

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

GREG NUZUM, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Red Lion, PA, Employer**

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**Docket No. 03-2255
Issued: April 26, 2004**

Appearances:
Greg Nuzum, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 22, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 26, 2003 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's emotional condition is causally related to his federal employment as a letter carrier.

FACTUAL HISTORY

On November 9, 1999 appellant, then a 44-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging he sustained depression as a result of three years of abusive treatment at the employing establishment. In support of his claim, appellant submitted a November 4, 1999 report from Dr. Kara Hayford, a psychiatrist, who diagnosed an adjustment disorder with mixed emotional feelings in the context of occupational stress. In a January 6, 2000 letter, appellant, who is also a union steward, noted that his condition developed after the

arrival of a “postmaster who has personally lied over and over to preserve their unwritten rules which are enforced with punitive actions and verbal threats.” Appellant alleged management harassment pertaining to the denial of leave, use of discipline and general attempts to intimidate him.

With regard to the denials of his requests for leave under the Family Medical Leave Act (FMLA), appellant listed five occasions where he was denied FMLA leave “pending approval from the Lancaster District Office.” According to appellant, he had submitted the appropriate medical documentation. Appellant also alleged that management failed to properly record his absences as FMLA related.

Appellant alleged that management attempted to intimidate and harass him, including a March 31, 1997 submission of a Form 3996 used to request assistance on a carrier’s route that was denied when his supervisor, Jim Loehwing, ordered him to put more mail in his bag. On July 5, 1997 appellant told his supervisor that he could not complete his route and the two relays he was asked to perform within eight hours and was told by Mr. Loehwing’s to “just do it.”¹ On December 9, 1997 appellant alleged that he was denied a 3996 form and was told by Mr. Loehwing that there was no need for assistance. Appellant stated that a December 22, 1997 request for assistance was denied and he was told to get the work done within eight hours or get a letter of warning. On August 6, 1998 appellant was told by Mr. Loehwing that he could not find any FMLA forms and on August 7 and 8, 1998 Mr. Loehwing told appellant that he could not use FMLA leave. Appellant also alleged that on August 13, 1998, while he was serving a seven-day suspension, Mr. Loehwing asked other carriers if they missed appellant. On October 1, 1998 appellant discovered that Mr. Loehwing had access to confidential medical information that he had submitted to the Office. On March 11, 1999 appellant alleged that he was given a letter of warning for unauthorized overtime for a tour in which he was accompanied by a postal inspector who stated nothing to him about the overtime. Appellant alleged that on August 13, 1999 Postmaster Mark Laird refused to honor an agreement made with a union steward regarding disciplinary action taken toward him. On September 3 and 29, 1999 appellant stated that he was denied use of the telephone by Mr. Loehwing to conduct union business.

With regard to disciplinary actions taken, on December 21, 1996 appellant was given a 14-day suspension for losing a wheel chock and for unacceptable attendance. This action was reduced on two separate occasions and allegedly represented disparate treatment as Coworker Greg Seitz was not given the same discipline for losing a wheel chock. On June 24, August 26, October 22 and December 31, 1997 and March 11 and July 11, 1998 and July 3 and 26, 2001 appellant was issued letters of warning for unacceptable attendance. On November 18, 1997, March 11 and February 12, 1998 appellant was issued letters of warning for failure to follow instructions. Each of these grievances resulted in negotiated resolutions, impasse or were not changed through the various steps in the grievance process.

¹ Appellant had an accepted work injury in 1996 that restricted him to working no more than eight hours in a day and chronic bronchitis which was not work related.

Appellant alleged that Fred Kocher, a coworker, stated and did inappropriate things to him and other employees. Appellant alleged that Mr. Kocher used profanity and farted out loud when appellant walked by. According to appellant, it did not seem like an accident.

In an August 2, 1999 letter, Bill Johns, a union steward, stated that other carriers ran a few minutes late and were not issued letters of warning for unauthorized use of overtime. He stated that Mr. Laird unnecessarily allowed grievances to drag on before settling them. Regarding the use of the telephone, Mr. Johns noted that, while it was technically not permitted to allow the use of the telephone for union business, it was generally allowed and appellant was singled out.

In a December 31, 1999 letter, Supervisor Loehwing denied that he ever harassed appellant or any other employee. He stated that appellant was counseled on many occasions concerning his attendance and work performance, as were other employees with similar deficiencies. Mr. Loehwing added that appellant's route had been reduced on two occasions even though it did not grow in terms of the number of stops or mail volume, stating that appellant's route was widely recognized as the easiest. After each reduction, appellant assured management and union representatives that he could do the route in eight hours but consistently failed to do so.

In a November 14, 2000 letter, Mr. Laird stated that the Red Lion Postal Facility had a history of management turnover and the disciplinary records left with the old management team. He stated that appellant was not well liked by his peers because of his numerous absences, but he was treated the same as all other employees. He stated that appellant resisted discipline and his standard way of responding to disciplinary actions was to file a grievance, assign a steward to create a massive paper trail and simply wear down management. Mr. Laird noted that management was required to respond to grievances in addition to other duties while union stewards were granted 20 to 30 hours to manage grievances. Mr. Laird stated that he and Mr. Loehwing were pressured by the other carriers to get appellant to carry his weight. He added that other carriers had no trouble completing appellant's route in eight hours.

Regarding the suspension for losing his wheel chock, Mr. Laird noted that this was reduced to a letter of warning that would be expunged after six weeks if no further infractions occurred. Within 11 days of the agreement, according to Mr. Laird, appellant lost his wheel chock again and the suspension was enforced. Regarding the August 1998 suspension, Mr. Laird stated that appellant was handed the paperwork on two prior occasions but refused to accept the document. Regarding appellant's FMLA requests, he stated that these were delayed pending approval from the district Office because appellant did not want local management to see the requested medical records. In some instances, the medical documentation was found to be incomplete, which caused delayed approvals. Regarding the letters of warning for unauthorized overtime, Mr. Laird noted that no other carrier, including substitutes from other offices, had problems completing appellant's route in eight hours. He noted that when appellant alleged that he was treated differently regarding use of overtime and not following directions it was because other employees were assuming additional work while appellant was just doing his route. Regarding the allegation of unauthorized possession of medical records, he noted that the grievance was negotiated to impasse through the appropriate channels. Mr. Laird noted that

issues related to Mr. Kocher were also negotiated through the grievance process and it was concluded that appellant and Mr. Kocher would stay away from each other.

In an August 6, 2001 decision, the Office denied appellant's claim finding that his condition did not arise in the performance of his federal duties as he did not establish a compensable work factor.

Appellant requested review by the Branch of Hearings and Review and submitted personal notes he wrote concerning his allegations. The notes reflect conversations appellant had with individuals including his supervisors, Mr. Kocher and union representatives. At the hearing appellant alleged that management was incompetent. He also submitted a December 26, 2002 report from Dr. Neal Ranen, a psychiatrist, who stated that appellant was affected by work-related stress.

In an April 16, 2002 decision, an Office hearing representative affirmed the August 6, 2001 decision finding appellant had not established that his emotional condition was the result of compensable employment factors.

Appellant requested reconsideration and resubmitted the entire record with some additional summaries of the evidence. In a June 26, 2003 decision, the Office denied modification of the April 16, 2002 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.² 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.³

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.⁴ This burden includes the submission of a detailed

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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.⁶ If a claimant does implicate a factor of 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.⁷

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated August 6, 2001, April 16, 2002 and June 26, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave and improperly assigned work duties, the Board finds that these allegations relate to administrative or personnel matters, which are unrelated to appellant's regular or specially assigned work duties and do not generally fall within the coverage of the Act.⁸ Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties, and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.⁹ However, the Board has held that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of employing establishment personnel. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁰ The Board finds that appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. Both

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁹ *Id.*

¹⁰ *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

Mr. Laird and Mr. Loehwing explained that appellant's medical leave requests were delayed because he refused to provide them with medical documentation and preferred it be sent to the district Office. They explained that the letters of warning for the unauthorized use of overtime were issued after several warnings to complete his route within eight hours. Appellant's route was reduced twice and other employees, including substitute carriers from other offices, were able to complete it within eight hours. Appellant has not established a compensable employment factor under the Act with respect to these administrative matters. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹¹

Appellant alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring these could constitute employment factors.¹² However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹³ Appellant alleged that his supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, such as asking other carriers if they missed appellant when he was suspended. However, appellant provided no supporting evidence, such as witness statements, to establish that the alleged statements actually were made or that the actions actually occurred.¹⁴ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and explained why his requests for FMLA leave and overtime were denied. Appellant did not submit sufficient evidence, such as witness statements, to establish that he was harassed or discriminated against. Mr. Johns August 2, 1999 letter was not specific about any incidents or allegations. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.¹⁵ In the present case, however, appellant did not allege overwork, or his inability to complete his route within eight hours, caused his emotional condition. Rather, he alleged that management's reactions to his failure to get his route completed in eight hours were harassing and discriminatory and caused his depression and stress.

Appellant has alleged that management was incompetent; but the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not

¹¹ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹² *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹³ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁴ *See William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁵ *See Lillian Cutler*, *supra* note 3.

being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.¹⁶

Appellant also alleged that he was denied use of the telephone to conduct union business, but the Board has adhered to the general principle that union activities are personal in nature and are not considered to be within an employee's course of employment or performance of duty.¹⁷

An altercation between coworkers which arose out of a claimant's regular or specially assigned duties would be considered an employment factor, but an altercation which arose out of nonemployment factors, *i.e.*, a purely personal dispute, would not be considered an employment factor.¹⁸ The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁹ Appellant has alleged that interaction with Mr. Kocher contributed to his condition, but the record lacks evidence establishing that Mr. Kocher used profanity or to establish the other alleged actions.

CONCLUSION

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²⁰

¹⁶ See *Michael Thomas Plante*, *supra* note 11.

¹⁷ See *Larry D. Passalacqua*, 32 ECAB 1859, 1862 (1981).

¹⁸ See *Irene Bouldin*, 41 ECAB 506, 514 (1990); *Lester O. Rich*, 32 ECAB 1178, 1180 (1981).

¹⁹ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

²⁰ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 26, 2003 is affirmed.

Issued: April 26, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member