

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARLON VERA and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 03-907; Submitted on the Record;
Issued September 29, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On November 10, 2001 appellant, then a 34-year-old letter carrier, filed a claim for traumatic injury alleging that he sustained a stress-related condition when he believed he was possibly exposed to a white powder thought to be anthrax. Appellant noted that on October 27, 2001 he was on break at the employing establishment when two police officers approached the building looking for the suspicious package department and that they were carrying plastic bags labeled biological hazard. Appellant inquired whether the bags contained anthrax and the police officers indicated it might be anthrax. Appellant stopped work on that day and did not return.

Appellant submitted emergency room medical records dated October 27, 2001, which noted that appellant was treated but did not reference any potential exposure to anthrax. Work status reports dated October 29 and November 7, 2001, noted that appellant was experiencing anxiety and hypertension. In reports dated November 15, 2001 to March 14, 2002, Robert Kaplan, Ph.D., a psychologist, noted that appellant was treated for anxiety after being exposed to an anthrax-like substance. Dr. Kaplan diagnosed acute stress disorder and advised that appellant was totally disabled through May 1, 2002. He also opined that financial stress exacerbated appellant's underlying condition.

The employing establishment submitted a note from appellant's supervisor Sunny Wong dated November 7, 2001, Ms. Wong stated that on October 27, 2001 appellant stated that he had been exposed to anthrax. She advised that appellant did not report the incident until the meeting. Ms. Wong further stated that she advised appellant that, if he believed he had been exposed to anthrax, he should seek medical attention immediately. She indicated that appellant left the station without preparing a written statement regarding the incident. In a disability slip dated October 26, 2001, Dr. James D. Kelly, a Board-certified orthopedist, advised that appellant should only work five hours a day.

By letter dated December 6, 2001, Roger Collado, manager of injury compensation, noted that appellant had been informed by his supervisor that no anthrax exposure occurred at the employing establishment. On October 29, 2001 when appellant arrived at the injury compensation office to discuss the filing of the claim, he acknowledged in Mr. Collado's presence that the white powder was verified not to be anthrax.

In a decision dated May 3, 2002, the Office of Workers' Compensation Programs denied appellant's claim for compensation on the basis that appellant failed to establish that the injury occurred in the performance of duty.

By letter dated June 4, 2002, appellant requested reconsideration and submitted additional evidence including several reports from Dr. Kaplan dated November 15, 2001 to May 20, 2002; an employing establishment handout regarding anthrax; and a narrative statement. Appellant alleged that an employing establishment manager Willie Hill harassed him and tried to intimidate him when appellant informed Mr. Hill of the possible exposure to anthrax on October 27, 2001 and that, when he informed his supervisor of the incident, his supervisor delayed three hours before clarifying that the contents of the plastic bag were not anthrax.

In a letter dated July 8, 2002, Mr. Hill noted that the unknown product in the custody of the police on October 27, 2001 was in a specially devised container labeled biohazard and was securely contained without hazard to the police or passers-by. He indicated that on that day, he was approached by appellant and Ms. Wong regarding the procedures to be followed after possible anthrax exposure. Mr. Hill stated that he recommended that appellant visit his physician and submit a statement regarding the results. He indicated that he had no further contact with appellant.

In a decision dated July 10, 2002, the Office denied modification of the prior decision, again finding that appellant failed to establish that the claimed injury occurred in the performance of duty.

The Board finds that appellant failed to meet his burden of proof to establish that appellant sustained an emotional condition in the performance of duty.

To establish appellant's 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.¹ Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.²

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² *Id.*

In the case of *Lillian Cutler*,³ 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.⁴ 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 under the Act.⁵ 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.⁶ 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 under the Act. 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 Act.⁷ On the other hand the disability is not covered where it results from such factors as an 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.⁸

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 employment factors.⁹ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions, for which compensation is claimed.¹⁰

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.¹¹ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 3.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

⁹ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁰ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹¹ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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.¹²

In the present case, appellant alleged that he sustained an emotional condition as a result of possible exposure to a white powder substance, which was being carried by the police in plastic bags marked biohazard. Appellant alleged that he was informed by the police that the substance could be anthrax. The Board initially notes that this incident occurred while appellant was on break and that appellant's regular or specially assigned duties did not require him to handle the package in question.¹³ Additionally, the record is void of any evidence that appellant ingested, inhaled or in any manner came into direct physical contact with the substance in the plastic bag while in the performance of duty. In fact the substance in question was enclosed in a biohazard container when appellant observed the police handling the container. This case can, therefore, be distinguished from those, in which the claimant is exposed to an unknown and potentially dangerous substance.¹⁴ Furthermore, appellant was notified within a couple of hours that the substance was not anthrax and that, when he was tested for anthrax exposure, the medical test results were negative. The Board finds that appellant's reaction was self-generated and was based on his mere perception of events. However, perceptions and feelings alone are not compensable factors.¹⁵

Appellant's allegation that his supervisor, Ms. Wong, delayed three hours before informing him of whether the contents of the plastic bag was anthrax, falls into the category of administrative or personnel actions.¹⁶ In *Thomas D. McEuen*,¹⁷ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act, as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In this case, the Board finds that the employing establishment acted

¹² *Id.*

¹³ Where the disability does not result from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability would not come within the coverage of the Act. See *Lillian Cutler*, *supra* note 3.

¹⁴ See *Judy C. Rogers*, 54 ECAB ____ (Docket No. 03-565, issued July 9, 2003).

¹⁵ *Pamela R. Rice*, *supra* note 9.

¹⁶ See *Marguerite J. Toland*, 52 ECAB 294 (2001). (An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse).

¹⁷ See *Thomas D. McEuen*, *supra* note 8.

reasonably in this administrative matter and notified appellant at the earliest possible time after a conclusive determination was made as to the identity of the contents of the plastic bag. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to this allegation. Thus, he has not established administrative error or abuse in regard to the notification by Ms. Wong.

Appellant alleged that his manager, Mr. Hill, verbally abused him and tried to intimidate him after appellant informed Mr. Hill of his possible exposure to anthrax. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁸ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁹ Mr. Hill indicated that on the day of the alleged exposure, he was approached by appellant and Ms. Wong regarding the procedures to be followed due to possible anthrax exposure. Mr. Hill recommended that appellant visit his physician and submit a statement regarding the results. He indicated that he had no further contact with appellant. General allegations of harassment are not sufficient²⁰ and in this case appellant has not submitted sufficient evidence to establish that he was harassed by Mr. Hill.²¹ Appellant provided no corroborating evidence, such as witness statements to establish that he was harassed or intimidated by Mr. Hill on October 27, 2001. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

The Board finds that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.²²

¹⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

²⁰ *See Paul Trotman-Hall*, 45 ECAB 229 (1993).

²¹ *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²² As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

The decisions of the Office of Workers' Compensation Programs dated July 10 and May 3, 2002 are hereby affirmed.

Dated, Washington, DC
September 29, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member