United States Department of Labor
Employees' Compensation Appeals Board

M.Z., Appellant	)	
and	)	**Docket No. 08-1050**
	)	**Issued: March 3, 2009**
U.S. POST OFFICE, POSTAL SERVICE, Brooklyn, NY, 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 February 25, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated June 29 and December 13, 2007 and January 3, 2008 decisions. 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 met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On May 10, 2007 appellant, a 36-year-old letter carrier, filed a (Form CA-1) traumatic injury claim alleging emotional stress, blackouts and headaches due to being disciplined at the employing establishment on May 9, 2007. He claimed that this was the fourth time the employing establishment had unfairly disciplined him.

In report dated May 14, 2007, Dr. Semyon Barash, a specialist in psychiatry, stated that on May 11, 2007 appellant was examined, at which time he related symptoms of anxiety, depression and headaches. He noted that appellant felt constantly tense and was unable to focus on simple tasks, including work-related responsibilities. Dr. Barash opined that appellant was not able to perform his usual work responsibilities and required time off for treatment and recovery. In a May 14, 2007 Form CA-20 report, he diagnosed adjustment disorder and acute, mixed anxiety and depression. Dr. Barash checked a box indicating that the condition was caused or aggravated by ongoing stress at work.

In a May 14, 2007 letter, Dave Nelson, appellant's manager, controverted the claim. He stated:

> "[Appellant] was issued a 14-day suspension letter on May 9, 2007 upon his return from the street. The last time he was issued a 14[-]day suspension he went home sick leaving his route unattended. The next day, May 10, 2007, [appellant] filed his Form CA-1 claim, which I believe was in retaliation for being issued the 14-day suspension."

By letter dated May 22, 2007, the Office advised appellant that he needed to submit additional factual and medical information in support of his claim. It asked him to address how the May 10, 2007 incident resulted in any injury or disability and to submit a comprehensive medical report from his treating physician describing his condition. The Office requested a physician's opinion as to whether appellant's claimed emotional condition was causally related to his federal employment. Appellant was provided 30 days to submit further evidence.

In a report dated May 22, 2007, Dr. Valeriy Chernov, a specialist in psychiatry, stated:

> "[Appellant] reported feeling depressed, anxious, unable to sleep, experiencing resistant negative thoughts and headaches. He reported feeling helpless and unable to concentrate. [Appellant's] level of energy is low and he has not been enjoying many activities he used to get pleasure from in the past. I believe his condition is related to his work. In my professional opinion, [appellant] is unable to perform his work responsibilities and needs treatment at this time."

In a May 22, 2007 CA-20 form report, Dr. Chernov reiterated the diagnoses and checked a box indicating that the condition was caused or aggravated by employment activity.

In May 28, 2007 statement, appellant alleged that management had engaged in a pattern of harassment, mistreatment and discrimination. He had been called into the supervisor's office four times in the prior year, all on frivolous and unjust grounds. The most recent incident occurred on May 9, 2007 when appellant was issued a 14-day suspension for unauthorized use of a cellular phone. Appellant contended that this charge was brought in retaliation for his filing four complaints with his union. He filed an Equal Opportunity Employment (EEO) complaint on March 6, 2007, following which management began calling him into the office to reprimand him for frivolous reasons. Appellant alleged that his supervisor made false and groundless accusations against him, such as taking too much time on the street and not taking out enough mail in his deliveries. He asserted that his supervisor began approaching him in a hostile way,

yelling at him, checking up on him and following him on the street. Appellant noted that the claims he filed were successful, after which management retaliated by suspending him on May 9, 2007. He became extremely upset upon his receipt of the most recent disciplinary action and the cumulative effect of his supervisor's actions triggered his emotional condition on May 10, 2007. Appellant experienced anxiety, stress, depression, headaches and black outs and was unable to focus on simple tasks such as racking and sorting mail.

Appellant submitted copies of union grievance resolution forms dated November 8, 2006 to May 25, 2007. On November 8, 2006 he contended that management did not have cause to issue him a letter of warning on October 28, 2006 for failure to follow instructions. The parties agreed that the letter of warning was to be rescinded and expunged from the record. A November 20, 2006 grievance concerned whether management had cause to issue a letter of warning on November 13, 2006 for failure to be regular in attendance. A resolution reduced the letter of warning to a discussion. In a January 13, 2007 grievance, appellant contended that management failed to afford him equitable opportunities for overtime. The matter was resolved with management agreeing to pay appellant 12 hours at the overtime rate in lieu of work. A May 25, 2007 grievance pertained to whether management had cause to discipline appellant on May 9, 2007 for failure to work in a safe manner (14-day suspension). The resolution reduced the letter of warning to a discussion.

By decision dated June 29, 2007, the Office denied appellant's claim. It accepted the May 10, 2007 incident, in which he received the suspension letter, as a compensable factor of employment. The Office noted that the grievances appellant filed on November 8 and 20, 2006 and January 13 and May 25, 2007, which were modified, showed a pattern that can lead to an emotional condition. It found, however, that the medical evidence did not establish that his claimed emotional condition was causally related to the accepted employment factor.

In a July 12, 2007 report, Dr. Chernov stated that appellant was complaining of severe depression, anxiety, inability to sleep or concentrate, persistent negative thoughts and severe headaches. He related that these symptoms developed after appellant's altercation with his supervisor. Dr. Chernov opined that appellant's clinical condition was directly related to his work and caused disability, which affected his level of functioning. He reiterated the diagnosis of adjustment disorder, acute, with anxiety and depressed mood.

On July 13, 2007 appellant requested a review of the written record. In a statement dated July 9, 2007, he stated that the May 10, 2007 work incident hindered his job duties because it caused him mental stress, major headaches, black outs, made him "see things" and lose concentration, which impaired his ability to rack mail. Appellant stated that he had since returned to full duty. He contended that Mr. Nelson was an abusive administrator who had a proclivity to harass his employees and was eventually transferred to Texas.

In a statement dated October 10, 2007, V.M. Gooding, appellant's manager, stated:

> "From past experiences with [appellant], he has problems taking orders from new supervisors that may be assigned to the station for short periods of time. He is the type of person that does not want to be challenged. When [appellant] is given an order to do overtime or asked to put more mail in his case, he feels he knows

more than what the supervisor is asking him to do. There were times when he would get angry with management and say that he does not feel good and is going home. [Appellant] would do this to avoid forced overtime on another route that he did not want to do. We have always required [him] to submit documentation from his [physician] for unscheduled leave.

"Postal policy states that employees are not to use their cell[ular] phones while on the work floor. They are not permitted to use them on the street while delivering their route. The previous manager, Mr. Butcher, has made service talks regarding this policy.

"Every morning carriers are given orders as to how much time they have out on their route prior to going to the street. If a carrier cannot complete their route in the allotted time, they are required to complete [an appropriate form]. Carriers are disciplined for the use of unauthorized time. They must call to notify management when they are having a problem completing their route. Additionally, I have had no knowledge that (appellant) ever filed an EEO case."

By decision dated December 13, 2007, an Office hearing representative denied appellant's claim, modified to find that the evidence did not establish administrative error or abuse on May 9, 2007 when he was issued the 14-day suspension. Although appellant had filed a claim for a traumatic injury, the Office's June 29, 2007 decision did not specifically address whether the May 9, 2007 incident was compensable or whether he had an emotional reaction to a compensable incident on May 10, 2007.

By letter dated December 18, 2007, appellant requested reconsideration and reiterated his contentions that management engaged in a pattern of harassment and abuse in retaliation for the grievances he filed. He contended that the employing establishment erred in finding that he violated the cellular phone policies. Appellant noted that these policies stated that "the use of cellular phones is strictly prohibited while operating a motor vehicle" and "no usage permitted on the work floor at any time."[1] He stated that management allowed employees to use a cellular phone while on the street and, if operating a vehicle, so long as the vehicle was safely parked and the motor had been turned off.

By decision dated January 3, 2008, the Office denied appellant's application for review on the grounds that it did not raise substantive legal questions or include new and relevant evidence sufficient to require further merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable

[1] The record contains copies of the employing establishment's policies prohibiting cellular phone use by employees while on the work floor and while operating a motor vehicle, as of April 11, 2007.

employment factors are causally related to the claimed emotional condition.[2] There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[3]

The first issue to be addressed is whether appellant has cited factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[4] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[5]

ANALYSIS -- ISSUE 1

Appellant filed a traumatic injury claim for an emotional condition following his receipt of a 14-day suspension on May 9, 2007. He subsequently expanded his claim, noting a series of disciplinary actions by his supervisor which he alleged were erroneous and abusive.

The Board finds that the administrative and personnel actions taken by management in this case have not been established as erroneous abusive and are therefore not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.[6] In the instant case, appellant has not submitted evidence that his supervisor acted unreasonably or committed error with regard to disciplinary actions taken.

Appellant contends that his supervisor engaged in a pattern of harassment against him, demonstrated by the four disciplinary charges against him within the prior year. He asserted that this constituted harassment, culminating in the May 9, 2007 incident in which he was issued a 14-day suspension for unauthorized use of a cellular phone. The Board finds that appellant failed to establish a compensable factor of employment with respect to the disciplinary actions taken from November 2006 through May 10, 2007. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertaining to actions taken in an administrative capacity and do not arise from the employee's regular or specially assigned dates.[7] In this case, there is insufficient evidence to find that appellant's supervisor acted abusively in suspending appellant in May 2007 or that the letters of warning were issued in error.

[2] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

[3] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[4] *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Id.*

[6] *See Alfred Arts*, 45 ECAB 530, 543-44 (1994).

[7] *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

The record reflects that the letters of warning were later reduced to discussion and that management resolved appellant's grievances over lack of overtime opportunities by agreeing to pay him 12 hours at the overtime rate. The fact that personnel actions are modified, rescinded or dismissed does not, in and of itself, establish error or abuse.[8] The grievances were settled without any admission of guilt or fault by the parties involved. With regard to appellant's reaction to his receipt of the May 9, 2007 notice of suspension, he has not submitted any evidence to establish error or abuse by his supervisor in issuing the disciplinary letter. Any anxiety on behalf of appellant must be considered self-generated. Regarding his allegation that he developed stress due to insecurity about maintaining his position, the Board has previously held that a claimant's job insecurity is not a compensable factor of employment under the Act.[9] Thus, appellant has not established a compensable employment factor.

Appellant alleged that his supervisor made derogatory remarks against him and treated him in a demeaning, condescending manner. However, he did not submit sufficient evidence to establish his allegations as factual. There are no statements from any witnesses to such conduct.[10] As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work and do not establish his claim for an emotional disability.[11] Mere perceptions of harassment or discrimination are not compensable; a claimant must establish a basis in fact for the claim by supporting his allegations with probative and reliable evidence.[12]

The Office reviewed all of appellant's allegations of harassment and error and found that they were not substantiated by the evidence of record. Appellant has not submitted evidence sufficient to establish that his supervisor committed error or was abusive towards him in the disciplinary actions. As such, appellant has not established a compensable work factor. For this reason, the medical evidence need not be considered.[13]

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.[14] Evidence that repeats

[8] *See Sherry L. McFall*, 51 ECAB 436 (2000)*; Garry M. Carlo*, 47 ECAB 299 (1996).

[9] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[10] *See Joel Parker, Sr.*, 43 ECAB 220 (1991) (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[11] *See Debbie J. Hobbs*, *supra* note 2.

[12] *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

[13] *See Margaret S. Krzycki*, *supra* note 12.

[14] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15]

ANALYSIS -- ISSUE 2

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. He reiterated his contentions that his supervisor engaged in a pattern of harassment by issuing disciplinary actions against him and that his receipt of the May 9, 2007 notice of suspension was abusive and erroneous. Appellant also reiterated that Mr. Nelson made derogatory comments toward him and treated him in a condescending, demeaning manner. These contentions, however, were previously considered and rejected by the Office and are therefore cumulative and repetitive. Appellant has failed to submit evidence showing that management acted improperly by disregarding its own policies regarding restrictions on cellular phone usage. His reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty. The Board finds that the Office properly refused to reopen his case for further reconsideration on the merits.

[15] *Howard A. Williams*, 45 ECAB 853 (1994).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2008, December 13 and June 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 3, 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