United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 08-2102**
	)	**Issued: September 17, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2008 appellant filed a timely appeal from a May 12, 2008 merit decision of the Office of Workers' Compensation Programs denying his emotional condition claim and a June 6, 2008 nonmerit decision denying his reconsideration request. 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 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 November 16, 2007 appellant, then a 35-year-old city mail carrier, filed an occupational disease claim (Form CA-2) alleging that the high pressure of his job aggravated his preexisting manic depression/bipolar disorder and paranoia. He first realized his condition was aggravated by his employment in November 2007. Appellant stopped work on November 27,

2007 and returned on March 4, 2008. In a separate statement, he noted that Bob Reynolds, his supervisor, walked his route with him and threatened to take disciplinary action for taking too long to complete his mail route. Appellant also alleged an overwhelming volume of mail on his route and having to skip lunch and breaks to complete the route on time. He was placed on a seven-hour workday, but Mr. Reynolds sent him home saying that light duty was not available. Appellant submitted medical evidence from Dr. Ostenre E. Matos, a Board-certified psychiatrist, regarding his preexisting emotional condition and his ability to work. He was removed for cause from the employing establishment on June 6, 2008.

In a December 4, 2007 letter, Mr. Reynolds reported that appellant worked under an active "Last Chance Agreement," due to inappropriate behavior to coworkers and customers following his transfer from another facility. He noted that appellant had discipline problems throughout his career with the employing establishment.

In a December 27, 2007 letter, appellant noted transferring to his current facility under a Last Chance Agreement signed on February 24, 2006. His transfer was met with criticism and he contended that his supervisor used the agreement to control and intimidate him. In January 2007, appellant was placed on an emergency suspension after feeling he might be a threat to himself or others after he came to work in the middle of the night to wait for his shift to begin. Mr. Reynolds believed that appellant was breaking the agreement. Appellant returned to work with an amended last chance agreement. After his supervisor placed parentheses around two sections of the agreement, he felt intimidated. Appellant indicated that his mail route had an overwhelming mail volume and disagreed with Mr. Reynolds on the time it took to complete. He alleged that his supervisor told him he would be written up if he incorrectly estimated the time for completing the route. When appellant requested assistance, Mr. Reynolds threatened to follow him. He contended that his preexisting condition was not accommodated. Appellant requested documentation from the employing establishment on December 20, 2007, but had not received anything. His physician released him to restricted work on December 26, 2007, but the employing establishment did not allow him to return.

On February 5, 2008 the Office denied the claim, finding that appellant did not establish a compensable employment factor.

On February 13, 2008 appellant requested an oral hearing before an Office representative. On March 4, 2008 the Office hearing representative set aside the February 5, 2008 decision. She noted that the Office did not seek evidence from the employing establishment and had not responded to all factors alleged by appellant.

In a March 23, 2008 letter, appellant alleged that he was harassed by his supervisor and discriminated against due to mental disability. On March 7, 2008 Mr. Reynolds stood next to appellant's truck with a clip board writing down everything he did. This caused appellant to panic. He noted that he was on a five-hour-workday restriction and felt undue stress as the route could not be completed in that time. When appellant returned to work on March 6, 2008 he was not assigned to his regular duties. On March 12, 2008 he asked for a bag to carry on his route but was told by Mr. Reynolds that it was not the supervisor's responsibility to provide a bag. On March 13, 2008 Mr. Reynolds underwent an investigative interview because a customer complained that she did not feel comfortable with appellant delivering mail to her house.

Appellant was placed on an emergency suspension, which he alleged was discrimination based on his mental disability. He provided a copy of an October 11, 2007 grievance decision, which found that the employing establishment did not provide light duty from August 23 to 27, 2007. The decision found that some facts remained in dispute, but that management did not give "the greatest consideration" or "careful attention" to the situation in not providing light duty. Appellant's physician did not restrict any duties and there was no indication that appellant could not be accommodated. Appellant was provided $500.00 in resolution of the matter. He also provided a November 19, 2007 note from Dr. Matos about his work restrictions.

The employing establishment responded that all carriers were periodically reviewed and that a postal customer had complained about appellant's behavior. On April 17, 2008 Mr. Reynolds explained that observing appellant on March 23, 2008 was part of his job. He noted that a customer contacted the employing establishment and complained about appellant's behavior. Mr. Reynolds interviewed the customer, who stated that appellant was rude and had yelled at her and her husband. Appellant had corrective action taken for confrontations with fellow employees. Mr. Reynolds stated that appellant had violated his last chance agreement by improperly behaving and intimidating postal customers on his route.

On February 14, 2008 Russ Holland, Officer-in-Charge, advised supervisors had a responsibility to question carriers to determine workloads and a fair estimate of the time for street delivery. He advised all carriers were treated with dignity and respect and appellant's light-duty needs were honored. Mr. Holland noted that the Postal Inspectors threat assessment team had investigated the complaint of a postal customer. It was found that appellant engaged in improper conduct unbecoming of an employee, which was a violation of his last chance agreement and resulted in removal. The Office received copies of the last chance agreements, documents pertaining to the March 13, 2008 customer complaint, noting that she was intimidated by appellant and corrective actions taken, including an April 21, 2008 removal notice providing that he would be removed effective June 5, 2008 for violating his last chance agreement. In an Equal Employment Opportunity complaint, appellant alleged that his supervisor retaliated against him, put undue stress on him when monitoring him and gave him improper assignments on March 7, 8, 12 and 14, 2008.

By decision dated May 12, 2008, the Office denied appellant's claim on the basis that he failed to establish a compensable employment factor.

On May 15, 2008 appellant requested reconsideration. On May 30, 2008 he contended that the customer complaint that led to his ultimate dismissal was false and that he had performed his job properly.

By decision dated June 6, 2008, the Office denied appellant's reconsideration request on the grounds that it did not raise a substantive legal questions or included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that an emotional condition arose in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that she has an emotional

or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the 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. 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 or her 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.[2] 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.[3]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[4] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[5] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. 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

[1] *D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006).

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

[3] *Id.*

[4] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[5] *See William H. Fortner*, 49 ECAB 324 (1998).

[6] *Ruth S. Johnson*, 46 ECAB 237 (1994).

evidence.[7] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[8] The primary reason for requiring factual evidence from the claimant in support of her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[9]

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. 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.[10]

ANALYSIS -- ISSUE 1

Appellant alleged that his preexisting emotional condition was aggravated as a result of a number of employment incidents. The Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must initially review whether the alleged incidents or conditions of employment are compensable factors under the Act.

Appellant attributed his emotional condition to administrative and personnel actions taken by management following transfer to the facility under a result of a last chance agreement.[11] He provided no specifics details for his allegation that his transfer to the current facility was met with criticism and his supervisor used the "last chance agreement" to control and intimidate him. These are unsubstantiated claims. While appellant asserted that

[7] *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Arthur F. Hougens*, 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] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (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*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[9] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

[10] *A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006); *C.S.*, 58 ECAB ___ (Docket No. 06-1583, issued November 6, 2006); *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006); *D.L.*, *supra* note 1.

[11] *See L.C.*, 58 ECAB ___ (Docket No. 06-1263, issued May 3, 2007) (although the handling of job transfers and the management of work assignments and schedules are generally related to the employment, they are administrative functions of the employer and not duties of the employee).

Mr. Reynolds tried to intimidate him by placing parentheses around two sections of the agreement, there is no evidence to substantiate that this was done for the purpose of intimidating him. Thus, any reaction to this is not a compensable factor.

Appellant generally alleged that he felt pressured to skip lunches and breaks too timely complete his mail route. He did not allege that the actual performance of his work caused him stress. Rather, the pressure was due to appellant's supervisor. While appellant generally alleged an overwhelming volume of mail, he did not provide any evidence addressing the specific mail assignments he was handling or to establish that the estimate of time to complete the route was in error. The employing establishment asserted that he worked within his five-hour-a-day restriction. Appellant has not established that management acted unreasonably or abusively regarding these matters involving his work assignments.

Appellant alleged that, on March 12, 2008, Mr. Reynolds stated that he was not responsible for providing a mailbag to carry on the route. The Board has held that an employee's complaint concerning the manner in which a supervisor performs his duties or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.[12] This principle recognizes that supervisors or managers must be allowed to perform their duties and that employees will at times dislike the actions taken; however, mere disagreement or dislike of a supervisory action will not be compensable absent evidence of error or abuse.[13] The record indicates that appellant retrieved a mailbag and had to bring some of the mail back. While he contends he was given mail that he could not deliver within his five-hour-workday restriction, there is no evidence to support error by his supervisor in assigning work or providing equipment. Appellant's desire to perform regular duties when he returned to work on March 6, 2008 is not a compensable factor of employment.

Appellant was placed on emergency suspensions in January 2007 and March 13, 2008. A suspension is an administrative function of the employer.[14] It is not a compensable employment factor unless error or abuse is shown.[15] The January 2007 suspension was issued after appellant believed that he might be a threat to himself or others when he came to work early in the middle of the night. The March 13, 2008 suspension arose after a customer complained to the employing establishment about appellant's behavior on the route. The customer felt intimidated and frightened by appellant. While appellant disagreed with management's decisions, he presented no evidence to establish error for the disciplinary actions. He has not established a compensable employment factor in this regard.

Appellant has indicated his preexisting emotional condition has restricted him to the number of hours he could work. He alleged that on one occasion his supervisor called him off the street and sent him home because no light duty was available. Appellant also alleged that the employing establishment did not allow him to return to work after his doctor released him on

[12] *See Judy L. Kahn*, 53 ECAB 321 (2002).

[13] *Id.*

[14] *See Alice M. Washington*, 46 ECAB 382 (1994).

[15] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

December 26, 2007. His allegations pertaining to the availability of light duty is an administrative matter, unrelated to his regular or specifically assigned work duties. It does not fall within the coverage of the Act absent evidence of error or abuse.[16] Mr. Holland asserted that appellant's light-duty needs were honored. The record contains an October 11, 2007 grievance decision reflecting that the employing establishment did not provide appellant light duty from August 23 to 27, 2007. While it stated that management did not give "the greatest consideration" or pay "careful attention" to the situation, the language in the decision is vague and does not address any error or abuse on the part of the employer. Rather, it notes that some of the facts remain in dispute. Appellant received $500.00 in resolution of the matter which gives the appearance of a settlement agreement.[17] The evidence concerning this decision does not establish compensable error or abuse by his managers.[18] Appellant has not established a compensable employment factor in this regard.

Appellant's allegation that the employing establishment failed to provide a timely response to his requests for documentation relates to personnel matters. While he may not have received the documentation he requested as promptly as he would like, he has not established that the employing establishment committed error or abuse with regard to this managerial function, and his dislike of or disagreement with the actions is not a compensable factor of employment. The Board finds that appellant has not established a compensable employment factor with respect to this administrative matter.

Appellant did not establish that his supervisor's route inspections or other observations of him while working to compensable factors of employment. The inspection and monitoring of work is an administrative function unrelated to his job duties.[19] Appellant has not shown that Mr. Reynolds acted abusively in this regard. He responded to the allegations and explained the reasons for his actions. Appellant has not established that these incidents were factors of employment.

Appellant generally alleged harassment and discrimination based on his mental disability. He indicated that his supervisor and others at the employing establishment knew of his medical conditions and attempted to overwhelm him. As noted, mere perceptions and feelings of harassment or discrimination will not support an award of compensation. A claimant must substantiate such allegations with probative and reliable evidence.[20] The employing establishment denied treating appellant unfairly and he did not submit evidence to establish his allegations as factual. Appellant has not established a compensable work factor in this regard.

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[16] *See generally Lori A. Facey*, 55 ECAB 217 (2004). *See also Janet I. Jones*, 47 ECAB 345, 347 (1996).

[17] *See Michael A. Salvato*, 53 ECAB 666 (2002) (settlement of a grievance or EEO complaint did not establish error or abuse by the employing establishment). *See also Lori A. Facey*, 55 ECAB 217 (2004) (no compensable employment factor found where grievance settlement awarded employee $25,000.00 due to insufficient description of the subject matter involved).

[18] The findings of other administrative agencies or courts, while instructive are not determinative of his disability or rights under the Act. *See Beverly R. Jones*, 55 ECAB 411 (2004).

[19] *See Daryl R. Davis*, 45 ECAB 907 (1994).

[20] *Robert Breeden*, 57 ECAB 622 (2006).

On appeal, appellant advised that he receives disability retirement from the Social Security Administration (SSA). He asserted that the SSA found him totally disabled based on his physician's opinion that the employing establishment caused his conditions. The Board notes that findings of other administrative agencies, such as the SSA, are not determinative of appellant's disability or rights under the Federal Employees' Compensation Act. The Social Security Act and the Federal Employees' Compensation Act have different standards of medical proof and, thus, these decisions are not relevant with regard to appellant's claim under the Federal Employees' Compensation Act.[21]

CONCLUSION

The Board finds that appellant did not establish an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[21] *Daniel Deparini*, 44 ECAB 657, 680 (1993).