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

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| **ROLAND R. GAGNON, Appellant** | ) | |
| **and** | ) | **Docket No. 04-567** |
| | ) | **Issued: June 24, 2004** |
| **U.S. POSTAL SERVICE, POST OFFICE, North Attleboro, MA, Employer** | ) | |

*Appearances:*
*David O. Scott, Esq.,* for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

# DECISION AND ORDER

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

## *JURISDICTION*

On December 24, 2003 appellant filed a timely appeal from the January 15 and September 24, 2003 merit decisions of the Office of Workers' Compensation Programs, which denied his claim that he sustained an injury in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these decisions.

## *ISSUES*

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office abused its discretion in denying appellant's request for subpoenas.

## *FACTUAL HISTORY*

On July 18, 2002 appellant, then a 55-year-old customer services supervisor, filed a claim alleging that his angina attacks, his fluctuating hypertension and the pain in his left arm, jaw and neck were a result of stress, tension and pressure directly related to the duties and responsibilities of his position:

> "The specific stressful conditions, causing my illness is directly related to the continued number of duties and responsibilities assigned to me as, [c]ustomer [s]ervice [s]upervisor. There are not enough hours in a day or week to complete what is expected, due to an extremely heavy workload.
>
> "I am constantly pressured to meet budget, cut hours, cut overtime, increase productivity, decrease employee absenteeism, meet goals, distribute more mail, work less hours, increase labor relations, decrease grievances, issue more discipline, submit timely reports and maintain all files.
>
> "This caused constant stress and pressure 8 to 10 hours per day, 5 to 6 days per week. Several times weekly I have to bring paper work home with me in order to attempt to catch up with my work.
>
> "I drive home talking to myself and lie in bed nights unable to sleep due to worrying about what did not get done today, and having to answer for it, as well as, worrying about the next days needs.
>
> "This stress is a continued day to day, and week to week problem, at the North Attleboro Post Office, causing my illness."

Appellant provided details of his daily activities during the week prior to May 21, 2002, the date he stopped work. He did not return.

On August 7, 2002 Gregory Eustis, a customer services supervisor and officer-in-charge of the employing establishment from November 6, 2000 to March 30, 2002, responded to appellant's statement as follows:

> "Employee rarely ended his day at 12:30 p.m. -- took personal leave frequently or would skip lunch and leave at 12:00 p.m. by his own choice.
>
> "Supervisor did not count the mail and just keep track that the clerks were counting the mail.
>
> "Office went on TAC and DOIS in March/April 2002 and employee had to perform new functions that was required by all supervisors. During my tenure rarely went on a computer for any matters. He was not willing to take on any task dealing with a computer and would resist any assistance in being taught to use the system.

> "Employee rarely did driver's observation due to the fact that he was an F-4 supervisor.
>
> "Since POS April 2001 only had to issue stock to one clerk.
>
> "Employee rarely made time deadlines on his paperwork.
>
> "Employee rarely submitted anything of quality that he would need to take home.
>
> "During the fall 2001 he told me he had a blood clot and was hospitalized for the problem.
>
> "In summary the employee's health problem was cause[d] by his lifestyle and previous medical condition. The employee was unable to handle the normal workload of a function four supervisor."

Appellant replied on October 11, 2002 that his medical condition was aggravated by the tremendous amount of stress imposed by Mr. Eustis "due to his constant pressure and lack of professionalism." Appellant added that Mr. Eustis' inability to manage and lack of concern for appellant's health and well-being induced stress and only exacerbated his condition:

> "My work schedule began at 4:00 a.m. To maintain assignments, I would work through my lunch period and even bring work home to complete. I was subjected to dozens and dozens of grievances, mostly generated by Mr. Eustis' poor treatment of his other workers. As the first line supervisor I would be the first level to which the grievances were presented. In order to maintain contractual timeliness relative to answering these grievances, several times each week for months on end, I would have to bring grievance work home so I could complete it in peace and quiet. Although grievance activity was a regular occurrence prior to Mr. Eustis' arrival, the sheer number of grievances exploded after he arrived because of his poor interpersonal skills. He even had the habit of calling the previous postmaster engaging in difficult conversation. And although there was certainly a level of stress related to my position before Mr. Eustis' arrival, it was manageable. After his arrival, it became insurmountable. The evening before my most recent relapse (May 21, 2002), I was extremely agitated and unable to sleep. I was sweating profusely and my heart was pounding. My head and the left side of my chest and arm ached. My wife became so concerned that she demanded I call my doctor. He directed me immediately to his office where he examined me and restricted me from work until further notice. To this day, I have not worked."

To support his claim, appellant submitted statements from three coworkers. Patricia Burns Chandley stated that she worked with appellant for about 16 years and that he was kind, helpful, polite and professional. Noting an unusually high turnover in management at the employing establishment, she stated that appellant had adjusted to the management styles of many different postmasters professionally and competently.

John King, a customer services supervisor, stated that he had seen appellant work overtime on his nonscheduled day "as well as overtime when required to do so." He stated that

he had seen appellant take work home to complete and bring it to work the day completed. He stated that appellant's position was stressful "in that the work force environment is a very hostile one."

Jeanne M. Jackson noted that appellant told the officer-in-charge that he wished not to work six days a week on the advice of his doctor; however, there were many occasions when the officer-in-charge would require appellant to work six days a week.

In a decision dated January 15, 2003, the Office denied appellant's claim for compensation on the grounds that the evidence failed to establish that the claimed medical condition or disability was sustained in the performance of duty. The Office did not accept appellant's statement that "there are not enough hours in a day or week to complete what is expected, due to an extremely heavy work load." The Office found that appellant presented no evidence to substantiate this allegation. Accepting that appellant was responsible for carrying out such duties as meeting the budget, cutting hours and overtime and increasing productivity, the Office found that appellant presented no evidence that these responsibilities "were beyond any person's capacity or that he performed exceptional amounts of work." The Office did not accept appellant's statement that Mr. Eustis created a tremendous amount of stress due to his constant pressure and lack of professionalism. The Office found that appellant submitted no supportive evidence, and there was no evidence that the employing establishment erred or acted unreasonably.

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on July 2, 2003, appellant testified that Mr. Eustis criticized him constantly on the workroom floor in the presence of the employees, verbally abused him and the other employees on the workroom floor such that the union president would advise them to get off the workroom floor and "take it in the office." Appellant stated that Mr. Eustis wanted him to change the color coding of certain mail to incorrectly reflect a later receipt in order to avoid having to report delayed mail. He also stated that Mr. Eustis gave him a direct order to open up all the locked pouches and cash boxes awaiting grievance resolutions and to include the clerk credits in the main stock prior to counting the main stock for accountability. He stated that this had the effect of making him personally responsible for the shortages and that Mr. Eustis issued him a letter of demand for $3,800.00. On one occasion, appellant testified, Mr. Eustis withheld his paycheck as payment toward the shortage. Appellant stated that a grievance decision found in his favor.

Appellant testified that his daily schedule ended at 12:30 p.m. but Mr. Eustis consistently scheduled management meetings after this hour, meetings that lasted an hour and a half to two hours. Appellant stated that his doctor had restricted him to 40 hours a week but that Mr. Eustis insisted the meetings were mandatory. Appellant testified that on many occasions Mr. Eustis insisted that he work on his nonscheduled day off because they were short one supervisor. Appellant stated that he was not able to complete his work during his normal shift. He explained that his first responsibility in the morning was to get the mail out and that it would be around 11 o'clock in the morning before he could meet with the union stewards on any grievances. Appellant stated that he was answering from 8 to 20 grievances a week on a regular basis because the employees were upset with Mr. Eustis' management style. He stated that he would meet with the union stewards for an hour to an hour and a half until his workday ended. He

stated that he was never able to complete the paperwork and had to sit at home in the afternoons answering grievances. He testified that he was averaging 50 to 55 hours of work a week: "I wasn't getting paid for those hours at home, but I would put them in."

Appellant testified that he really enjoyed his job and never had a problem performing his duties at any level for the previous 12 managers at the employing establishment; it was only when Mr. Eustis arrived that he became overburdened and upset. When asked whether the stress that was damaging to him was directly attributable to the actions of Mr. Eustis or to the normal stress of the job as he had known it for some 15 years, appellant stated:

> "No, I attribute it directly to the treatment I received from Mr. Eustis. I think everything else could have been dealt with if I received the support of the manager instead of the stress that he was putting upon me. If we worked as a team, everything could have functioned."

At the hearing, appellant submitted pay records showing the extra hours he worked, that is, the number of hours over 40 he worked per week.

Appellant's wife also testified at the hearing. She stated that appellant did bring work home with him, and she witnessed how he turned into a broken man: "It was like his spirit was broken."

In a decision dated September 24, 2003, the hearing representative affirmed the denial of appellant's claim for compensation. The hearing representative found that although appellant implicated his job duties in his initial statement, he focused his claim on the treatment he received from Mr. Eustis. The hearing representative found that appellant took work home to complete but found that this was not a compensable factor because appellant submitted no evidence that this was a requirement of his position. The hearing representative accepted none of appellant's other allegations as having occurred as alleged. She noted that Mr. Eustis had stated that appellant rarely worked until the end of his tour of duty at 12:30 p.m. and used much personal leave, that appellant rarely met any deadlines and did not submit quality work when he did, that there was no evidence that Mr. Eustis pressured appellant to perform any of his duties and that there was no evidence to establish that Mr. Eustis' treatment of appellant was beyond the scope of supervisory management of employees. The hearing representative found that appellant's reactions to his perceived treatment by Mr. Eustis were self-generated and not in the performance of duty. The hearing representative explained that it was unnecessary to address the medical evidence until appellant had established a compensable factor of employment.

The hearing representative noted that appellant had requested subpoenas for Mr. Eustis and various personnel documents to be presented at the hearing. The hearing representative denied this request on May 21, 2003 because the Office had already received a statement from Mr. Eustis and it was determined that appellant could obtain the documents he requested without the necessity of a subpoena.

## *LEGAL PRECEDENT -- ISSUE 1*

As the Board observed in the case of *Lillian Cutler*,[1] workers' compensation law does not cover each and every illness that is somehow related to the employment. When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his 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 resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.

## *ANALYSIS -- ISSUE 1*

Appellant squarely attributes his illness, at least in part, to the duties and responsibilities of his position as a customer services supervisor under Mr. Eustis, the officer-in-charge. As he testified at the July 2, 2003 hearing, appellant enjoyed his job and never had a problem performing his duties at any level for the previous 12 managers at the employing establishment; it was only when Mr. Eustis arrived that he became overburdened and upset. It is not appropriate, therefore, to separate Mr. Eustis from appellant's duties, as the hearing representative attempted, and to characterize appellant's claim as focusing on one and not the other. Once the nature of appellant's claim is properly understood, legal analysis may draw distinctions as to what is and is not compensable under the law of workers' compensation.

The evidence in this case supports that appellant experienced emotional stress in carrying out his employment duties under Mr. Eustis or had fear and anxiety regarding his ability to carry out these duties. Apart from a point or two that Mr. Eustis raised in his August 7, 2002 statement -- points that appellant addressed in his testimony before the hearing representative -- there is no dispute about the essential nature of appellant's work as a customer services supervisor. Appellant's contention is that these duties became more burdensome under Mr. Eustis: The number of grievances he had to answer as a first-line supervisor increased after Mr. Eustis arrived; Mr. Eustis scheduled mandatory meetings after appellant's workday ended; and Mr. Eustis required appellant to work on nonscheduled days because the office was short one supervisor. Finding that he was unable to complete his work during his normal shift, appellant brought grievance paperwork home to complete in the afternoons. He testified that he averaged 50 to 55 hours of work a week, though he was not paid for all those hours.

The employing establishment does not specifically contest these points. Mr. Eustis, in fact, lent some support to appellant's claim by reporting on August 7, 2002 that appellant rarely made time deadlines on his paperwork and was unable to handle the normal workload of a

[1] 28 ECAB 125 (1976).

function four supervisor. Mr. King, a customer services supervisor, stated that he had seen appellant work overtime on his nonscheduled day, as well as overtime when required to do so, and had seen appellant take work home to complete. Appellant's wife corroborated this last point and testified to the decline in her husband's demeanor. Ms. Jackson stated that there were many occasions when the officer-in-charge would require appellant to work six days a week. At the hearing, appellant submitted pay records showing that he did work more than 40 hours a week, officially at least, on a number of occasions.

Appellant need not show that his duties or responsibilities were "beyond any person's capacity" or that he performed "exceptional" amounts of work, as the Office indicated in its January 15, 2003 decision. The showing unusual exertion or stress in the employment is not a prerequisite for compensability. The claim is compensable if it is established that the performance of regular duties did in fact cause or aggravate the injury claimed.[2] The Board finds that the record in this case contains sufficient supporting evidence to establish a compensable factor of employment, insofar as appellant attributes his condition to stress in carrying out his employment duties under Mr. Eustis.

To the extent that appellant faults Mr. Eustis for mismanagement or other perceived errors and abuses, the evidence establishes no additional compensable factors of employment. Workers' compensation law will not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[3] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[4] The claimant must substantiate allegations of error or abuse with probative and reliable evidence.[5]

Appellant submitted no evidence to substantiate error or abuse by Mr. Eustis. His general allegations of mismanagement and poor treatment of other workers are not established as factual. Appellant specifically alleged that Mr. Eustis criticized him constantly on the workroom floor in the presence of the employees and verbally abused him and the other employees, but there is no evidence to support this allegation. Neither is there evidence to support that Mr. Eustis wanted appellant to change the color coding of certain mail to incorrectly reflect a later receipt in order

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[2] *See John J. Gallagher*, 35 ECAB 1128 (1984); *see also Richard C. Cleveland*, 9 ECAB 700, 703-04 (1958) (to be compensable all that is required is that the disease be caused or aggravated by the employment; the ordinary and normal working conditions, if they cause or aggravate the condition, are sufficient to meet the causal relation requirement of the Federal Employees' Compensation Act. The efficient cause of a disease, or aggravation of an existing disease, is the proximate cause thereof whether or not it has any "unusual, extraordinary or special characteristics").

[3] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon*., 42 ECAB 566, 572-73 (1991).

[4] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[5] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

to avoid having to report delayed mail. Appellant stated that Mr. Eustis gave him a direct order to open up all the locked pouches and cash boxes awaiting grievance resolutions and to include the clerk credits in the main stock prior to counting the main stock for accountability, but the record contains no evidence to corroborate this. Although appellant testified that a grievance decision found in his favor, he submitted no copy of the decision.

The Board will set aside the denial of appellant's claim for compensation and remand the case for further development. The Office shall prepare a proper statement of accepted facts, one that sets forth established compensable factors of employment, which a physician shall consider when giving an opinion on whether appellant's diagnosed condition is causally related to his federal employment, and those factors that are either not compensable or not established as factual, which a physician may not consider. This will give the physician a proper factual basis for his or her opinion. The Office shall then obtain a reasoned medical opinion on the issue of causal relationship and any disability for work. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for compensation.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[6] The implementing regulation provides:

> "A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses, and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts."[7]

## ***ANALYSIS -- ISSUE 2***

Appellant requested subpoenas for Mr. Eustis and various personnel documents to be presented at the hearing. The hearing representative denied this request on May 21, 2003 because the Office had already received a statement from Mr. Eustis and because it was determined that appellant could obtain the documents he requested without the necessity of a subpoena.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. It is not enough to show that the

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[6] 5 U.S.C. § 8126(1).

[7] 20 C.F.R. § 10.619 (1999).

evidence could be construed so as to produce a contrary factual conclusion.[8] As appellant has not shown how oral testimony from Mr. Eustis is the best way to ascertain the facts, and as he has not shown that the personnel records in question cannot be obtained by other means, the Board finds no abuse of discretion in the hearing representative's denial of appellant's request for subpoenas. The Board will affirm the Office's September 24, 2003 decision on this issue.[9]

## ***CONCLUSION***

The Board finds that this case is not in posture for a determination of whether appellant sustained an injury in the performance of duty. Because the evidence establishes a compensable factor of employment, further development of the evidence is warranted. The Board also finds that the Office did not abuse its discretion in denying appellant's request for subpoenas.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 24, 2003 decision of the Office of Workers' Compensation Programs is affirmed on the issue of subpoenas. The September 24 and January 15, 2003 decisions of the Office are otherwise set aside. The case is remanded for further action consistent with this opinion.

Issued: June 24, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *Dorothy Bernard*, 37 ECAB 124 (1985).

[9] A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing. 20 C.F.R. § 10.619(c) (1999).