United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 08-2030**
	)	**Issued: June 10, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Greensboro, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 14, 2008 appellant filed a timely appeal from the January 7, 2008 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim and the April 15, 2008 nonmerit decision denying his request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 27, 2006 appellant, then a 35-year-old city letter carrier, filed a Form CA-2, notice of occupational disease and claim for compensation, alleging an emotional condition caused by factors of his federal employment. He first became aware of his illness in June 2002

and that it was caused or aggravated by his employment in October 2005. Appellant stopped work on June 26, 2006.

In undated statements, appellant alleged that, from August 2005 to June 26, 2006, James Benson, his supervisor, engaged in harassment, intimidation, race and disability discrimination, and bullying that created a hostile work environment. He indicated that Mr. Benson returned to the employing establishment in mid-August 2005 after being at another facility as part of a settlement agreement. On appellant's first day back, Mr. Benson stated that he would conduct a driving observation on appellant the next day. During the observation, Mr. Benson made numerous comments and snide remarks about appellant and did not discuss the inspection results. Appellant stated that Mr. Benson conducted covert driver observations on September 26 and October 6, 2005. He did not receive a driver observation form or any consultation from the October 6, 2005 observation. Appellant stated that Mr. Benson did driver observations on him every three to four months. He noted that Mr. Benson performed several unscheduled route counts in 2005 and 2006. Appellant filed an Equal Employment Opportunity (EEO) complaint in the matter and Mr. Benson denied all allegations during a November 7, 2006 mediation. On August 18, 2005 he alleged that a postmaster told him that, if he came back early from delivering the mail, only half of the time would be charged to leave.[1] Appellant indicated that this was bribery. He stated that, during August and September 2005, Mr. Benson stood behind him while he was at his case and whistled. Appellant found Mr. Benson's actions intimidating, threatening, disgraceful and discriminatory. When he asked Mr. Benson to stop his behavior, Mr. Benson stated that he could stand wherever and do whatever he wanted.

Appellant alleged that Mr. Benson deviated from standard procedures such that he was refused or given improper documentation to carry out his duties properly. On August 19, 2005 Mr. Benson would not let him deviate or provide reasonable accommodation for his disability. On September 15, 2005 he filled out auxiliary assistance requests forms that the carrier was supposed to complete. On September 16, 2005 Mr. Benson had appellant stop counting the mail to verify the count. On November 5, 2005 he filled out a form to have appellant sort mail from an unoccupied route, which violated the directions on the form. Appellant contended that Mr. Benson would not authorize overtime, did not give 24-hours notice before cancelling an unscheduled route count on April 2, 2006, and gave him a letter of warning for failure to obey. During December 2005, the first part of January 2006 and on June 12, 2006, Mr. Benson forced appellant to work overtime even though he was not on the overtime desired list. Appellant filed grievances regarding improper management of overtime, his request for assistance and a hostile work environment.

Appellant alleged that Mr. Benson accused him of improper mail delivery on January 17, 2006, his normally scheduled day off. Mr. Benson disapproved sick leave on January 20, 2006, even though the leave had been verbally approved the previous day and appellant had submitted the appropriate paperwork.[2] Appellant stated that Mr. Benson insisted that he was on annual leave on March 27, 2006, but was unable to produce documentation for a day that appellant denied requesting leave. On March 27, 2006 Mr. Benson accused appellant of putting mail in

[1] Appellant did not identify the postmaster by name.

[2] He indicated that he was allowed to take his leave after speaking with the postmaster.

the wrong distribution slot but could not show him how the mail was misplaced. Appellant stated that Mr. Benson accused him of not correctly filling out a request for auxiliary assistance in April 2006 and retaliated by conducting three route counts in less than a week. He reiterated that he did not receive post consultation copies of any route counts and Mr. Benson yelled at him whenever he asked for copies. On June 8, 2006 appellant asserted that Mr. Benson yelled at him about removing an observation chair and directed him to cease activities that were not credited. He alleged that Mr. Benson never gave him a list of activities that were not credited. Appellant asserted that Mr. Benson filled out postal document 3996, contrary to procedures, and inappropriately commented about appellant's speed on his route in front of a custodian. On June 12, 2006 he followed Mr. Benson's instructions but Mr. Benson was 40 minutes late in picking up his outgoing mail and never returned to the office so appellant could secure the mail, postal equipment and keys he had signed out. Appellant alleged that Mr. Benson wrongly accused him of missing a scan on April 28, 2006. On April 29, 2006 Mr. Benson removed a lock from a cluster of mailboxes at an apartment complex. Appellant alleged that Mr. Benson had altered his "clock rings" since April 28, 2006. He also alleged that, when he stopped work, he was placed on absent without leave (AWOL) status for about two months. Appellant filed a grievance to have the AWOL status removed.

Appellant also submitted copies of vehicle history reports, excerpts from the employing establishment's handbook and coworker statements about their interactions with Mr. Benson. A witness supported that on September 16, 2005 Mr. Benson yelled at appellant in the breakroom. A settlement agreement noted that the May 5, 2006 letter of warning for failure to follow instructions on April 21, 2006 would be expunged after three months. Copies of grievance settlements were submitted, including Grievance #001-006 (Mount Olive) regarding 3996's forms/request for auxiliary assistance and overtime; and Grievance #002-006 (Mount Olive) regarding harassment and intimidation. No wrongdoing was found.

Appellant submitted medical records dated June 27, 2006 from Eastern Medical Associates, which noted he was being treated for major depression and anxiety and was excused from work as of June 7, 2006. In an August 17, 2006 duty status report, Dr. Edwin W. Hoeper, a Board-certified psychiatrist, opined that appellant had disabling post-traumatic stress disorder and depression. On August 21, 2006 he advised that appellant's post-traumatic stress disorder and major depression directly resulted from persistent harassment at work.

The employing establishment controverted appellant's claim and asserted that management had neither erred nor acted abusively regarding the implicated administrative matters. An employing establishment case manager noted that Mr. Benson had taken action against appellant regarding job performance and was unaware of a claimed emotional condition until July 11, 2006. In a July 11, 2006 statement, Mr. Benson noted that appellant went out on sick leave while Mr. Benson was on leave from June 26 through 30, 2006. He disputed knowing that appellant had panic attacks or major depression. Mr. Benson spoke with appellant on several occasions concerning his job performance. On September 16, 2006 he stated that he tried to work with appellant "every possible way" to maintain a cordial working environment. Mr. Benson denied discrimination based on disability or race, noting that he had never taken corrective action against appellant and had allowed him to deviate from his route if he sought prior approval. He advised that appellant was held to the same standards as other carriers but was not meeting those standards. Mr. Benson attached September 16 and December 12, 2005

statements in which he noted meeting with appellant to discuss improvement in his job performance.

By decision dated April 20, 2007, the Office denied appellant's claim on the grounds that he did not establish any compensable factors of employment.

On April 29, 2007 appellant requested an oral hearing which was held on October 15, 2007.

In an undated letter received December 28, 2007, Carmen Long, a coworker, indicated that when she worked at the employing establishment, a supervisor told her to stay away from appellant after they were seen talking. Compared to the other employees, she stated appellant had a lot of route inspections and the supervisors, including Mr. Benson, talked about how it went and lost his paperwork.

By decision dated January 7, 2008, an Office hearing representative affirmed the April 20, 2007 decision.

On March 17, 2008 appellant requested reconsideration. He submitted two March 7, 2008 documents from the Office of Personnel Management (OPM). The materials found appellant disabled from his position as a city carrier due to depression and anxiety and approved his application for disability retirement.

By decision dated April 15, 2008, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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 where an injury or illness has some connection with employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his 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. 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 work duties.[3] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[4]

[3] *Ronald J. Jablanski*, 56 ECAB 616 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[4] *Id.*

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.[5] 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.[6] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim, but rather, must be corroborated by the evidence.[7] Mere perceptions and feelings of harassment will not support an award of compensation.[8]

ANALYSIS

Appellant did not allege that he sustained an emotional condition as a result of his regular or specially assigned duties. Rather, he alleged that his emotional condition was due to actions taken by his supervisor in various administrative matters. The Office denied appellant's claim on the grounds that he failed to establish a compensable employment factor.

Appellant alleged that the manner in which Mr. Benson observed him and performed route counts in 2005 and 2006 were against established procedures and done in a covert nature. He indicated that he never received postconsultation copies of any of the route counts and was yelled at when he asked for copies. Appellant contended that Mr. Benson did not follow established procedures regarding his overtime, requests for assistance or leave. He alleged that he was improperly placed on AWOL, denied preapproved leave, and given a letter of warning for failure to obey. On several occasions, Mr. Benson stood behind appellant whistling. Appellant found his actions intimidating and discriminating. Although the handling of disciplinary actions and leave requests, the assignment of work duties and the monitoring of work activities are generally related to employment, they are administrative functions of the employer and not duties of the employee.[9] However, the Board has found that an administrative or personnel matter may be considered an employment factor where the evidence establishes error or abuse on the part of the supervisor. In determining whether a supervisor erred or acted abusively, the Board has examined whether he or she acted reasonably.[10]

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[5] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[6] *Id.*

[7] *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Arthur F. Hougen*s, 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).

[8] *Beverly R. Jones*, 55 ECAB 411 (2004).

[9] *See Lori A. Facey*, 55 ECAB 217 (2004). *See also Janet I. Jones*, 47 ECAB 345 (1996).

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

Appellant has not submitted sufficient evidence to show that Mr. Benson acted unreasonably with respect to the administrative actions. While he claimed that his supervisor deviated from the standard procedures when filling out forms and authorizing leave, he presented no evidence that the supervisor erred or was abusive.[11] The issue is not whether the employing establishment properly followed established procedures in conducting its daily business, but rather whether there was error in the administrative actions pertaining to appellant. There is no evidence that appellant was refused or given improper documentation to carry out his duties properly. While appellant and Mr. Benson disagreed with the procedures pertaining to work assignments, appellant's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[12] There is no evidence that Mr. Benson engaged in unreasonable covert driver observations or that his instructions constituted error or abuse. The employing establishment asserted that the administrative actions were reasonable. Mr. Benson denied acting improperly and explained that he took action to help appellant improve his poor job performance. Appellant has not established a compensable employment factor with respect to these administrative matters.

Appellant also alleges that he was harassed and discriminated against when Mr. Benson unfairly disapproved leave which was previously approved, placed him on AWOL and gave him a letter of warning for failure to obey. Additionally, he alleged that Mr. Benson illegally altered his clock rings, wrongly accused him of various incidents, such as improper delivery of mail, put mail in the wrong place, incorrectly completed forms, etc., and yelled at him on several occasions. Mere perceptions of harassment or discrimination are not compensable under the Act,[13] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[14] Appellant submitted insufficient evidence to substantiate specific assertions.

Appellant did not provide witness statements to establish his allegations of being improperly singled out on particular dates and times. The statements from appellant's coworkers regarding the number of route inspections he had is not evidence that appellant was improperly singled out. Mr. Benson specifically denied acting improperly and indicated that he had appropriate interactions with appellant in an effort to improve his job performance. While the record contains evidence that the supervisor raised his voice with appellant on September 16, 2006, appellant has not shown how an isolated incident by the supervisor would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[15] Additionally appellant alleged

[11] Leave matters are also considered to be administrative in nature. *See Jeral R. Gray*, 57 ECAB 611 (2006).

[12] *See Michael Thomas Plante*, 44 ECAB 510 (1993).

[13] *James E. Norris*, 53 ECAB 93 (2000).

[14] *Id.*

[15] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers comments such as you might be able to do something useful and here he comes was self-generated and stemmed from general job dissatisfaction).

various discriminatory actions but he did not submit evidence, such as findings of grievances, to support these claims.[16] He therefore failed to establish a factual basis for his claims of harassment retaliation, or verbal abuse.[17] The evidence instead suggests that the employee's feelings were self-generated and thus not compensable under the Act.[18]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act. He has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[19]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[21] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[22] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[23]

ANALYSIS -- ISSUE 2

Appellant's March 17, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted two March 7, 2008 documents from OPM. One letter concerned his application for disability retirement. The other letter advised that appellant was found disabled from his position due to his emotional condition.

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[16] *See Mary J. Summers*, 55 ECAB 730 (2004).

[17] *Id.*

[18] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

[19] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[20] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2).

[22] *Id.* at § 10.608(b).

[23] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

However, the submission of this material does not require the reopening of appellant's claim. The EEO documents do not contain any pertinent findings regarding the employment factors alleged as a cause of the claimed emotional condition. Additionally, the Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under the Act.[24] The EEO documents do not constitute relevant and pertinent new evidence not previously considered by the Office.[25] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his March 17, 2008 request for reconsideration .

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant reconsideration request pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 15 and January 7, 2008 are affirmed.

Issued: June 10, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[24] *See Donald Johnson*, 44 ECAB 540, 551 (1993).

[25] *See Susan A. Filkins*, 57 ECAB 630 (2006).