U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN E. HEATH and U.S. POSTAL SERVICE,
POST OFFICE, Auburn, ME

Docket No. 02-1028; Submitted on the Record;
Issued July 15, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition causally related to factors of his employment.

On February 26, 1997 appellant, then a 47-year-old letter carrier, working limited duty from a prior employment-related left arm injury,[1] filed an occupational disease claim, alleging that the failure of the employing establishment to accommodate his needs for the accepted injury caused post-traumatic stress disorder. In support of his claim, appellant submitted a personal statement and medical reports which included a February 18, 1997 report from Dr. Frederick Van Mourik, a Board-certified family practitioner, who diagnosed post-traumatic stress disorder and opined that appellant was stressed due to constant harassment at work. By letters dated March 27, 1997, the Office advised appellant of the type evidence needed to support his claim, and requested that the employing establishment furnish information regarding appellant's allegations.

In response, appellant submitted additional medical evidence, additional statements, documentation concerning his request for a rehabilitation job, and information regarding grievances and Equal Employment Opportunity (EEO) Commission complaints he had filed. The employing establishment submitted a response and a number of statements.[2]

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[1] On April 17, 1994 the Office of Workers' Compensation Programs accepted that appellant sustained irritation of the extensor mechanism and radial nerve of the left forearm for which he received intermittent compensation. Appellant sustained recurrences of disability on July 14, August 25 and September 10, 1995 and September 16, 1996.

[2] Appellant also submitted evidence regarding events that occurred after the instant claim was filed or that was not relevant to the period in question.

On March 4, 1998 the Office referred appellant to Dr. Charles Clementson, a psychiatrist, for a second opinion examination.[3] In a decision dated May 12, 1998, the Office denied the claim, finding that appellant had not sustained an emotional condition in the performance of duty. On December 29, 1998 appellant requested reconsideration and submitted additional evidence. By decision dated March 30, 1999, the Office denied modification of the prior decision. On March 27, 2000 appellant, through counsel, requested reconsideration and submitted additional evidence. In a decision dated July 12, 2000, the Office again denied modification of the prior decision. On July 6, 2001 appellant, through his attorney, again requested reconsideration and submitted arguments and evidence. By decision dated December 7, 2001, the Office again denied modification of the prior decision, finding no compensable factors of employment. The instant appeal follows.

The Board finds this case is not in posture for decision.

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.[4]

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*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] 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.[8]

In the instant case, appellant has alleged that he was continually harassed by supervisors Peter A. Desjardins, David Thompson, Al Comeau, Michael D. Wolf, Stephen J. Harris, Robert Blodgett and Rick Beard regarding his work ethic, slow delivery times, pressure to keep up

[3] Dr. Clementson diagnosed major depressive disorder due to work stress and advised that appellant would need two months off work.

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

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

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

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

production and denial of his request for street assistance which, appellant alleged, was due to the physical restrictions of his employment-related left arm injury. He further alleged that the employing establishment failed to provide accommodations so that he could return to his bid route, and that he was retaliated against for EEO activity. He documented incidents beginning in August 1993 and continuing through March 1997, after which he had no further problems, advising that, after Charlie Gokas became postmaster in 1997, appellant was accommodated, fitted with specialized equipment, given assistance and allowed to resume his regular route.

Appellant specifically alleged that on December 7, 1994 Mr. Thompson made a disparaging remark regarding appellant's delivery times, that his privacy was violated on April 20, 1995 when a fitness-for-duty examination was discussed at a meeting, that official discussions were conducted in error on February 25, 1994, April 25, 1995 and April 18, 1996, and stated that a letter of warning issued on July 11, 1995, was withdrawn after a grievance was filed. He further alleged that, after signing limited-duty job offer on September 25, 1995, he was not allowed to carry his own route, that, at a meeting on November 14, 1995, he was told by Mr. Desjardins that, if he could not deliver his entire route, the only job available was collections and dusting, and that, on April 10, 1996, Mr. Blodgett demanded that he vacuum the carrier cases, for which he filed a grievance that was settled. Appellant indicated that an official discussion took place on April 18, 1996 regarding his excessive street times, which was later rescinded and that he filed an EEO complaint on May 21, 1996 due to failure on the part of employing establishment supervisors to recognize that his job-related arm injury required that he work at a slower pace. Appellant reported that a suspension dated February 14, 1997 was in error, and that letters of warning dated February 26, 1997 were in error. He stated that on March 3, 1997 he was suspended after a verbal exchange with a supervisor and that he filed a second EEO complaint on March 7, 1997 because of retaliation. Appellant further alleged that he was consistently given work that exceeded his physical restrictions.

Appellant also submitted statements dated May 5, 1995, April 8, 1997 and September 11, 1998, in which Edward Desgrosseilliers, a union representative, discussed various aspects of appellant's problems with employing establishment management. In statements dated May 26, 1996 and December 4, 1998, Dana J. Cook, union president, advised that since January 1996 he had met with employing establishment management in attempts to clarify appellant's job restrictions and requirements. Mr. Cook opined that appellant was forced to work beyond his time limitations and had to bring back mail, after which he had a confrontation with his supervisor.

The employing establishment submitted a number of statements including that dated January 11, 1995 in which Mr. Blodgett, customer service supervisor, advised that appellant had requested to go back to his old route, but that, since his restrictions had not been lifted, the request was refused. In a March 8, 1997 statement, Stephen J. Harris advised that he was officer in charge at the employing establishment from June 1, 1995 to April 15, 1996. He stated that he had met with appellant, his physician and a district nurse in order to ascertain appellant's long term condition and clarify his limitations, noting that it was determined that appellant's condition would not improve. Mr. Harris continued:

> "To be perfectly frank, I feel what happened, and probably is continuing to be a problem, is that [appellant] has certain expectations of what his job should be. He

feels he should be on his route as a regular carrier with no accountability at all. Whether he needs assistance and to what degree should not be questioned, according to [him]. He takes half hour breaks at his discretion; no prolonged gripping etc. This and more was tried for a period of time to evaluate the impact of what 'reasonable accommodations' meant to the [employing establishment] operation. I feel this is the part of the equation that [appellant] has a hard time to understand and accept. It is not reasonable that customers do not get their mail in a timely man[ner]; reporting that their carrier is sitting in a certain spot. It is not reasonable that coworkers witness, on a daily basis, substantial assistance for the volume handled. It is not reasonable that management and the [employing establishment] have to deal with this situation on a daily basis.

"After attempting to accommodate [appellant] for a period of time, it was my assessment, and the assessment of other professions, that the situation was not 'reasonable.' It was unreasonable and unfair to customers, coworkers and the managers who had to deal with a variety of issues daily. Therefore [he] was afforded and accepted a temporary light duty assignment while an ongoing altering of limitations was determined and understood, also properly evaluating the needs of the service. When I left the [employing establishment] [he] was doing meaningful office duties and daily collections."

In a March 10, 1997 statement, Mr. Desjardins advised that he had been postmaster at the employing establishment for the past four years. He stated:

"During this period [appellant] has always had a problem meeting his own demonstrated ability on the street portion of his job. By this I mean, if we sent a supervisor with him for the entire day, his performance was always ½ better than days when he was alone on the street. [He] has documented dates when certain incidents have occurred, most of which I disagree with in whole or in part. However, it was only our attempt to hold him accountable for his own demonstrated ability. As [appellant] himself has documented, he has had a problem with everyone who has supervised him since 1993. The problem with his performance goes back actually to 1986, with a letter of warning he received for expanding his street time.

"The reason I believe [he] is stressed is due to his own actions. In early February of this year, [he] received discipline for his attendance and received more discipline for failing to work safely.

"This is the same time frame, when all of a sudden, the limited-duty work which [he] had been successfully doing for about two months, now he could not complete timely. It is my opinion that the [employing establishment] is not responsible for this situation and that any stress that [he] may be feeling is self induced."

Michael D. Wolfe, supervisor, customer service relations, provided an April 8, 1997 statement in which he disagreed that appellant's job was stressful, advising that appellant had

been on limited duty for over a year, working 10:00 a.m. to 6:30 p.m. with no overtime. He stated that appellant was given three and one half hours to perform two hours of work so that he could ice and stretch his arm.[9] Mr. Wolfe stated that appellant had had some "conduct problems" during the previous six months which had led to discipline.

In an April 10, 1997 report, Sherry L. Burrill, Maine District Quality Specialist, advised that she had supervised appellant from 1991 to 1993, during which she had several official discussion regarding his performance. She concluded:

> "It is my observation that this employee strongly resisted doing things 'by the book.' He continually experimented with new ways to do things, even doing what he was explicitly instructed not to do. Since this experimentation adversely affected his performance, he was unable to justify his time used in office or on the street. I worked with the union and [appellant] extensively in an effort to understand and motivate this employee."

The record also contains evidence regarding four grievances filed by appellant dating from December 7, 1994 to April 11, 1996, regarding comments made by management regarding appellant's work habits, a letter of warning based on increased street time, an official discussion regarding street time and regarding appellant's assignment to custodial duties. The record further indicates that the letter of warning was withdrawn, and that appellant filed EEO complaints in 1996 and 1997.[10] In a settlement agreement dated March 26, 1999, the parties agreed to get updated medical information regarding appellant and to provide a job offer, based on his restrictions. He was to be reevaluated by "someone who has not been involved in evaluating [his] performance previously, and "anyone involved in [his] supervision will be educated concerning his medical restrictions and job accommodations." The agreement was not to be "construed as an admission of discrimination or wrongdoing on the part of any official" of the employing establishment. A second settlement agreement dated June 3, 1999 has been completely redacted.[11] Attached to this agreement, however, was an appendix regarding the process for determining appropriate reasonable accommodation. Appellant's attorney indicated that appellant had received a "substantial settlement" from the employing establishment.

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act,[12] and disciplinary actions concerning an oral remand, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not

[9] The limited-duty job began on September 25, 1995 and was described as "carry part of City 5, auxiliary, collections, express, CMU and other duties as assigned within your medical restrictions."

[10] The record further indicates that appellant also filed EEO complaints in 1999 and 2000, for events that occurred after the instant claim was filed.

[11] The record contains authorization from appellant, waiving his right to confidentiality. The employing establishment, however, forwarded the redacted version to the Office.

[12] *See Kim Nguyen*, 53 ECAB ____ (Docket No. 01-505, issued October 1, 2001).

compensable unless the employee shows management acted unreasonably.[13] Moreover, the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.[14] The Board has held, however, that being required to work beyond one's physical limitations could constitute a compensable employment factor if the record substantiated such activity.[15] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.[16] Thus, regarding appellant's allegations that he was not allowed to carry his own route, the Board finds that his emotional reaction arose from frustration at not being permitted to work in a particular environment and was not due to a compensable work factor in this regard.[17]

While appellant suggest that he was forced to work beyond the physical restrictions of his employment-related arm injury and Mr. Cook's statement provides support that appellant was forced to work beyond his time limitations, the main thrust of appellant's allegations are in regard to harassment by employing establishment management. He specifically alleged that the employing establishment management harassed him about his unsatisfactory performance, which he stated was caused by his employment-related arm injury, and disciplined him inappropriately regarding this.

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. Mere perceptions of harassment or discrimination are not compensable.[18] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19]

Where, as in this case, an employee alleges harassment and cites to specific incidents or working conditions and the employer denies that harassment occurred, the Office, as part of its adjudicatory function must make findings of fact regarding whether the alleged factors are factually established and constitute compensable factors of employment. The issue in such cases is not whether the claimant has established harassment or discrimination under standards applied

[13] *See Janice I. Moore*, 53 ECAB ____ (Docket No. 01-2066, issued September 11, 2002).

[14] *See Mary L. Brooks*, 46 ECAB 266 (1994).

[15] *Jamel A. White*, 54 ECAB ____ (Docket No. 02-1559, issued December 10, 2002).

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

[17] *See Helen P. Allen*, 47 ECAB 141 (1995).

[18] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[19] *Constance I. Galbreath*, 49 ECAB 401 (1998).

by the EEOC. Rather, under the Act, the issue is whether the claimant has submitted evidence sufficient to establish an injury in the performance of duty. The standards for harassment or discrimination as defined by the EEOC do not represent the standard for claim adjudication under the Act, where the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or supervisors.[20] While the Office may look to evidence from an EEOC claim in determining whether incidents of harassment occurred as alleged, the Office must make its own independent findings. The standard for "harassment" or "discrimination" as defined by EEOC statutory or case law is not the applicable standard for a claim under the Act.[21]

In the instant case, the Board finds that the removing of the letter of warning, *per se*, did not establish error or abuse on the part of the employing establishment. It would appear, however, that appellant was disciplined because he could not complete his work in the time required which, he alleged, was caused by his employment-related arm injury. The record contains numerous reports from Dr. Samuel S. Scott, appellant's treating Board-certified orthopedic surgeon, who provided an August 6, 1996 duty status report in which he provided restrictions to appellant's physical activities, concluding that the use of appellant's right upper extremity was unrestricted but that the left was restricted to occasional use with the opportunity to stretch for five minutes per hour and to avoid awkward posture. In a January 15, 1997 report, Dr. Scott advised that appellant's condition was permanent, and on April 7, 1997 advised that appellant's restrictions were unchanged.

The Board finds that, notwithstanding that the standard for harassment under the EEO is not determinative under the Act, under the facts of this case, the EEO settlements dated March 26 and June 3, 1999 are probative evidence that the employing establishment erred.[22] The opinion of an agency such as the EEOC, which has jurisdiction to investigate complaints of discrimination by an employer, carries much weight and therefore the fact that appellant's physical restrictions were to be reevaluated and to provide a job offer within these restrictions with his supervisors being educated regarding these restrictions and accommodations gave weight to appellant's allegations that he had been harassed in the past regarding his performance. The Board further finds the absence of information in the redacted June 3, 1999 settlement agreement probative, especially in light of appellant's willingness to provide a complete copy.[23] These actions, on the part of the employing establishment, following the EEO investigation into appellant's complaints, represent an acknowledgment that the type of harassment alleged by appellant for what was deemed unsatisfactory performance was, in fact, caused by his employment-related arm injury and was thus based upon medical conditions. The Board therefore finds error or abuse by the employing establishment which constitutes a compensable

[20] *Id*.

[21] *Martha L. Cook*, 47 ECAB 226 (1995).

[22] *See generally, Dennis J. Balogh*, 52 ECAB 232 (2001).

[23] *See supra* note 11.

factor of employment for purposes of determining entitlement to compensation benefits under the Act.[24]

Appellant has therefore identified a compensable employment factor. Thus, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence, and the case will be remanded to the Office for this purpose.[25] The Office should prepare an appropriate statement of accepted facts which provides a complete and proper frame of reference for a physician and further develop the medical evidence to resolve the issues in this case. After such development as the Office deems necessary, it should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated December 7, 2001 is hereby set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
July 15, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[24] *Ronald Martinez*, 49 ECAB 326 (1998).

[25] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).