, his supervisor, accused him of verbally threatening him. Appellant was escorted out of the building. He alleged that this incident was the "straw that broke the camel's back." In an e-mail correspondence dated December 31, 2006, Barry Littlestar, a manager, noted that appellant had called him to inform him that he was out of work due to "stress."

In a January 26, 2007 statement, Denise House, manager of the injury compensation unit, contended that appellant's claim was due to his failure to obey his supervisor's instructions and the use of language which would lead to a hostile workplace. She stated that the employing establishment removed appellant from the workroom and placed him on emergency suspension pending an investigation. Ms. House also noted that there were two prior threat assessment investigations which revealed that appellant had engaged in "inappropriate conduct, unacceptable behavior and demonstrated insubordination towards supervisors." Appellant's history of high anxiety was due to his military service in the 1970's for which he was seen by a psychiatrist. The employing establishment provided an investigative report, which revealed that appellant had generalized anxiety disorder dating back to sometime between 1971 to 1973 while serving in the Marine Corps. The employing establishment documented a December 30, 2006 incident, in which appellant shouted profanities at his supervisor and alleged that he was going to "take care" of him. The employing establishment alleged that there were at least four such incidents where appellant made threats against managers. In a December 30, 2006 statement, Mr. Gonzalez, the supervisor of distribution operations, described an incident that occurred on that date. Appellant became agitated after requesting time off and being told that he would need to wait for his leave request to be approved. Mr. Gonzalez alleged that appellant shouted obscenities and threatened him such that he felt that "he was going to attack me physically, especially when he came forward and started pointing the finger in my face." An e-mail from Mr. Cote, dated December 31, 2006, confirmed the altercation between appellant and Mr. Gonzalez.

In a February 7, 2007 statement, Mary Crawford, an injury compensation specialist controverted the claim. On February 13, 2007 she indicated that appellant had outside stressors which included that his wife was unable to work. Ms. Crawford noted that appellant was trying to get a 100 percent services connected disability but only received a 70 percent disability.

On February 26, 2007 Mr. Gonzalez stated that appellant had not been forced to work overtime or to work on scheduled days off. He noted that appellant was only engaged in

confrontations with his supervisors Orland Rivera, Bernard Cole, (twice) and himself on December 30, 2006.

By decision dated May 10, 2007, the Office denied appellant's claim. It found that he failed to establish any compensable factors of employment.

On May 16, 2007 appellant requested a hearing, which was held on October 23, 2007. On June 27, 2007 he requested that the Office issue a subpoena to Mr. Cote, contending that he had harassed him since he started working at the employing establishment.

On September 28, 2007 the Office hearing representative denied appellant's request for a subpoena. He noted that appellant did not provide any indication as to what the specific nature of the witness testimony or why the evidence could not be provided by submitting a sworn statement from the witness. The Office hearing representative also informed appellant that the denial of his request for a subpoena was not appealable prior to the issuance of his decision following the hearing.

The Office subsequently received a June 15, 2007 investigative interview and October 17, 2007 settlement agreement, regarding the employing establishment's proposed removal of appellant. The employing establishment did not acknowledge any wrongdoing in the settlement.

In a letter dated November 16, 2007, the employing establishment provided comments to appellant's hearing, noting that appellant "was found to have yelled and cursed during the verbal altercations, not the supervisors." On December 13, 2007 he responded to the employing establishment's comments. Appellant indicated that his condition arose as a result of constant harassment by his supervisors and altercations with his employer.

By decision dated December 27, 2007, the Office hearing representative affirmed the May 10, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3] 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.[4]

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

Appellant 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.[5] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.[6]

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 the 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of stress related to harassment by his supervisors. The Board must thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the Act.

Appellant's allegations included that he sustained job stress due to conflicts with his supervisors which resulted in physical altercations or removal from the premises. The Board notes that appellant referred to incidents on April 7, July 31 and December 30, 2006 involving leave or administrative forms and supervisory orders. 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.[9] 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.[10]

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

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

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

[8] *Id.*

[9] An employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. *Sandra Davis*, 50 ECAB 450 (1999).

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

Appellant alleged that on April 7, 2006 a fire alarm went off at work on two occasions. On the second occasion, he alleged that a supervisor, Mr. Cote, directed the mail handlers to return to their posts while other employees remained outside. Appellant refused to go inside until all employees were required to return. Mr. Cote directed the mail handlers to go into the plant and begin processing the mail and that appellant became "vociferous and disruptive" and questioned him as to "why only the mail handlers?" He directed appellant to go to the control center and appellant responded, "you do n[o]t want to go alone with me." Mr. Cote felt threatened by appellant's behavior and requested that another supervisor accompany them. He also alleged that appellant's behavior at the subsequent meeting resulted in appellant being escorted from the premises. In giving instructions to an employee, a supervisor is performing an administrative function, which, absent evidence of error abuse, is not a compensable factor of employment.[11] While appellant may not have liked the way his supervisor directed him and the other mail handlers, generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[12] The Board finds that the evidence of record does not establish error or abuse on the part of supervisor. Mr. Cote explained his actions and the evidence does not establish that he acted unreasonably.

Appellant also referred to an instance on July 31, 2006 related to a request made to his wife for a leave form and an instance on December 30, 2006 related to a request for time off. The Board notes that although the handling of leave requests, are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[13] The employing establishment noted that on July 31, 2006 appellant confronted Mr. Cote because he had called his wife at home to request documentation concerning her absence. An investigation revealed that appellant was acting inappropriately. The statements from Ms. Carter and Mr. Shear, coworkers, who witnessed the event confirmed that appellant was making threats and refused to leave. As to the December 30, 2006 incident, Mr. Gonzalez, the supervisor of operations, indicated that appellant became agitated after being told that he would need to wait for his leave to be approved. Appellant began to shout obscenities, threatened him and caused him to feel that he was going to be physically attacked when he pointed his finger in his face. Mr. Cote provided a December 31, 2006 statement confirming the event. The Board finds that appellant's supervisor acted reasonably as to these incidents. Appellant has not established a compensable employment factor with respect to this administrative matters.

Appellant generally alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these

[11] *Paul L. Stewart*, 54 ECAB 824 (2003).

[12] *See T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006).

[13] *C.S.*, 58 ECAB ___ (Docket No. 06-1583, issued November 6, 2006).

could constitute employment factors.[14] 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.[15] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[16] Appellant has not presented any corroborating evidence, such as witness statements, to establish that he was harassed or discriminated against by his supervisors.[17] Instead, statements from the employing establishment note appellant's history of difficulty interacting with his superiors. The employing establishment provided reasonable explanations for its actions where appellant noted specific incidents. This evidence does not support that appellant was harassed or discriminated against but instead indicates that the employing establishment acted reasonably, under the circumstances, in managing its employee.

While appellant submitted an October 17, 2007 settlement release from a grievance pertaining to his removal from employment, this did not contain any admission of wrongdoing by the employing establishment engaged in any wrongdoing. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[18] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

As appellant has not established a compensable employment factor, it is not necessary to address the medical evidence.[19]

LEGAL PRECEDENT -- ISSUE 2

Section 8126[20] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas which will be issued for witnesses only where oral testimony is the best way to ascertain the facts.[21]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is

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

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

[16] *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).

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

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

[19] *Garry M. Carlo*, 47 ECAB 299 (1996); *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[20] 5 U.S.C. § 8126.

[21] *See* 20 C.F.R. § 10.619.

no other means, by which the testimony could have been obtained.[22] Additionally, a subpoena request must be made within 60 days after the date of the original hearing request.[23]

The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment or action taken, which is clearly contrary to logic and probable deductions from established facts.[24]

ANALYSIS -- ISSUE 2

On May 16, 2007 appellant requested a hearing. On June 27, 2007 appellant asked the Office to issue a subpoena to his supervisor, Mr. Cote and alleged that Mr. Cote's harassment aggravated his generalized anxiety disorder condition.

The Board finds that the hearing representative properly denied appellant's request because appellant did not provide any explanation of why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could have been obtained.

Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[25] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.

The Board finds that the Office hearing representative did not abuse his discretion denying appellant's request for a subpoena.

CONCLUSION

Appellant has not established that he sustained an emotional condition in the performance of duty. The Board also finds that the Office hearing representative properly denied appellant's request for a subpoena.

[22] *Id.*

[23] 20 C.F.R. § 10.619(a)(1).

[24] *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts). *See also Dorothy Bernard*, 37 ECAB 124 (1985).

[25] *V.T.*, 58 ECAB ___ (Docket No. 06-1347, issued October 19, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2007 is affirmed.

Issued: September 25, 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