United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-1269**
	)	**Issued: March 12, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Kalispell, MT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 1, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 13, 2008, which affirmed a February 1, 2007 decision denying his claim for an emotional condition and his request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he developed an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request to subpoena witnesses and documents.

FACTUAL HISTORY

On June 16, 2006 appellant, then a 41-year-old part-time flexible letter carrier, filed an occupational disease claim alleging that he developed anxiety and depression related to stress at work. He became aware of his illness on June 2, 2006 and realized that his condition was caused

or aggravated by his employment on the same date. Appellant stopped work on June 30, 2006 and was granted disability retirement on November 6, 2007.

Appellant submitted records from Dr. Doug Pitman, a family practitioner, dated June 30 to November 20, 2006, who treated appellant for anxiety and depression due to work stress. Also submitted was a June 21, 2006 letter from Paul Price, a union business agent, who responded to appellant's complaint that the union was not pursuing a maximization grievance. Mr. Price advised that because the branch was under 125 work years it did not qualify for coverage under the maximization regulations and no grievances could be filed. He further noted that the branch investigated the issue and found no reason to file a grievance.

By letter dated August 10, 2006, the Office asked appellant to submit additional evidence, including a detailed description of the employment factors or incidents that he believed contributed to his claimed illness. In a letter dated August 24, 2006, it requested that the employing establishment address appellant's allegations of stress in the workplace.

In an August 15, 2006 statement, appellant alleged that starting March 27, 2006 he was harassed and subject to reprisals and retaliation from management for filing an Equal Employment Opportunity (EEO) complaint and a maximization grievance. He noted that on March 27, 2006 he incurred 40 minutes of penalty time and the acting supervisor, David Fieldhouse, vowed to cut his work hours in retaliation. Appellant stated that Mr. Fieldhouse told him on April 29, 2006 that an official instructed management to "starve" him out of work, by decreasing his hours. He alleged that Mr. Fieldhouse and Aimee Schmidt, customer relations supervisor, schemed to cut his hours. Appellant noted that, because management retaliated against him, the local union was reluctant to represent him in a maximization grievance. He stated that, on May 15, 2006, Dan Kolesar, the postmaster, directed him to turn in vehicle repair tags to him personally which was not required of other carriers. Appellant alleged that management abused their authority and were negligent in using the Delivery Operations Information System (DOIS).

Further, appellant alleged that, on May 22, 2006, Mr. Kolesar questioned him about the way he signed his name and stated that he took too much time. He noted that on May 23, 2006 management informed him that he would be charged $469.00 for tack reports required to investigate his maximization grievance. Appellant alleged that on May 23, 2006 he was investigated by his supervisor and union representative regarding why he had not checked in with the delivery supervisor before ending his tour on May 22, 2006 and he was then required to call his supervisor before clocking out. He stated that on May 24, 2006 he was reprimanded by Mr. Kolesar for taking more than 10 minutes for the investigative interview and, on May 27, 2006, for endorsing a piece of mail with the phrase "no such number" and placing it in the throwback case. Appellant asserted that on June 2, 2006 he requested two hours of auxiliary assistance to complete his assignment which was denied and, when he inquired about calling and notifying the branch if he was unable to complete the route, his supervisor stated, "it sounds like sh-t." He stated that on June 2, 2006 a coworker harassed him in a restroom by asking if he was working too many hours. Appellant asserted that Mr. Kolesar spread rumors that the branch would lose mail routes because appellant filed a maximization grievance.

In an August 22, 2006 statement, Mr. Kolesar indicated that there were no conversations about cutting appellant's hours or actions to "starve" him of hours. Likewise, he denied that Mr. Fieldhouse and Ms. Schmidt schemed to reduce appellant's hours. Mr. Kolesar noted that appellant was a part-time carrier who felt entitled to more than he received. He noted that the work ethic in his branch was very high and appellant had shown only average to good performance. Mr. Kolesar noted meeting with appellant on May 10, 2006 to discuss his work. He advised appellant that he took longer than other carriers to carry short routes, noted that he needed carriers who were efficient with great service and on time deliveries and noted that appellant struggled to achieve this level of performance. Mr. Kolesar denied using an improper tone of voice with appellant. He noted that the branch was managed by the DOIS system but was not held to complete accuracy due to accountables, parcels and travel. Mr. Kolesar indicated that the supervisors were not negligent, did not abuse their authority and did not commit contractual violations. He stated that the work environment was not hostile and appellant was never harassed; rather, each carrier was treated with dignity and respect. Mr. Kolesar noted that he never told appellant to "move on," rather appellant requested a transfer and Mr. Kolesar contacted another branch on appellant's behalf regarding his desire to transfer. He welcomed appellant to return to work noting that he had a good personality and the potential to be one of the better carriers. On October 13, 2006 Mr. Kolesar noted that he was very fair and honest and his branch was one of the top performers in Montana. He indicated that appellant was never asked to compromise delivery, work in an unsafe manner or work in a hostile environment.

The employing establishment provided a November 16, 2006 duty status letter, in which Ms. Schmidt advised appellant that he had not worked since June 30, 2006 and had not submitted sufficient medical documentation to support his absence. Ms. Schmidt advised that she was not able to grant appellant leave without pay due to the needs of the employing establishment and requested he returned to work on his first scheduled workday or provide proper medical documentation. In a letter dated December 2, 2006, she informed appellant that, starting November 25, 2006, he would be considered absent without leave. In a December 5, 2006 letter, Simon Storey, human resources manager, advised appellant that, as a matter of administrative discretion, he was placed in leave without pay status after considering the needs of the employee and the employing establishment.

In a December 11, 2006 report, Dr. Michael M. Newman, a Board-certified psychiatrist, noted treating appellant for work-related depression. Appellant also submitted statements from October 17 to December 20, 2006 reiterating his previous allegations and a September 18, 2006 amendment to an EEO complaint alleging discrimination on the basis of mental or physical disability and retaliation.

In a February 1, 2007 decision, the Office denied appellant's claim finding that the claimed emotional condition did not occur in the performance of duty.

Appellant requested an oral hearing which was held on November 8, 2007. He submitted several letters dated January 9 to April 27, 2007 reasserting his allegations set forth above.

In an April 26, 2007 letter, appellant requested subpoenas for several union and agency officials and for various documents.

Appellant submitted a March 14, 2007 EEO complaint against the union alleging that it failed or refused to fairly represent him in his compensation claim and EEO complaint. Also submitted were excerpts of the DOIS manual and reports from Dr. Jennifer Simon-Thomas, a psychologist, dated March 28 to May 11, 2007, who treated appellant for work-related stress.

The employing establishment submitted various documents relative to an Inspector General report.

Appellant submitted treatment notes from Dr. Pitman dated March 14 to November 26, 2007 who noted appellant's continued anxiety and depression due to his work environment. Also submitted was a July 17, 2007 report from Dr. Tristan Falls, a clinical psychologist, who evaluated appellant and diagnosed major depressive disorder, moderate anxiety disorder, obsessive compulsive personality features, occupational problems and economic problems. Appellant submitted a November 14, 2007 letter from the Kalispell, Montana, City Attorney who reviewed appellant's allegation of fraud and false statements on behalf of employees at the employing establishment and determined that the facts would not support criminal charges. He submitted an undated letter from Mr. Kirchoff, union vice president, who noted that the president of the union informed him that management was going to "starve" appellant out by cutting his hours. Mr. Kirchoff noted that he did not have any supporting evidence to prove these statements were made.

The employing establishment submitted a notice of separation dated September 21, 2007 based on appellant's physical and mental inability to perform the duties of his position.

By decision dated February 13, 2008, the hearing representative affirmed the Office decision dated February 1, 2007. The hearing representative denied appellant's subpoena requests finding that there was no indication that the testimony or documents sought would be relevant. The hearing representative also noted that the subpoena of the Office claims examiner was denied pursuant to Office regulation.

LEGAL PRECEDENT -- ISSUE 1

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

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*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a

[1] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[2] 28 ECAB 125 (1976).

compensable emotional condition arising under the Federal Employees' Compensation Act.[3] 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.[4] 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.[5] 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. Where the disability results from an employee's emotional reaction to his 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.[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 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 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]

ANALYSIS -- ISSUE 1

Appellant alleged that he was discriminated against, harassed and subjected to reprisals and retaliation by management and coworkers. He noted several incidents, specifically indicating that, on March 27, 2006, Mr. Fieldhouse, vowed to cut his work hours back in retaliation for taking too much time to carry his route. Appellant indicated that Mr. Fieldhouse told him on April 29, 2006 that management would "starve" him out of work and that Mr. Fieldhouse and Ms. Schmidt schemed to reduce his hours. He alleged that Mr. Strong and Mr. Kolesar did not like his maximization grievance and Mr. Kolesar spread rumors that his

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler, supra* note 2.

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler, supra* note 2.

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

[8] *Id.*

branch would lose mail routes due to the grievance. Appellant alleged that, on May 23, 2006, management informed him that he would be charged $469.00 for the tack reports required to investigate his maximization grievance. He alleged that on June 2, 2006 a fellow employee harassed him in the restroom by asking if he was working too many hours.

To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[9] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[10]

The factual evidence fails to support appellant's claim of harassment or retaliation. On August 22, 2006 Mr. Kolesar denied appellant's contentions regarding cutting his hours and he denied that Mr. Fieldhouse or Ms. Schmidt sought to reduce appellant's hours. He noted that appellant's work performance was average to good but he was taking longer than other carriers to deliver short routes and he noted discussing this with him in a constructive manner. Mr. Kolesar denied any hostile work environment or harassment noting that supervisors did not abuse their authority or commit contractual violations. He further noted that appellant was never asked to compromise delivery or work unsafely. The factual evidence fails to support appellant's claim that he was harassed or treated disparately by his supervisor.[11] Rather, the evidence supports that Mr. Kolesar discussed with appellant his expectations and areas for improvement with the goal of his carriers to be efficient and provide proper customer service. Although appellant alleged that his supervisors engaged in actions which he believed constituted harassment, he provided no corroborating evidence or witness statements to establish his allegations,[12] especially in light of Mr. Kolesar's refutations of such allegations. Furthermore, the June 2, 2006 allegation regarding the restroom interaction with a coworker is too vague to rise to the level of a compensable work factor.[13]

Appellant also indicated that he filed an EEO claim for harassment and discrimination; however, the Board notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[14] Although he submitted copies of two EEO complaints dated September 18, 2006 and March 24, 2007 that he had filed, these complaints do not establish improper action by the employing establishment with regard to appellant. Thus, appellant has not established a compensable employment factor under the Act based on harassment.

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

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

[11] *See Michael A. Deas*, 53 ECAB 208 (2001).

[12] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[13] *See Paul Trotman-Hall*, 45 ECAB 229 (1993) (general allegations of harassment are not compensable).

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

To the extent that appellant alleged verbal abuse by his supervisor on June 2, 2006 when he requested two hours of auxiliary assistance and his supervisor stated "it sounds like sh-t," the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[15] Appellant provided no corroborating evidence or witness statements to establish his allegations[16] and therefore the Board finds that the facts of the case do not reveal that his superior verbally abused him or acted unreasonably in view of his conduct. Further, the employing establishment has denied these allegations. Appellant has not otherwise shown how supervisory comments or actions rose to the level of verbal abuse or otherwise fell within coverage of the Act.[17]

Appellant also alleged that the local union was reluctant to represent him and file a maximization grievance on his behalf because of the retaliatory nature of the employing establishment. However, the Board has generally held that matters pertaining to union activities are not deemed to be employment factors[18] and that union activities are generally personal in nature and not considered to be in the course of employment.[19]

Other allegations by appellant regarding his work assignments relate to administrative or personnel actions. In *Thomas D. McEuen*,[20] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act 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. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[21]

Appellant alleged that Mr. Kolesar directed him to turn in vehicle repair tags to him personally unlike other carriers. The assignment of work is an administrative matter.[22] The Board finds that appellant has not offered sufficient evidence to establish error or abuse regarding this work assignment. The evidence does not establish that the employing

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

[16] *William P. George*, *supra* note 12.

[17] *See Judy L. Kahn*, 53 ECAB 321 (2002) (the fact that a supervisor was angry and raised her voice does not, by itself, support a finding of verbal abuse).

[18] *See George A. Ross*, 43 ECAB 346 (1991).

[19] *Marie Boylan*, 45 ECAB 338 (1994).

[20] *See Thomas D. McEuen*, *supra* note 6.

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

[22] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

establishment acted unreasonably in making this request. The Board has also held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[23] The employing establishment has either denied appellant's allegations or explained the reasons for its actions in these administrative matters. Appellant has presented no corroborating evidence to support that the employing establishment acted unreasonably. He has not established a compensable factor of employment in this regard.

Appellant alleged that management abused its authority and was negligent in using the DOIS program. He further alleged that, on May 22, 2006, Mr. Kolesar questioned him about the way he signed his name. However, the Board has found that an employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory 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, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[24] Appellant presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to these allegations. Mr. Kolesar noted that the branch was managed by the DOIS system with certain allowances. He further indicated that every carrier was treated with dignity and respect. The evidence does not indicate that the employing establishment acted unreasonably in these matters. Appellant has not established error or abuse in these matters and they are not compensable work factors.

Appellant alleged that on May 23, 2006 he was subjected to an investigation by his supervisor and union representative with regard to why he had not checked in with the delivery supervisor before ending his tour on May 22, 2006 and that in the future he would be required to call his supervisor before he clocks out. The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[25] Although appellant alleged that the employing establishment erred and acted abusively in conducting its investigation, he has provided no evidence to support such a claim. A review of the evidence indicates the employing establishment's actions regarding its investigation were reasonable. Appellant alleged that his supervisor wrongfully investigated him but he provided no corroborating evidence, such as witness statements, to establish that such action was unreasonable.[26] Instead, the employing establishment denied any disparate treatment of him. Appellant has not established a compensable employment factor in this respect.

[23] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[24] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

[25] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[26] *See Larry J. Thomas*, 44 ECAB 291, 300 (1992). *See also supra* note 25 and accompanying text.

Appellant's allegations that the employing establishment improperly reprimanded him relates to administrative or personnel matters unrelated to his regular or specially assigned work duties.[27] Although the handling of disciplinary actions and evaluations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[28] Appellant alleged that he was improperly reprimanded on May 24, 2006 by Mr. Kolesar for taking longer than 10 minutes for an investigative interview and for endorsing a piece of mail with "no such number." Mr. Kolesar denied any unfair action and noted that he was tasked with providing quality timely service and needed carriers to be efficient. Appellant has presented no corroborating evidence to support that the employing establishment acted unreasonably regarding these allegations and the employing establishment denied acting improperly. Thus, he has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

Consequently, appellant has not met his burden to establish his claim for an emotional condition as he has not attributed his claimed condition to any compensable employment factors.[29]

LEGAL PRECEDENT -- ISSUE 2

Section 8126[30] 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. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[31]

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 no other means by which the testimony could have been obtained.[32] Additionally, no subpoena will be issued for attendance of employees of the Office acting in their official capacities as decision-makers or policy administrators.[33]

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[27] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[28] *Id.*

[29] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[30] 5 U.S.C. § 8126.

[31] *See* 20 C.F.R. § 10.619.

[32] *Id*.

[33] *Id*. at § 10.619(b).

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.[34]

ANALYSIS -- ISSUE 2

By letter dated April 26, 2007, appellant requested subpoenas for union officials, employing establishment officials and an Office claims examiner. He also requested a subpoena be issued for various employing establishment and union documents. The hearing representative denied the subpoena requests and provided reasons.

To establish that the Office abused its discretion, appellant must show 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. The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.[35]

Although appellant has identified the parties he wished to subpoena he has not sufficiently explained why any of these persons possess additional information relevant to his claim or why any information they possess could not be obtained by other means. Additionally, he requested the subpoena of several employing establishment officials; however, the employing establishment has commented upon appellant's allegations several times and their statements are in the record and speak for themselves. Appellant did not provide an explanation of why the testimony of the persons would be relevant to the issue in his claim or why a subpoena was the best method to obtain such evidence. Regarding his request to subpoena an Office claims examiner for alleged failure to properly review his claim, the Board notes that Office regulations provide that no subpoena will be issued for attendance of employees of the Office acting in their official capacities as decision-makers or policy administrators.[36] With regard to the subpoena for records from the employing establishment and union publications, appellant has not specifically identified that any additional probative information would be elicited by compelling production of the records requested.

The Board finds that the hearing representative did not abuse his discretion in denying appellant's requests for subpoenas.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's subpoena requests.

[34] *Dorothy Bernard*, 37 ECAB 124 (1985).

[35] *See Joseph P. Hofmann*, 57 ECAB 456 (2006).

[36] *Id*. at § 10.619(b).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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