United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-2095**
	)	**Issued: June 4, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Gulfport, MS, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 23, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 3, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

FACTUAL HISTORY

On May 26, 2007 appellant, then a 45-year-old rehabilitated clerk, filed an occupational disease and alleged that he developed an emotional condition due to factors of his federal employment. He stated that he first became aware of his condition in 1997 and sustained an aggravation in 2007. Appellant noted that his prior claim for an emotional condition had been denied.

In support of his claim, appellant submitted a statement dated May 24, 2007 describing discipline. He noted that in 1985 his supervisor, Glynn C. Steele, began punitive actions including rigidly pushing for production, which appellant felt resulted in two work-related injuries. Ms. Steele attempted to remove appellant in 2000, which was reduced to a 30-day suspension. Appellant stopped work in 2001 and returned in June 2005 in a rehabilitation position. Ms. Steele became appellant's supervisor in December 2006 and issued an unsatisfactory performance which was reduced to a discussion. On May 16, 2007 she instructed appellant to follow proper procedure and to leave at 6:00 p.m. until his schedule changed. On May 21, 2007 appellant received a warning for failure to follow instructions and unsatisfactory performance from Ms. Steele.

In a letter dated June 20, 2007, the Office requested additional factual and medical evidence in support of appellant's claim. Appellant responded on July 5, 2007 and attributed his emotional condition to Ms. Steele's push for production, his limited-duty job on the midnight shift in 1996, Ms. Steele's issuance of a removal in 2000, which was reduced to a 30-day suspension, the grievance filed for lost time for seniority and retirement when he returned to work in 2005, Ms. Steele's recent issuance of a unsatisfactory performance, which was reduced to a discussion and the discipline for failure to follow instructions and unsatisfactory performance as well as the recent change in his work hours on May 26, 2007. He listed several statements from Ms. Steele criticizing his performance. Appellant noted on May 22, 2003 Ms. Steele discussed more duties for him regarding truck keys and on May 29, 2007 regarding tilt carts.

Appellant submitted a July 11, 2007 form report from Dr. Patrick Crane, a clinical psychologist, diagnosing anxiety. On July 22, 2007 he stated that the employing establishment erred by issuing discipline, which was subsequently withdrawn or reduced through the grievance process.

By decision dated November 26, 2007, the Office denied appellant's claim finding that he failed to substantiate a compensable factor of employment. Appellant requested an oral hearing on December 4, 2007. He submitted a statement that he believed that the employing establishment acted unreasonably in personnel matters and discriminated against him.

Appellant stated that he was submitting letters of warning from 1993, 1994 and 1999 Equal Employment Opportunity (EEO) settlement agreement as well as other grievances and settlements. He submitted an August 23, 1993 letter of warning for working more than eight hours; which was resolved through a September 16, 1993 settlement agreement expunging a letter of warning for failure to follow instructions from his records. Appellant also submitted a July 11, 1994 letter of warning due to unsatisfactory performance. On February 8, 1995 an arbitrator found that the employing establishment and specifically, Ms. Steele, did not have just cause to issue the July 11, 1994 letter of warning and stated, "The record establishes disparity of treatment between the [g]rievant and other employees." The arbitrator found that Ms. Steele had instituted changes, which resulted in lowered productivity, that many employees disregarded these changes after experiencing the drop in production, that Ms. Steele explicitly authorized one employee to return to prior procedures, but that appellant "rigidly adhered" to the changes and that his productivity did not improve. The arbitrator found that appellant was not treated equally with the other employees in his unit.

Appellant submitted a January 20, 1995 notice of suspension due to unsatisfactory conduct alleging that he walked away during a work discussion with Ms. Steele and citing a July 19, 1994 letter of warning. He withdrew an EEO complaint regarding this notice of suspension on the grounds that the notice was issued but never served and was therefore null and void.

On August 13, 1996 appellant filed a grievance alleging that there was ample work available within his restrictions, but that Ms. Steele had made no attempts to accommodate him. In a letter dated February 19, 1997, the union requested that the employing establishment reduce appellant's limited-duty position to writing. On August 22, 1998 appellant filed a grievance alleging that on August 10, 1998 he received an unofficial discussion and to request rubber mats for standing. The parties reached a settlement on this matter on September 11, 1998 and agreed that two safety mats would be placed at the copier machines. The agreement was reached without prejudice.

Appellant received a letter of warning on June 24, 1999 for failure to follow instructions regarding a leave request. On March 26, 2007 he received a letter of warning for unsatisfactory performance. In a letter dated April 8, 2007, appellant stated that the station manager had instructed him to sort metered mail piece by piece. He alleged that this is a new operation requirement imposed only on him. Appellant noted that supervisor, Lori Stephenson, instructed him to return to his normal method of sorting mail on April 7, 2007. He submitted a letter dated May 13, 2007, alleging that he received a letter of warning, which was reduced to a discussion due to unsatisfactory performance. Appellant stated that he was instructed to close the employing establishment, but had no verifiable method to know if all the carriers had returned. He noted that he received an inappropriate change of work schedule. Appellant provided a copy of the letter of warning issued on May 21, 2007 due to unsatisfactory performance and failure to follow instructions.

Appellant testified at the oral hearing on April 14, 2008. He submitted additional documentation after the hearing consisting of medical records and factual documents. Appellant resubmitted the August 23, 1993 letter of warning for failure to following instructions. He submitted a January 18, 1999 settlement agreement revoking the July 11, 1994 letter of warning, a letter dated April 15, 2008 from Mark Cunningham, Union President, stating that the March 26, 2007 letter of warning was grieved and expunged from appellant's file. Appellant also resubmitted an EEO settlement agreement dated January 11, 1999, which stated the notice of suspension dated January 20, 1995 was never served and was therefore null and void.

On June 6, 2007 Dr. Ismin Zen, a psychiatrist, diagnosed dysthymic disorder and anxiety. In a note dated August 14, 2007, he diagnosed major depression disorder, recurrent.

By decision dated July 3, 2008, the hearing representative found that appellant had not substantiated allegations of harassment or established error or abuse on the part of the employing establishment in issuing disciplinary actions. As appellant had not substantiated a compensable factor of employment, the hearing representative found that he failed to meet his burden of proof.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related an employee's employment. 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 of workers' compensation. Where the disability results from an employee's emotional reaction to his regular of specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2] Reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable until it is established that the employing establishment erred or acted abusively in such capacity.[3]

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[4] A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[5] A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.[6]

ANALYSIS

Appellant had attributed his emotional condition to work assignments and disciplinary actions by his supervisor, Ms. Steele, which he felt rose to the level of harassment and discrimination. The Office denied his claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, improperly assigned work duties and improperly changed his work schedule, the Board finds that these allegations relate to administrative or personnel matters,

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387, 390-91 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

[4] *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

[5] *Penelope C. Owens*, 54 ECAB 684, 686 (2003).

[6] *Beverly R. Jones*, 55 ECAB 411, 417 (2004).

unrelated to his regular or specially assigned duties and do not fall within the coverage of the Act. Although the handling of disciplinary actions, the assignment of work duties and the assignment of a work schedule are generally related to the employment, they are administrative functions of the employer and not duties of the employee. However, the Board has noted that an administrative or personnel matter will be considered 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.[7] The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters regarding the majority of his disciplinary actions. Appellant submitted evidence of an August 23, 1993 letter of warning, which was resolved on September 16, 1993 and expunged from his personnel file. A January 20, 1995 notice of suspension was never served and found null and void. The mere fact that the actions of the employing establishment were later modified does not, in and of itself, establish error or abuse by management in its administrative duties.[8]

There is, however, evidence with respect to appellant's claim for error or abuse in regard to the July 11, 1994 letter of warning. Although the hearing transcript and party briefs are not of record, the February 8, 1995 decision of the arbitrator makes a finding of error in issuing the July 11, 1994 letter of warning and found that appellant was subjected to disparate treatment. The Office did not acknowledge the findings of the arbitrator or otherwise make a finding as to this evidence. It is well established that, while the findings of other federal agencies are not dispositive with regard to questions arising under the Act, such evidence may be given weight by the Office and the Board.[9]

On the return of the case record, the Office should secure the hearing transcripts from the February 2, 1995 arbitration and make an appropriate finding with respect to the alleged work factors. After such further development as it deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the record contains probative evidence with respect to a claim of disparate treatment and the case will be remanded to the Office for further development.

[7] *Peter D. Butt, Jr.*, 56 ECAB 117, 123-24 (2004).

[8] *Id.*

[9] *Pamela D. Casey*, 57 ECAB 260, 264 (2005).

ORDER

IT IS HEREBY ORDERED THAT July 3, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: June 4, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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