United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 08-2397**
	)	**Issued: September 25, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Arlington, TX, 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 September 2, 2008 appellant filed a timely appeal from an August 6, 2008 merit decision of the Office of Workers' Compensation Programs, denying his emotional condition claim. 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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 25, 2004 appellant, then a 50-year-old clerk, filed an occupational disease claim alleging that he sustained depression and mental illness due to factors of his federal employment. He stopped work on March 1, 2004. In statements accompanying his claim, appellant related that he became aware of his condition and its relationship to his employment in January 1992. He filed numerous Equal Employment Opportunity (EEO) complaints and

grievances. The employing establishment abolished appellant's bid assignment while he was on leave under the Family and Medical Leave Act (FMLA) to care for his mother. Appellant experienced chest pains in January 1992, after a "particularly hostile confrontation with a supervisor."

In an undated FMLA medical certificate form, a physician diagnosed depression aggravated by employment and found that appellant would need to miss work intermittently. The physician opined that there were duties that he "might find too stressful from time to time, such as window and cages duties." In a May 13, 2003 FMLA medical certificate form, a physician noted that appellant attributed his condition to his job. The physician found that appellant had a chronic condition and that he needed "at times relief from work stress and attention to family needs" but otherwise had no work restrictions.[1]

On March 30, 2004 the employing establishment controverted the claim. Kaye Nolan, acting station manager, related that she began working in her current position in August 2003. At that time the union president informed her that appellant's position had been abolished and requested that she return him to his prior job. Ms. Nolan spoke with appellant about reinstating his position, but he "proceeded to talk in a loud tone of voice making comments about the uncaring attitude of management and that he would not compromise in any way, he wanted his job back the way it was in the beginning." She offered appellant his old job back and he refused. Ms. Nolan related:

> "[Appellant] continued to make statements on a regular basis about [the employing establishments] management and [the employing establishment]. I noted that his productivity was worsening also. [Appellant] was unable to case mail at a minimum rate on many occasions. I asked about his efforts and he stated that he had a shoulder problem irritated by his job. [Appellant] also stated that he had many personal problems concerning his mother's condition."

Ms. Nolan indicated that, on January 26, 2004 she spoke with appellant because he was delaying the final pull of mail. Appellant responded that she should not tell him how to do his job and then left work. He "insisted that, by speaking with him about his job, I had incited him to violent behavior and he had to leave in accordance with his FMLA restrictions." Appellant received a letter of warning for failing to follow instructions. He used leave under the FMLA again when told he would begin cage duties. Ms. Nolan noted that appellant was a former union president and "regularly allows daily union/business negotiations to become a personal issue that he feels is an attack on him."

By decision dated May 5, 2004, the Office denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. It determined that appellant had not identified any compensable employment factors.

On May 28, 2004 appellant requested an oral hearing. He submitted a letter he wrote the postmaster on August 31, 2001 in his capacity as union president about Ms. Nolan. Appellant described postmaster's behavior as "haughty" and "condescending."

[1] The names of the physicians who completed these forms are not legible.

In a statement received by the Office on July 28, 2005, appellant attributed his condition to various events occurring throughout the 1980s, including working forced overtime in 1983, when his daughter was in the hospital and having to provide documentation for emergency leave in 1984. Around late 1985 or early 1986 appellant began working as the head cage clerk. The position was stressful because the mail was worth a lot of money and the cage clerk was responsible for any lost funds. The employing establishment did not have appropriate security for the cage clerks. A friend and coworker was fired, reinstated and then resigned. A supervisor, Janice Godlewski, treated employees disparately and appellant "called her on it." She issued appellant a letter of warning in January 1991. Ms. Godleweski left and then a subsequent supervisor, Tammy Abrahamson, clashed with all employees. In 1998, appellant won an EEO case for discrimination. Ms. Godlewski returned to his work location and abolished his position. Appellant filed an EEO complaint but it was dismissed when he decided to keep his new position. He received another letter of warning that was quickly dismissed. A coworker, Paul Dilena, became union president. Appellant had him removed because of sexual harassment and became union president. Management harassed him by refusing to allow union time in accordance with the contract. Appellant resigned as president and filed a grievance because he was denied another bid position. Ms. Nolan told him that she could give him his old position, but that she would just abolish it again. Appellant later decided to stay in his new job. Ms. Nolan loudly ridiculed his work in front of coworkers and issued him a letter of warning. On February 28, 2004 she told appellant that he had to work the cage. Appellant informed Ms. Nolan that the assignment was too stressful. When he went to work the next day he told management of his new assignment and that he could not work the cage. After a supervisor advised that appellant had to work the cage or leave work, he left and did not return.

Appellant submitted EEO complaints. In a decision dated December 30, 1998, the Equal Employment Opportunity Commission (EEOC) found that the employing establishment discriminated against him in 1994 and the beginning of 1995 because of prior EEO activity by giving him less overtime in matters involving leave. The EEOC granted appellant wages for overtime activities to which he would have been entitled and reasonable attorney's fees.

On February 9, 2004 appellant received a letter of warning for failing to follow Ms. Nolan's instructions on January 24, 2004. In statements dated February 28, 2004, Sharon Thorpe and Yvonne Mitchell, coworkers, related that on February 28, 2004 appellant told Ms. Nolan that he could not work the cage due to his mental illness. Ms. Nolan insisted that appellant work the cage. In a July 19, 2005 statement, Mary Ann Allison, a coworker, related that on March 1, 2004 Richard Foreman instructed appellant to work the cage. Appellant told Mr. Foreman that he could not work the cage. Mr. Foreman stated that he could work the cage or leave.

At the hearing held on July 28, 2005, appellant attributed his stress to working the cage beginning in 1985. He related that his problems began in January 1991 when he was still working the cage. A supervisor, Ms. Godlewski, was not satisfied with appellant's performance and improperly denied him annual leave and overtime. Appellant switched from working as a cage clerk to working as a mail handler in 1992. Another supervisor, Ms. Abrahamson wrongly denied him overtime. Appellant won an EEO complaint against her in 1998. He also filed an EEO claim when his position was abolished. The EEOC judge asked appellant if he wanted his position back, but he decided that he wanted to stay in his current position. Appellant filed a

grievance when the employing establishment changed his days and hours. When he returned to the employing establishment after taking leave under the FMLA he was told that his position was abolished. Appellant believed that it was in retaliation for taking leave under the FMLA. He received a letter of warning which was reduced to a discussion. Ms. Nolan issued appellant a letter of warning and accused him of not doing his job, which was also reduced to a discussion. She told appellant that he had to work the cage and he refused because of his mental stress. Appellant returned to work the next day and was told again to work the cage. He related that he could not perform the job and the employing establishment told him to leave work.

By decision dated September 28, 2005, the hearing representative affirmed the May 5, 2004 decision. She noted that appellant had described an EEO complaint that he filed in 1994 and won in 1998 and the stress of working in a cage from 1995 until 1992. The hearing representative determined, however, that these allegations were not timely filed. She reviewed appellant's remaining contentions and found that he had not identified any compensable work factors.

On September 18, 2006 appellant requested reconsideration.[2] He related that his work at the employing establishment aggravated rather than caused his emotional condition. Appellant asserted that he told the employing establishment that he could not perform work outside of his bid job because of his stress, FMLA and seniority. He related that his FMLA documentation indicated that at times he would not be able to work the cage. The employing establishment placed appellant off the clock on his last day of work because he refused to perform duties that contractually he "should not have been forced to do."

On April 4, 2008 the employing establishment asserted that appellant used FMLA to retaliate against management. Appellant responded on May 1, 2008.

By decision dated August 6, 2008, the Office denied modification of its September 28, 2005 decision.

LEGAL PRECEDENT

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 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 or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3] On the other hand, the disability is not covered where it results from such factors as an

[2] In a letter dated September 20, 2006, a witness at the hearing indicated that the hearing representative told him that she wanted a short hearing and "would brush him aside when he was going through his testimony."

[3] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

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.[4]

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.[5] 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.[6] 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.[7]

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[9] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10] The primary reason for requiring factual evidence from the claimant in support of his or 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.[11]

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.[12] If a claimant does implicate a factor of

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[4] *David Apgar*, 57 ECAB 137 (2005); *Gregorio E. Conde*, 52 ECAB 410 (2001).

[5] *See Pamela D. Casey*, 57 ECAB 260 (2005); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[6] *See Robert G. Burns*, 57 ECAB 657 (2006); *William H. Fortner*, 49 ECAB 324 (1998).

[7] *Jeral R. Gray*, 57 ECAB 611 (2006); *Ruth S. Johnson*, 46 ECAB 237 (1994).

[8] *See Doretha M. Belnavis*, 57 ECAB 311 (2006); *Michael Ewanichak*, 48 ECAB 364 (1997).

[9] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

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

[12] *Robert Breeden*, 57 ECAB 622 (2006); *Dennis J. Balogh*, 52 ECAB 232 (2001).

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.[13]

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied his emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed his condition to the employing establishment erroneously abolishing his bid position and changing his hours and days. Although the assignment of work duties is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[14] An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[15] Ms. Nolan informed appellant that she would restore his bid position but that it would again be abolished. Appellant filed an EEO complaint, but, subsequently decided that he would stay in his new position. He has not submitted sufficient evidence to establish that the employing establishment erred or acted abusively in abolishing his bid position and changing his workdays and hours. Consequently, appellant has not established a compensable work factor.

Appellant further argued that the employing establishment erred in instructing him to again work the cage in late February and on March 1, 2004 because of his medical condition, position and seniority. He maintained that medical evidence supported that he was unable to perform the duties of the cage due to his stress-related medical condition. Appellant submitted statements from coworkers who related that he informed management that he could not work the cage due to his medical condition. He further submitted an undated FMLA form from a physician who indicated that he might occasionally find cage duties too stressful. The physician did not, however, prohibit the employing establishment from assigning him work as a cage clerk. In a May 2003 FMLA form, a physician found that appellant might occasionally miss work but had no restrictions at work. The medical evidence is, thus, insufficient to establish that the employing establishment required appellant to work outside of his restrictions.[16] Additionally, appellant has not submitted any evidence establishing a factual basis for his allegation that the employing establishment violated a contractual obligation by reassigning him to work as a cage

[13] *Id.*

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

[15] *Id*.

[16] *David C. Lindsey*, *Jr*., 56 ECAB 263 (2005) (the Board has held that being required to work beyond one's physical limitations may constitute a compensable employment factor if the record substantiated such activity).

clerk. Further, he refused to perform the duties of a cage clerk, left work and did not return.[17] The possibility of a future injury does not form the basis for the payment of compensation under the Act.[18]

Regarding appellant's allegation that he received letters of warning which were subsequently reduced to discussions, disciplinary actions are administrative functions of the employer and not duties of the employee and unless the evidence discloses error or abuse on the part of the employing establishment are not compensable employment factors.[19] Further, the mere fact that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.[20] Appellant has not submitted any evidence that the employing establishment erred in issuing disciplinary action and, thus, has not established a compensable employment factor.

Appellant further maintained that he experienced harassment and discrimination by several supervisors, including Ms. Godlewski, Ms. Abrahamson and Ms. Nolan. He alleged that Ms. Nolan ridiculed appellant in front of coworkers and criticized his work. Ms. Godlewski issued appellant a letter of warning that was later rescinded and abolished his work position and Ms. Abrahamson clashed with employees. Management also denied appellant union time. If disputes and incidents alleged as harassment and discrimination by supervisors and coworkers are established as occurring and arising from the employee's performance of appellant's regular duties, these could constitute employment factors.[21] The evidence, however, must establish that the incidents of harassment and discrimination occurred as alleged.[22] Appellant submitted an EEOC decision dated December 1998 finding that the employing establishment retaliated against him due to prior EEO activity and wrongfully gave him less overtime in 1994 and early 1995 and discriminated against him in matters involving leave. The EEOC granted him wages for the overtime that he would have earned and reasonable attorney's fees. As the EEOC decision concerned matters occurring in 1994 and early 1995; however, it is not pertinent to establishing that appellant sustained a compensable factor of employment within the time limitations of his claim.[23] Appellant has not submitted any evidence showing harassment and discrimination by the employing establishment subsequent to early 1995; consequently, he has not established a compensable work factor.

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[17] Appellant did attribute his stress-related condition to working as a cage clerk from 1985 to 1992. As found by the hearing representative, however, this allegation is untimely as he did not file a claim for these work factors within three years of the date of last exposure, 1992 or the date that he asserted that he became aware of the relationship between his employment and the aggravation of his depression, January 1992. The record also contains no evidence that a supervisor had actual knowledge or written notice within 30 days that appellant claimed an employment-related condition. *See* 5 U.S.C. § 8122(a)(b).

[18] *Andy J. Paloukos*, 54 ECAB 712 (2003).

[19] *See Lori A. Facey*, 55 ECAB 217 (2004).

[20] *See Linda K. Mitchell*, 54 ECAB 748 (2003).

[21] *Peter D. Butt, Jr.*, 56 ECAB 117 (2004); *Janice I. Moore*, 53 ECAB 777 (2002).

[22] *Id.*

[23] *See* 5 U.S.C. § 8122(a), (b); *see also supra* note 17.

On appeal, appellant contends that he submitted sufficient evidence to establish discrimination by the employing establishment. As discussed, however, he did not provide evidence corroborating his allegation of discrimination for the time period covered by his 2004 occupational disease claim.

Appellant further alleges that the Office should have considered the medical evidence he submitted in support of his claim. As he has not established a compensable work factor; however, it is not necessary to consider the medical evidence.[24]

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2008 is affirmed.

Issued: September 25, 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

[24] *See Hasty P. Foreman*, 54 ECAB 427 (2003); *Debora L. Hanna*, 54 ECAB 548 (2003).