

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL A. FONSECA and U.S. POSTAL SERVICE, NORTH BAY
PROCESSING & DISTRIBUTION CENTER, Petaluma, CA

*Docket No. 02-849; Submitted on the Record;
Issued September 25, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On October 8, 1998 appellant, then a 58-year-old mail processor, filed an occupational disease claim alleging that on August 6, 1988 he first realized that his stress was caused by factors of his federal employment. In detailed narrative statements, appellant alleged that he was verbally and physically abused by his coworkers and supervisors and discriminated and retaliated against due to his Equal Employment Opportunity Commission (EEOC) activities.

By decision dated April 27, 1999, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. The Office determined that the following incidents occurred and constituted compensable factors of employment: (1) an August 5, 1988 employment-related cervical strain; (2) a November 10, 1990 work-related back strain; (3) employment-related stress resulting from a confrontation appellant had with an employee on February 4, 1992 that resolved no later than February 10, 1992; (4) a verbal confrontation between appellant and a coworker on January 26, 1994; (5) a July 7, 1994 employment-related back strain; and (6) an EEOC decision finding that appellant was discriminated against when he was fired in 1985.¹

The Office found that the following incidents occurred, but were not considered to be within the performance of duty: (1) appellant was called "wacko" by his supervisor on August 10, 1992; (2) the issuance of a letter of warning to appellant for leaving work on October 27, 1993 without permission from a management official; (3) the denial of appellant's claim regarding the January 26, 1994 employment incident based on insufficient medical evidence establishing that his emotional condition was caused by this incident; (4) the filing of

¹ The Board notes that, following the March 27, 1987 EEOC decision, appellant was reinstated at the employing establishment.

EEO complaints alleging discrimination by the employing establishment and the dismissal of these complaints by the EEOC and the employing establishment; (5) appellant yelled at supervisors and/or coworkers on several occasions; and (6) the termination of appellant's employment for cause.

The Office further found that the following incidents were not established as having occurred: (1) the scheduling of appellant to work outside his physical limitations following his July 5, 1994 injury; (2) the belittling and scolding of appellant by an employing establishment supervisor, Kathleen D. Wilber, in front of his coworkers on July 5, 1994; (3) Ms. Wilber's public scolding of appellant on April 26, 1994; (4) appellant was verbally abused by Deborah Fisher, a management trainee, on October 27, 1993; (5) appellant was verbally attacked by Nancy Fox, an employing establishment supervisor, on November 13, 1991; (6) the Office's decision denying appellant's claim alleging that he sustained a concussion due to his August 5, 1988 employment-related injury; and (7) coworkers who overheard appellant's supervisor call him "wacko."

Having found that appellant established compensable employment factors, the Office addressed the medical evidence of record and determined that it was insufficient to establish that appellant's emotional condition was caused by the accepted employment factors. Accordingly, the Office denied appellant's claim.

In decisions dated January 14, 2000 and March 30, 2001, the Office denied appellant's October 3, 1999 and December 20, 2000 requests for reconsideration, respectively, based on merit review of the claim.

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

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.² To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³

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 the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability, is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁴

In emotional condition cases, the Office 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 to be factors of employment and may not be considered.⁵ Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁶

Appellant has alleged that his supervisor, Harold Sillery, called him "wacko" on August 10, 1992. He has also alleged that his supervisor, Ms. Fisher verbally abused him on October 27, 1993 and Ms. Fox verbally abused him on November 13, 1991. He contended that Ms. Wilber and his coworkers verbally abused him. Appellant has alleged that his supervisors discriminated and retaliated against him due to his EEOC activities. Actions of an employee's supervisor and coworkers, which the employee characterizes as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.⁷ Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.⁸

Appellant has not substantiated his allegations of harassment, discrimination or retaliation by his supervisors and coworkers. Appellant submitted an October 1, 1998 narrative statement of Clarence Hagins, a coworker, who stated on July 5, 1994 Ms. Wilber publicly belittled and scolded appellant in front of his coworkers after he requested reasonable accommodation. Mr. Hagins further stated that appellant became upset and requested a shop steward. He noted that Ms. Wilber appeared to willfully delay appellant's request and verbally antagonized appellant even more. He stated that superintendent, Don Smith, was aware of Ms. Wilber's conduct and ignored it. He related that he had previously observed managers single out appellant and he overheard Ms. Wilber, Ray West, an employing establishment manager and Ms. Fox make negative comments about appellant on the workroom floor. They referred to appellant as being slow. Mr. Hagins noted that coworkers told him about comments that they overheard managers make about appellant and stated that appellant was given nonpreferable work assignments due to the manager's hostility towards him.

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

⁶ *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

⁷ *Anna C. Leanza*, 48 ECAB 115 (1996); *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

⁸ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

Mr. Hagins' statement failed to specifically identify the comments Ms. Wilber directed towards appellant on July 5, 1994. Further, Mr. Hagins did not describe the circumstances under, which the comment was made by Ms. Wilber, Mr. West and Ms. Fox about appellant being "slow." Additionally, Mr. Hagins did not specifically provide the comments that were made by supervisors about appellant that were overheard by his coworkers.

In a September 14, 1993 affidavit, Mr. Sillery admitted calling appellant "wacko." He described an incident where he did not see anyone in the work area. When Mr. Sillery saw appellant, he told appellant not to leave the work area unless he was on break or until his work was completed. He stated that a couple of weeks later appellant entered the breakroom where he was having lunch and told him that he was going on break. Mr. Sillery asked appellant why he was telling him about his break. Appellant became loud and stated that since Mr. Sillery had bothered him while he was on break he was going to do the same. He stated that appellant continued to be loud and he asked him to leave the room. Mr. Sillery also stated that he called appellant "wacko" under his breath as appellant was leaving the room. He realized he should not have made this comment and immediately apologized to appellant in the presence of Mr. Smith and a tour one shop steward.

In a June 4, 1994 statement, Robert Pittman, a shop steward, related that Mr. Sillery apologized to appellant for calling him "wacko" and any other workroom behavior or comments he had made that appellant might have construed as humiliating or offensive. Mr. Pittman noted that Mr. Sillery expressed a desire to work together with appellant in the future and guaranteed that he would no longer question appellant's mental condition. Mr. Pittman stated that Mr. Smith did not take any action against either Mr. Sillery or appellant and that he and Mr. Smith only served as observers.

Regarding the exchange between appellant and Mr. Sillery, Ms. Wilber stated that appellant became loud when Mr. Sillery asked him why he had interrupted his lunch break to tell him that he was going to take his break. Ms. Wilber explained that appellant became louder when Mr. Sillery asked him to leave the room and that appellant did not begin to leave the room until Mr. Sillery got up to open the door for him. Ms. Wilber noted that Mr. Sillery admitted to calling appellant "wacko" and upon realizing the inappropriateness of his remark, he apologized to appellant in the presence of the tour superintendent and a shop steward. She further noted this was the only incident, in which the terminology was used.

In response to appellant's allegation that Ms. Wilber verbally abused him on July 5, 1994 Ms. Wilber stated on that date that appellant yelled at her when she forgot to obtain information from an injury compensation specialist that he had requested and when she could not immediately accommodate his request to see a shop steward. Ms. Wilber noted that in April 1994, appellant refused to follow her direct order that he return to his assignment and had yelled at her. She stated that appellant's actions disrupted two different operations.

Although Mr. Sillery admitted that he called appellant "wacko." The Board finds that this does not constitute a compensable factor of employment. While the Board has recognized the compensability of verbal abuse under certain circumstances, this does not imply that every

statement uttered in the workplace will give rise to coverage under the Act.⁹ Appellant has not submitted any of his allegation that he was verbally harassed by his coworkers, which describes such incidents in detail, including dates, individuals involved and subjects of the discussions leading to harassment. Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.¹⁰

With respect to the November 10, 1993 letter of warning issued by the employing establishment to appellant for leaving the work area on October 27, 1993 without advising his supervisor or any other management official,¹¹ the filing of EEO complaints,¹² an Office decision denying appellant's claim that he sustained an emotional condition due to the January 26, 1994 employment incident¹³ and an Office decision denying appellant's claim alleging that he sustained an employment-related concussion on August 5, 1998 such administrative or personnel matters may be a factor of employment where the evidence discloses error or abuse by the employing establishment.¹⁴ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁵

There is insufficient probative evidence of error or abuse by the employing establishment in handling the above administrative matters. The EEOC and employing establishment dismissed appellant's complaints without finding that any error or abuse had been committed by the employing establishment. There is no other evidence of record establishing that the employing establishment committed error or abuse in handling the other administrative matters noted above. Thus, appellant has failed to establish a compensable factor of employment under the Act.

Appellant stated that he injured his back at work on July 7, 1994 and received medical treatment for his injury on that date. He alleged that on July 8, 1994 he was scheduled to perform work outside his physical limitations. While being required to work beyond one's physical limitations can constitute a compensable employment factor, this allegation must be substantiated by probative and reliable evidence.¹⁶ In response to appellant's allegation, Ms. Wilber stated that on July 8, 1994 appellant went to work in an operation that he did not belong in and he was asked to leave this assignment to work in another area based on his limitations. Appellant then requested permission to go the emergency room and was placed on total disability for three days. Ms. Wilber stated that upon appellant's return to work on July 13,

⁹ See *Frank B. Gwozdz*, 50 ECAB 434 (1999); *Alfred Arts*, 45 ECAB 530 (1994).

¹⁰ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

¹¹ Disciplinary actions are administrative functions of the employer. *Sharon R. Bowman*, 45 ECAB 187 (1993).

¹² *Janet I. Jones*, 47 ECAB 345, 347 (1996).

¹³ *Bettina M. Graf*, 47 ECAB 687, 689 (1996); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

¹⁴ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹⁵ *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁶ *Diane C. Bernard*, 45 ECAB 223 (1993); *Joel Parker, Sr.*, *supra* note 10.

1994 he submitted a duty status report from his physician indicating that he was able to return to full duty. She further stated that Mr. Smith denied appellant's request to be assigned duties other than his regular duties and she noted that appellant's response that the employing establishment was breaking the law by not accommodating his limitations. Ms. Wilber noted that appellant had no permanent mental/physical handicap that management was aware of and he did not provide any documentation of any such handicap. She further noted that appellant was not asked to perform any more work than what his coworkers were doing. She stated that appellant was able to perform his required duties, but that he lacked enthusiasm and resented directions.

Mr. Smith stated that, in denying appellant's request to perform duties other than his regular duties, he was not aware of any physical handicap or limitations that precluded appellant from performing his work duties on either July 5 or 13, 1994. Mr. Smith also stated that appellant yelled at him when he requested that appellant return to his work area. Appellant has failed to submit any supportive evidence establishing that he was required to work outside his physical limitations. Rather, appellant merely made a general allegation without providing specific details about the duties that he was required to perform by the employing establishment that were not within his physical limitations. This alleged compensable factor of employment, therefore, is not established as factual.

The Office determined that appellant had established five compensable factors of employment with respect to his July 7, 1994, August 5, 1988 and November 10, 1990 employment-related back and cervical injuries and verbal confrontations with a coworker, Doug Clark, on February 4, 1992 and with Ms. Fisher on January 26, 1994.

However, a claimant's burden of proof is not discharged by the fact that he has established an employment factor that may give rise to a compensable disability under the Act. To establish an occupational disease claim for an emotional condition, a claimant must also submit rationalized medical evidence establishing that he has an emotional condition and that such condition is causally related to the accepted work factors.¹⁷

In denying appellant's claim, the Office relied on the second opinion medical report of Dr. Robert Hepps, a Board-certified psychiatrist. In his April 17, 1999 report, Dr. Hepps reviewed appellant's medical records and a statement of accepted facts. He provided a history of appellant's emotional condition, social and family background, medical treatment and employment. Dr. Hepps provided his findings on mental examination and diagnosed personality disorder not otherwise specified with passive-aggressive and paranoid features on Axis II, sleep apnea on Axis III and global assessment of functioning of 80 by history. He did not make any diagnosis on Axis I because appellant stated that he was not presently depressed or had any psychiatric problems and there was no evidence of a psychiatric disorder based on the results of the Minnesota Multiphasic Personality Inventory test. Dr. Hepps stated that there were no known psychosocial stressors on Axis IV. He opined that appellant did not have an emotional or psychiatric condition causally related to factors of his employment or any disability due to his emotional condition. Dr. Hepps stated that appellant made the case that he was not disabled and that he was capable of returning to work at the employing establishment.

¹⁷ *Janet L. Terry*, 53 ECAB ____ (Docket No. 00-1673, issued June 5, 2002); *Ronald C. Hand*, 49 ECAB 113 (1997); *Mary J. Ruddy*, 49 ECAB 545 (1998).

In an April 29, 1998 letter, Dr. John R. Brandes, appellant's treating clinical psychologist, stated that appellant's emotional condition was not only due to the January 26, 1994 incident, but also due to a culmination of several work incidents. Dr. Brandes noted the filing of several EEO complaints by appellant based on the manner his coworkers and supervisors treated him including, the 1987 EEOC decision finding that the employing establishment improperly terminated him. Dr. Brandes also noted that appellant was placed in a lower level position in April 1988, he sustained a head injury in August 1988, when a coworker dropped a large door on his head, he was verbally abused in public by a supervisor on April 26 and June 5, 1994 and information was released concerning his medical condition. He noted that, due to the January 26, 1994 incident, appellant was treated for stress in a hospital emergency room and he was unable to work at that time. He stated that the Office only examined individual incidents rather than acknowledged the cumulative nature of the incidents experienced by appellant. Dr. Brandes further stated that at the time of the January 26, 1994 incident appellant had very little confidence that he would be supported or protected by his supervisors. He noted that this was confirmed when appellant informed a supervisor about the incident and the supervisor responded "I am well aware and I am the Manager." Dr. Brandes opined that the cumulative effect of the above events associated with a past history of adversity and due process finally created a problem for appellant that he could not overcome while working in that type of environment. He stated:

"This phenomenon of a cumulative effect of an unresolved problem is common sense and understood by all mental health professionals. [Appellant] was diagnosed as being depressed, DSM III-R 300.41, Dysthymic Disorder Depression on Axis I by the undersigned and that condition did not improve because circumstances under which he had to work did not change. [Appellant] was continually pointed to as being the cause of his own problems. This depression, disappointment and lack of faith caused [appellant] to have lack of confidence in himself. His concentration was altered and he perceived risk in regard to his relationship with his supervisors and fellow workers at the United States Post Office in Petaluma, California....

"There is a tenet of learning theory that applies in this particular case. Reinforcement of a negative quality or a repetition of a negative stimulus on an unexpected, not-every-day basis, can cause profound effects in individuals in the workplace. Because there was no sense of protection, no overall plan to make it better, [appellant's] experience of his fellow workers left him believing that he was extremely vulnerable to being picked-on and not supported. His reactions to that were profound and disabling, requiring him to take vacation time and leave without pay in order to survive from a psychological perspective. The undersigned had suggested to [appellant] early in 1984 to take as much time off work as possible. The undersigned believes that this pattern of cumulative trauma and stress had gone on for a number of years and that [appellant] very specifically could not do his job during the time that he was taken off work and with no change in his working environment would not be able to continue. This is associated with his job, is a condition of employment and an implied impairment in his work function, would appear clearly to the undersigned to be a factor of work."

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹⁸ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁹

The Board finds that there is a conflict in the medical evidence between Dr. Hepps, the Office referral physician and Dr. Brandes, appellant's treating physician, as to whether appellant's emotional condition is causally related to the January 26, 1994 verbal confrontation with Ms. Fisher and the 1987 EEOC decision, accepted employment factors. The case must, therefore, be remanded for referral of appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination. The specialist should be requested to examine appellant, give a diagnosis of his condition and provide his or her rationalized opinion on whether appellant's emotional condition was causally related to the accepted employment factors. After further development as it may find necessary, the Office should issue a *de novo* decision.

The March 30, 2001 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision.

Dated, Washington, DC
September 25, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ *H. Adrian Osborne*, 48 ECAB 556 (1997); *Lawrence C. Parr*, 48 ECAB 445 (1997).

¹⁹ *Charles M. David*, 48 ECAB 543 (1997); *Lawrence C. Parr*, *supra* note 18.