# United States Department of Labor
# Employees' Compensation Appeals Board

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| **D.S., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1376** |
| | ) | **Issued: April 15, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Panorama City, CA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On April 22, 2010 appellant timely appealed the March 30, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of his claim for an employment-related emotional condition. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

### ***ISSUE***

The issue is whether appellant sustained an emotional condition in the performance of duty as of December 19, 2008.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On March 13, 2009 appellant, a 58-year-old former letter carrier, filed an occupational disease claim for an emotional condition commencing December 19, 2008.[2] In a prior claim, No. xxxxxx988, the Office accepted that he sustained a lumbar sprain, lumbar disc displacement and an aggravation of a neck sprain in a July 20, 1985 dog attack. Appellant was unable to resume his regular letter carrier duties because of his injury but worked in a limited-duty capacity. He last worked on December 12, 2006.[3] Appellant filed a claim for recurrence of disability beginning December 13, 2006, which he attributed to the July 20, 1985 employment injury. The Office denied the recurrence claim by decision dated July 10, 2007, and the Branch of Hearings & Review affirmed that decision on January 24, 2008. A brief restatement of facts relevant to this appeal follows.

In October 2007 appellant's orthopedic surgeon released him to resume full-time work. The employing establishment did not permit him to return to work at that time, but instead requested additional medical evidence regarding his capacity to work due to both his orthopedic and psychological status. Appellant underwent a number of fitness-for-duty examinations. He raised concerns about the timing of the various medical appointments, as well as the location.[4] Appellant accused his employer of engaging in delay tactics with respect to his return to work. He contended that he should have been allowed to return to work based on his physician's October 2007 release. Appellant also argued that his employer should have scheduled the fitness-for-duty examinations after his return to work.

The employing establishment explained that it processed appellant's return-to-work documents in a timely fashion. Any delay in returning appellant to work was attributable to inconsistencies in the reports of his attending physicians or the lack of cooperation. The employer further noted that several fitness-for-duty examinations were cancelled and rescheduled at appellant's request, thus prolonging his return to duty. As noted, the assessment process included evaluation of both psychological and orthopedic conditions, some of which were not accepted as employment related. In December 2008 appellant was cleared to resume work from both a psychological and orthopedic standpoint. In the December 7, 2010 decision, the Board found that he did not establish any compensable employment factors for an October 1, 2007 emotional condition. The facts of the prior decisions are incorporated herein by reference.

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[2] The record indicates appellant has filed 10 claims for various orthopedic and emotional conditions. In an August 4, 1998 decision, the Board found that appellant did not establish an emotional condition due to compensable work factors or a recurrence of disability due to his July 20, 1985 injury. Docket No. 96-1098 (issued August 4, 1998). In an October 12, 2005 decision, the Board found that appellant failed to establish a recurrence of disability commencing March 29, 2000 causally related to his 1985 injury. Docket No. 04-2268 (issued October 12, 2005). In a July 2, 2009 decision, the Board affirmed the denial of appellant's claim for bilateral carpal tunnel syndrome and a cervical condition. Docket No. 08-2348 (issued July 2, 2009). By decision dated December 7, 2010, the Board found that appellant did not establish an emotional condition due to his separation from employment. Docket No. 10-128 (issued December 7, 2010) in claim No. xxxxxx930.

[3] Appellant's most recent limited-duty assignment was as a sales service/distribution clerk.

[4] Appellant relocated from California to Alabama and subsequently moved back to California. While he resided in Alabama, the employing establishment scheduled him to see a doctor in California.

The present claim relates to the December 19, 2008 emotional condition claim. Appellant essentially reiterated many of the allegations and employment incidents previously raised and adjudicated. The March 13, 2009 claim (Form CA-20) noted that he had been on medical leave for a previous employment-related injury and when his physician released him to full, unrestricted duty the employing establishment refused to bring him back to work. Appellant also alleged that the Office asked his employer to extend a job offer, but instead the employing establishment issued a letter of separation.

A January 26, 2009 notice of proposed separation advised appellant of his employer's intention to remove him from service based on his prolonged absence. The proposal noted that appellant last worked on December 12, 2006 and used leave without pay (LWOP) in excess of one year. The notice stated that "[a]t the expiration of one year of continuous absence without pay, an employee who has been absent because of illness may be separated for disability."[5] The removal from service was not mandatory if there was reason to believe the employee would recover within a reasonable length of time beyond the one-year period. The employing establishment found that, in light of appellant's absence for medical reasons, he would not be able to return to work and perform the core duties of his current position or any other available position in the near future. The notice explained appellant's various rights and responsibilities, including the option of filing for disability retirement.

In reports dated January 9 to March 6, 2009, Dr. Gunilla M. Karlsson, a clinical psychologist, diagnosed major depressive disorder and panic disorder with agoraphobia. She attributed appellant's condition to his employer's delay in returning him to work. Dr. Karlsson advised that appellant had been totally disabled since December 19, 2008. She noted that appellant was being terminated for having been on medical leave. The proposed termination resulted in additional depression, anxiety and stress. Dr. Karlsson found appellant to be totally and permanently disabled from performing any work duties.

The employing establishment removed appellant effective March 8, 2009.

In a March 9, 2009 statement that accompanied his latest Form CA-20, appellant reiterated that he had been on medical leave for a job-related injury. When his personal physician released him to return to work, he was precluded from returning until he obtained clearance from his employer's physician. Appellant also was required to attend several fitness-for-duty examinations. He filed an Equal Employment Opportunity (EEO) complaint for disability discrimination, age discrimination and retaliation. Appellant stated that a judge ordered his return to work and an Office claims examiner similarly requested that his employer extend a job offer. He had been told he would be returned to work following his most recent fitness-for-duty examination, but his employer terminated him effective March 8, 2009. Appellant also noted that he had not been reimbursed for travel expenses incurred in connection with his most recent fitness-for-duty examination. He contended that his employer violated both the Privacy Act and the Family and Medical Leave Act (FMLA) by requiring medical documentation and by directly contacting his physicians to obtain duty status reports.

[5] The cited authority for the proposed separation-disability was "[s]ection 365.34 of the Employee and Labor Relations Manual."

Appellant alleged that Postmaster Joel Smith had him escorted from the premises when he met with his immediate supervisor to discuss his return to work. The postmaster instructed the supervisor to escort appellant off the premises. The supervisor advised appellant not to return until he was called back and to consider retirement. In March 2009, appellant's union representative advised that the employer was interested in settling the pending EEO complaint.

The employing establishment controverted appellant's claim. In an April 16, 2009 letter, Phil Fudally, the manager of customer services, noted that appellant's last official duties were on December 12, 2006. Appellant was not on the clock and leave status as of the alleged December 19, 2008 injury. The manager reiterated that the employer had an obligation to follow procedures as outlined in the Employee and Labor Relations Manual in consideration of whether appellant was ready to return to duty following an extended medical absence. While released to return to duty for his on-the-job injury, appellant also submitted medical documentation describing other medical conditions that precluded his return to work. The employer was responsible for appellant's safety and therefore required he be both physically and mentally capable of performing his duties.[6] Mr. Fudally noted that appellant previously filed a claim for major depression and panic disorder (xxxxxx930), which the Office denied. As to the fitness-for-duty examinations, the employer acknowledged that appellant had undergone a total of three examinations on June 18 and October 3, 2008 but then submitted medical documentation of medical conditions that required consideration. Appellant retired on April 6, 2009.

By letter dated July 28, 2009, the Office advised appellant that the evidence of record was insufficient to determine his eligibility for benefits. Appellant did not allege anything that was not already under appeal with respect to his two prior emotional condition claims. The Office inquired as to any other factors not already alleged and asked him to describe those conditions or incidents he believed contributed to his illness. Appellant was afforded 30 days to submit the requested information. He did not respond.[7]

By decision dated September 1, 2009, the Office denied appellant's claim for an emotional condition commencing December 19, 2008 as he failed to establish a compensable employment factor. It noted that many of his allegations were addressed in his previous claims. Appellant alleged a number of administrative matters, such as the fitness-for-duty examinations, leave requests and his termination, that were not compensable absent a finding of error or abuse on the part of his employer. The Office found that he did not establish that he had been escorted off the premises by his immediate supervisor.

Appellant requested a hearing, which was held on December 15, 2009. He appeared and was represented by counsel. Appellant stated that the present claim pertained to the medical examination his employer required he attend. After he stopped work, he spent time residing at a home in Alabama. Upon notice of the referral to the third and final fitness-for-duty examination, appellant requested that it be performed in Alabama. He subsequently grieved the notice of proposed separation due to his medical absence and retired as of April, 2009.

[6] The manager referred to various correspondences between appellant's physicians, the claims examiner and the employer.

[7] The Office received additional reports from Dr. Karlsson dated March 15 to August 21, 2009.

The employer submitted a January 11, 2009 response to appellant's testimony. Laura Landgraf, resource manager, advised that the Merit Systems Protection Board (MSPB) affirmed the removal action. She contended that there was no evidence that appellant's emotional condition was a result of any error or abuse by management in discharging administrative or personnel responsibilities. Ms. Landgraf noted that appellant had asked for reimbursement for travel expenses from Alabama to California for the fitness-for-duty examination, but he was not entitled to such a refund.

In a decision dated March 30, 2010, an Office hearing representative affirmed the September 1, 2009 decision.

## ***LEGAL PRECEDENT***

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.[8]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[9] Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[10]

An employee's emotional reaction to administrative or personnel matters generally falls outside the scope of the Act.[11] Although generally related to the employment, administrative and personnel matters are functions of the employer rather than the regular or specially assigned duties of the employee.[12] However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[13]

[8] *See Kathleen D. Walker*, 42 ECAB 603 (1991).

[9] *Pamela D. Casey*, 57 ECAB 260, 263 (2005).

[10] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[11] *Andrew J. Sheppard*, 53 ECAB 170, 171 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001).

[12] *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005).

[13] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[14] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter, the Office must base its decision on an analysis of the medical evidence.[15]

## ***ANALYSIS***

Appellant alleged an emotional condition commencing December 19, 2008 causally related to his federal employment. The Board notes that, at that time, he was on medical leave. Appellant's claim does not relate to the performance of any regular or specially assigned duties under *Cutler*.[16]

The factors identified by appellant in this claim include his removal from employment effective March 8, 2009 and being escorted from the premises of his employer by an immediate supervisor. With respect to this latter incident, appellant's allegations lack adequate specificity. He did not identify the immediate supervisor involved or provide a date when this incident allegedly occurred. Based on the evidence of record, appellant's allegation is not established as factual. Consequently, the Board finds that this alleged incident is not a compensable factor of employment.

The January 26, 2009 notice of proposed separation and appellant's subsequent removal on March 8, 2009 constitute an administrative matter taken by his employer.[17] In order for appellant's March 8, 2009 removal to be compensable, he must demonstrate error or abuse on the part of his employer in discharging this personnel action.[18] He claims his employer violated both the Privacy Act and the FMLA by requesting medical documentation, which it later used as a basis for terminating his employment.[19]

The employer provided materials pertaining to the Employee and Labor Relations Manual (ELM) -- section 865 -- which outlined the various procedures for obtaining return-to-

[14] *Kathleen D. Walker*, *supra* note 6.

[15] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992). Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[16] To the extent appellant reiterated allegations previously considered under separate appeals, those matters are *res judicata* absent any further review by the Office under section 8128. *See Robert G. Burns*, 57 ECAB 657 (2006).

[17] *Charles D. Edwards*, 55 ECAB 258, 266 (2004).

[18] *David C. Lindsey, Jr.*, *supra* note 10.

[19] Appellant did not provide any proof that his absence beginning December 13, 2006 was either requested or approved under the FMLA. Although time and attendance issues are generally related to the employment, they are administrative functions of the employer and not duties of the employee. *Joe M. Hagewood*, 56 ECAB 479, 488 (2005).

work clearances for employees returning from both FMLA and non-FMLA absences.[20] Apart from appellant's allegation, there is no evidence to establish that the employer violated its procedures or the Privacy Act and FMLA. By the time the employer removed appellant in March 2009, he had been off work continuously for more than two years. Dr. Klasson's February 6 and March 6, 2009 reports reiterated that appellant was found totally and permanently disabled from performing any work. The reports do not suggest there was reason to believe that he would recover within a reasonable length of time under ELM section 365.34. The evidence establishes that appellant's removal was consistent with the employer's established procedures. Furthermore, the employer noted that the MSPB subsequently affirmed the removal decision. Accordingly, appellant has not demonstrated error or abuse on the employer's part in removing him from service due to his prolonged medical absence. This is not established as a compensable factor of employment.

## ***CONCLUSION***

The Board finds that appellant did not establish an emotional condition commencing December 19, 2008 arising from his federal employment.

[20] ELM Section 865.4 provides in relevant part: "All medical certifications must be detailed medical documentation and not simply a statement that an employee may return to work. There must be sufficient information to make a determination that the employee can perform the essential functions of his/her job, and do so without posing a hazard to self and others."

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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