United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
	)	**Docket No. 08-2395**
and	)	**Issued: July 22, 2009**
U.S. POSTAL SERVICE, PAWTUCKET POST OFFICE, Pawtucket, RI, 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 September 2, 2008 appellant filed a timely appeal of the May 30, 2008 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On December 17, 2006 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim alleging that on December 13, 2006 he experienced stress and fear of future injury as a result of physical contact with a coworker. The coworker grabbed his chest with both hands and looked him in the eye, stating that he was in his way. The coworker then pushed appellant aside. Appellant stopped work on December 14, 2006. On the claim form, Diane Gaj, a coworker, stated that appellant and Joe Martins bumped into each other. She stated that Mr. Martins spoke

to appellant in a light-hearted tone and kidding manner. Ms. Gaj noted that appellant became very angry and Mr. Martins backed off and said nothing further.

In a December 28, 2006 narrative statement, appellant described the development of his emotional condition. He had been suffering from stress for more than two years. Appellant had asked a coworker to stop making trumpet noises and whistling which irritated him. He stated that coworkers overheard this conversation and had been whistling ever since. Appellant stated that management addressed the whistling problem but it continued. On October 24, 2006 he stated that a coworker overheard his conversation with a supervisor and loudly called him a "rat." Appellant informed a union steward that he became sick due to the incident and was going home. He alleged that the coworker told the union steward that he was whistling because he knew it bothered appellant. Appellant later accepted the coworker's apology. At home that evening, he experienced chest pains while thinking about the incident and subsequently called in sick. An attending physician excused appellant from work for two weeks. When appellant returned to work there was no whistling but he heard drumming and popping noises. He contended that this incident demonstrated a hostile work environment.

On December 13, 2006, while working at his station, appellant stepped back from his case to pick up flats from the floor. Mr. Martins grabbed him by the front of his coat, looked him straight in the eyes and said that he was in his way and to get out of the aisle. He pushed appellant aside like a rag doll. Appellant finished his collection that evening and went to a union meeting to voice his concerns.

On the claim form, Alan Angelone, a supervisor, controverted the claim. He was aware of only incidental contact for approximately one second between appellant and Mr. Martins. In a December 28, 2006 letter, Darlene A. Palladini, an employing establishment injury compensation specialist, contended that neither fact of injury nor causal relationship had been established. She noted a discrepancy in the description of the alleged incident provided by appellant and Ms. Gaj.

In an undated narrative statement, Mr. Angelone stated that the union president informed him about the December 13, 2006 incident the next day. He interviewed everyone present on December 13, 2006, except appellant who did not return to work. Mr. Angelone stated that Mr. Martins and Ms. Gaj provided similar accounts of the incident. As Mr. Martins was returning to his work area, he bumped into appellant very softly with his hands up to shield the bump. He kiddingly told appellant to get out of his way. Mr. Martins told Mr. Angelone that appellant had been his floater for many years and they frequently kidded one another. Appellant became upset that Mr. Martins bumped into him. He cursed him and threatened bodily harm. Mr. Martins then walked to his work area without saying another word to provoke him.

On January 2, 2007 Dr. David W. Ashley, a Board-certified family practitioner, stated that appellant suffered from stress, anxiety and insomnia due to his work environment and interactions.

By letter dated February 28, 2007, the Office requested that the employing establishment respond to appellant's allegations. It also advised appellant that the evidence submitted was

insufficient to establish his claim. The Office addressed the factual and medical evidence he needed to submit to support his claim.

In a March 5, 2007 letter, appellant described an incident similar to the December 13, 2006 incident. John Manfredi, a coworker, grabbed and threatened him in front of two coworkers. Appellant wrote a statement regarding the incident but a witness refused to do so. He was advised by the employing establishment that if he reported the incident, he and Mr. Manfredi could be fired. Appellant provided his employment history and stated that he did not experience any problems with his coworkers or management.

On March 6, 2007 Mr. Angelone stated that appellant had informed management about noises made by his coworkers for more than two years. Several service talks were given over this period reminding carriers to be respectful of their coworkers. Mr. Angelone stated that once in a while someone may have heard a song on the radio and forgot about appellant's exception to whistling. When management was made aware that someone was whistling, it asked the employee to stop. Mr. Angelone did not recall one instance where someone insisted on whistling after being reminded not to do so. He could only remember three occasions during this period when an employee may have forgotten not to whistle. In each of these instances, the employee refrained from whistling when reminded to do so. Mr. Angelone stated that management was not aware of the October 24, 2006 incident. He stated that, if appellant had reported the incident to management, it would have been handled differently. At no time during the more than two-year period alleged by appellant, had a determination been made that a hostile environment existed. Mr. Angelone stated that an investigation of the December 13, 2006 incident revealed a case of one employee accidentally making incidental contact with another employee.

Mr. Angelone stated that there were no aspects of appellant's job that could be perceived as stressful. The overtime list was signed on a voluntary basis. Appellant's letter carrier duties were substantially less than most other carriers because his afternoon collection duty was shorter than 99 percent of the other routes, in order to accommodate appellant. He started work at 9:00 a.m. while almost all other carriers began work at 6:30 a.m. or 7:00 a.m. Mr. Angelone stated that this limited his contact with other carriers. On more than one occasion, appellant was given telephone numbers and contact names of employee resource counselors to obtain help with personal circumstances. Mr. Angelone stated that, when appellant expressed concerns about the type of vehicle assigned to his route, management reassigned a right hand drive long-life vehicle (LLV) to him. Management also discussed the possibility of moving his work area to another side of the building but, appellant was not interested. Mr. Angelone stated that his requests for a different and shorter lunch schedule on Saturdays and realignment of his route were granted.

In a February 15, 2007 report, Dr. Ashley opined that appellant's severe anxiety, insomnia and trouble focusing were due to the October 24 and December 13, 2006 assaults. He advised that appellant was totally disabled for work. In reports dated December 15, 2006 to May 10, 2007, Dr. Ashley reiterated his diagnosis and found appellant disabled.

By decision dated July 26, 2007, 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 coworker.

On March 5, 2008 appellant requested reconsideration. In an undated letter, he alleged that approximately seven years prior, a supervisor threw a book at him for asking why a casual employee received 40 hours of work a week when he had priority to receive those work hours as a part-time flexible carrier under the union contract. Appellant stated that Roger Wilgres, a coworker, kicked him at the time clock in front of coworkers, who refused to prepare witness statements. He contended that Mr. Martins had been assaulting him by slapping him in the head and pushing him around while management did nothing. Appellant talked to the union about these incidents and a union representative stated that he would talk to the workroom floor supervisor about a hostile work environment. He contended that for the past two years he had been tormented by a group of coworkers that overheard the conversation he had with Mike Scetta, a coworker, about his high pitch whistling. The whistling hurt his ears and he sustained hearing loss as a result of serving in the Air Force. Appellant and Mr. Scetta engaged in a shouting match on the back dock about his whistling. He alleged that Mr. Scetta informed John Westgate, a union representative, that he knew the whistling bothered appellant and that was why he did it. Mr. Scetta apologized to appellant. He requested that Mr. Westgate not inform Jack Clegg, a supervisor, about the incident because Mr. Clegg had advised him on several prior occasions to stop whistling. Appellant reported the incident to the postmaster who only wanted the names of the people who were whistling. He did not know their names. A few days later appellant informed Mr. Westgate that Mr. Martins was still whistling. He stated that Mr. Westgate talked to Mr. Martins who was not happy that he had reported the incident. Appellant subsequently asked Mr. Angelone to move his case because the whistling continued. He did not respond. On December 13, 2006 Mr. Martins suggested to Mr. Clegg that appellant perform the extra work that Mr. Clegg had assigned to him. Appellant indicated that Mr. Martins still had to perform the assigned work. He reported the December 13, 2006 incident at a union. The union vice president advised him that, if this incident were reported to postal inspectors, then he and Mr. Martins could be fired.

In an undated letter, Mr. Angelone stated that an investigation of the incident involving Mr. Manfredi determined that there were no grounds for further action as appellant's allegations could not be corroborated. He could not comment on the incident involving appellant and Mr. Wilgres because he did not work at the employing establishment during that time period. As to the December 13, 2006 incident, an investigation was conducted and it was determined that there were no grounds to act on appellant's allegations. The statement from appellant's coworker differed considerably from his account of the incident. This was the only alleged assault he was aware of involving appellant and Mr. Martins.

In an April 14, 2008 narrative statement, Postmaster Jenny McKay-Fazzina related that she was not aware of the alleged incidents involving appellant, Mr. Manfredi, Mr. Wilgres, Mr. Martins or the supervisor who threw a book at him. She stated that no report of physical violence or contact was made prior to December 13, 2006. Moreover, appellant could not identify the coworker who was whistling or the location of such incidents. He also refused to identify the coworker with whom he exchanged words. Appellant informed Postmaster McKay-Fazzina that the issue had been resolved as he had accepted his coworkers' apology. Postmaster McKay-Fazzina had no knowledge of any request to have appellant's case moved away from his coworkers, Mr. Angelone's failure to respond to this request or Mr. Martins' comment to Mr. Clegg.

By decision dated May 30, 2008, the Office denied modification of the July 26, 2007 decision. It found the evidence insufficient to establish that appellant was harassed by his coworkers.

LEGAL PRECEDENT

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 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

[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).

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

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

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

In this case, appellant has not attributed his emotional condition to the regular or specially assigned duties of being a letter carrier. Rather, he attributed his emotional condition to being physically assaulted and verbally abused by Mr. Martins, a coworker, on December 13, 2006 and to fear of an injury in the future due to this incident. Appellant contended that, while picking up flats from the floor, Mr. Martins grabbed his coat, looked him straight in the eyes, told him to get out of his way and pushed him aside. He also alleged that on December 13, 2006 Mr. Martins suggested to Mr. Clegg that appellant perform the extra work assigned to him. Appellant alleged that Mr. Martins slapped him in the head and pushed him around on other occasions. He alleged that Mr. Manfredi physically and verbally assaulted him by grabbing and threatening him in front of two coworkers. Appellant stated that management and a union vice president prevented him from reporting this incident, as well as, the December 13, 2006 incident to postal inspectors because he could be fired. The Board notes that verbal abuse or harassment may give rise to coverage under the Act. However, there must be evidence that 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 has failed to submit sufficient evidence to establish his assertion that he was physically assaulted or verbally abused. Ms. Gaj stated that appellant and Mr. Martins incidentally bumped into one another other and that

[8] *Id.*

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

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

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

[12] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell, supra* note 2 (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, supra* note 1 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

Mr. Martin spoke to him in a light-hearted and kidding tone. Mr. Martin walked away without saying anything further after appellant became angry. This statement does not establish that he was grabbed, pushed or subjected to verbal abuse by Mr. Martin. The statement of Ms. Gaj is not sufficient to establish appellant's allegation of physical harassment by Mr. Martins. Moreover, the Board finds that appellant's fear of future injury is not compensable under the Act.[13]

Mr. Angelone, a supervisor, stated that the December 13, 2006 incident involved incidental contact for approximately one second between appellant and Mr. Martins. His investigation of the incident obtained similar accounts of the incident from Mr. Martins and Ms. Gaj. According to Mr. Martins, he was returning to his work area when he bumped into appellant very softly with his hands up to shield the bump. He kiddingly told him to get out of his way. Mr. Angelone stated that appellant became extremely upset after Mr. Martins bumped into him and began to curse at him and threatened physical harm. Mr. Martins then walked to his work area without saying another word to provoke appellant. Mr. Angelone concluded that there were no grounds for further action. The Board finds that Mr. Angelone's statement does not establish a pattern of verbal abuse or harassment of appellant by Mr. Martins. The evidence does not reflect that Mr. Martins posed any physical or verbal threat to appellant. Appellant has not established a compensable factor of employment with respect to the December 13, 2006 incident. Similarly, he did not establish his allegation that Mr. Martins attempted to have work duties reassigned him. Appellant did not submit a witness statement to corroborate his allegation.

As to his other allegations of harassment, appellant contended that coworkers whistled and made drumming and popping noises for more than two years which irritated him. Appellant alleged a shouting match with Mr. Scetta regarding his whistling, for which Mr. Scetta later apologized. He alleged that on October 26, 2004 a coworker called him a "rat" for telling a supervisor about the whistling problem. Appellant also stated that a supervisor threw a book at him after he questioned the hours assigned to a casual employee. He alleged that Mr. Wilgres kicked him at the time clock in front of coworkers. Appellant also alleged that he was physically and verbally assaulted by Mr. Manfredi who grabbed and threatened him. He alleged that a union vice president persuaded him to not report this incident to postal inspectors because he could be fired. Again, appellant did not submit any witness statements or other evidence to substantiate his allegations of harassment by his coworkers or supervisors. He has not established a factual basis for his allegations and they are not compensable factors.[14]

Mr. Angelone noted that several service talks were given to appellant's coworkers in response to his complaint that they were making noises. They were reminded to be respectful of all coworkers. Mr. Angelone noted only three occasions when an employee may have forgotten not to whistle. In each of these instances, the employee refrained from whistling when requested. Mr. Angelone related that he was not aware of the October 24, 2006 incident. The Board finds that Mr. Angelone's statements do not establish verbal abuse or harassment on the part of by appellant's coworkers. His statements reflect that management investigated

[13] *See Andy J. Paloukos*, 54 ECAB 712 (2003); *Calvin E. King*, 51 ECAB 394 (2000).

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

appellant's allegations but they were not supported. The Board finds that appellant has not established a compensable factor of employment with respect to harassment by his coworkers.[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.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.[16]

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2009
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

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

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