

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

ROGER A. RUTZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Belleville, IL, Employer**

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**Docket No. 04-1161
Issued: November 16, 2004**

Appearances:
Roger A. Rutz, pro se
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 March 29, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 10, 2004 denying his request for a hearing and a December 23, 2003 decision denying his claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the February 10, 2004 and December 23, 2003 Office decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a hearing; and (2) whether he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On June 18, 2003 appellant, then a 49-year-old letter carrier, filed an occupational disease claim alleging that he sustained major depression and anxiety due to his "toxic workplace." He attributed his condition to general harassment and discrimination by Michael Barczewski and

other supervisors and harassment regarding his job performance and union position, and having his paperwork for disability and leave stolen, lost or not accepted by supervisors.

In a July 15, 2003 statement, an employee stated that he had not witnessed any harassment or intimidation of appellant by any member of management. In a July 16, 2003 statement, another employee stated that she had witnessed no unusual problems between appellant and Mr. Barczewski. In an undated statement received by the Office on July 29, 2003, a third employee stated that he never saw Mr. Barczewski harass appellant or yell at him but he had heard appellant yell profanities and even threaten Mr. Barczewski, saying, "I'll get you."

By letter dated July 24, 2003, the Office advised appellant that he needed to submit additional evidence in support of his claim, including a detailed description of employment factors contributing to his condition to include such information as specific dates, locations and persons involved and a comprehensive rationalized medical opinion explaining how appellant's condition was causally related to factors of his federal employment.

In an undated statement received by the Office on July 29, 2003, Mr. Barczewski stated that he had been appellant's supervisor for approximately three years and had never harassed him. He indicated that he had tried to help appellant with several problems but that his assistance was refused or appellant did not follow up on the recommendations. Mr. Barczewski stated that appellant never told any supervisor that he was experiencing too much job stress and the position did not require him to do anything that was not a part of his regular job.

On July 14, 2003 appellant filed a grievance alleging that management did not forward his compensation claim form to the district Office within 10 days as required. The employing establishment indicated that it was not aware of the time guidelines until advised by appellant on July 14, 2003. The grievance form indicated that the matter was resolved on July 14, 2003.

In an undated statement received by the Office on August 22, 2003, union steward, Bob Rapps, stated that he had observed management harassing appellant. He noted that management had required appellant to use all of his sick and annual leave prior to using LWOP (leave without pay). He indicated that Mr. Barczewski was slow in processing appellant's compensation claim form in violation of federal time requirements for forwarding the form to district management.

In an undated letter received by the Office on August 22, 2003, a compensation specialist stated that management had lost or misplaced appellant's medical documentation and leave requests, required him to use annual leave before LWOP, did not timely forward his compensation claim form to the district office and did not provide a required worksheet when it gave appellant his claim form. In a written statement dated February 25, 2003, Spencer Wiggers, a friend of appellant, stated that on an unspecified date he was present when appellant gave Mr. Barczewski a disability form to sign¹ and he told appellant to leave the form and pick it up the next day. Appellant took the document back and began to leave. Appellant asked to have the postmaster present but Mr. Barczewski refused to call him. Mr. Wiggers stated that

¹ Mr. Wiggers indicated that Mr. Barczewski had signed this same type of form on previous occasions and the forms had subsequently been "lost."

Mr. Barczewski told them that he would call the police if they did not leave the premises and told another coworker, "I want this son of a bitch off the dock, so call the police if he doesn't leave." He stated that appellant told Mr. Barczewski that his days at the employing establishment were numbered, Mr. Barczewski asked if he was being threatened and appellant responded that "it was all going to be done legally." He stated that appellant had a panic attack as a result of this incident. Sherry Rutz, appellant's daughter, provided a description of this incident similar to that of Mr. Wiggers and also a chronological list of dates concerning appellant's submission of requests for leave and documents received from the employing establishment.

Appellant submitted documents pertaining to compensation claims and grievances filed by other employees and general information about the employing establishment.

Appellant also submitted medical evidence in support of his claim.

By decision dated December 23, 2003, the Office denied appellant's claim on the grounds that he had not established that his emotional condition was causally related to any compensable employment factors. Attached to the decision was a notice of appeal rights advising appellant to read his appeal rights carefully and to clearly specify the appeal procedure he wished to request. The attachment notified appellant that he had 30 days from the date of the Office's decision to request an oral hearing before an Office hearing representative.

By letter dated January 22, 2004 and postmarked January 23, 2004, appellant requested an oral hearing.

By decision dated February 10, 2004, the Office denied appellant's request for an oral hearing on the grounds that the request was not timely filed within 30 days of the December 23, 2003 decision and the issue in the case could be resolved through a request for reconsideration and the submission of additional evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation not satisfied with a decision of the Secretary of Labor is entitled, on a request made within 30 days after the date of issuance of the decision, to a hearing on his claim.²

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. §§ 10.615-10.618. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.³ A claimant is not entitled to a hearing or a review of the

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.616.

written record if the request is not made within 30 days of the date of the decision for which a hearing is sought as determined by the postmark of the request.⁴

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁵ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right for a hearing,⁶ when the request is made after the 30-day period for requesting a hearing⁷ and when the request is for a second hearing on the same issue.⁸ In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁹ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹⁰

ANALYSIS -- ISSUE 1

The Office issued its merit decision on December 23, 2003. Attached to the decision was a notice advising appellant to read his appeal rights carefully and to clearly specify the appeal procedure he wished to request. The attachment notified appellant that he had 30 days from the date of the Office's decision to request an oral hearing before an Office hearing representative.

By letter postmarked January 23, 2004, 31 days following the Office's December 23, 2003 decision, appellant requested a hearing. The letter was received by the Office's Branch of Hearings and Review which properly found that the request for a hearing was untimely as it was not requested within 30 days of the Office's December 23, 2003 decision.¹¹

The Office, in its discretion, considered appellant's hearing request in its February 10, 2004 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence establishing that his emotional condition was causally related to compensable factors of employment.

⁴ *Id.*

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁶ *Rudolf Bermann*, 26 ECAB 354 (1975).

⁷ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ *Johnny S. Henderson*, *supra* note 5.

⁹ *Claudio Vasquez*, 52 ECAB 496 (2002).

¹⁰ *Id.*

¹¹ *Claudio Vasquez*, *supra* note 9; *Charles J. Prudencio*, 41 ECAB 499 (1990).

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.¹² In its February 10, 2004 decision, the Office properly determined that appellant could address the issue of whether he sustained an emotional condition in the performance of duty through the reconsideration process by the submission of additional evidence not previously considered by the Office.¹³ There is no evidence that the issue in the case could not be resolved as well through the reconsideration procedure as through the hearing procedure. Therefore, the Office did not abuse its discretion in refusing to grant appellant's hearing request.

LEGAL PRECEDENT -- ISSUE 2

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's job. 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 Act. 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.¹⁵ 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.¹⁶ However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.¹⁷ Where appellant alleges compensable factors of employment, he must substantiate such allegations with probative and reliable evidence.¹⁸

¹² *Claudio Vasquez*, *supra* note 9.

¹³ *See Marilyn D. Polk*, 44 ECAB 673 (1993).

¹⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁶ *Michael L. Malone*, 46 ECAB 957 (1995).

¹⁷ *Elizabeth Pinero*, 46 ECAB 123 (1994).

¹⁸ *Michael Thomas Plante*, 44 ECAB 510 (1993).

ANALYSIS -- ISSUE 2

Appellant alleged that his emotional condition was caused by general harassment and discrimination by Mr. Barczewski and other supervisors, and harassment regarding his job performance and union position, and having his paperwork for disability and leave stolen, lost or not accepted by supervisors. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties or representative functions as a union officer,¹⁹ these could constitute employment factors.²⁰ 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.²¹

The employing establishment denied that appellant was subject to harassment or discrimination. In a written statement, Mr. Barczewski stated that he had been appellant's supervisor for approximately three years and had never harassed him. He indicated that he had tried to help appellant with several problems but the assistance was refused or appellant did not follow up on the recommendations. Mr. Barczewski stated that appellant never told any supervisor that he was experiencing too much job stress and his job did not require him to do anything that was not a part of his regular job. In written statements three employees indicated that they had not witnessed any harassment of appellant by Mr. Barczewski or any other supervisor.

Mr. Wiggers, a friend of appellant, stated that on an unspecified date he was present when appellant gave Mr. Barczewski a disability form to sign and was told to leave the form and pick it up the next day. He stated that Mr. Barczewski told them that he would call the police if they did not leave the premises and told another coworker, "I want this son of a bitch off the dock, so call the police if he doesn't leave." Appellant's daughter, Ms. Rutz, provided a description of this incident similar to that of Mr. Wiggers. While the Board has held that verbal altercations with a supervisor may, if proven, constitute a compensable factor of employment, not every utterance in the workplace is compensable. The Board must evaluate the reasonableness of the language given the circumstances surrounding the incident. The mere allegation of profanity is not enough, without evidence that the language was directed at appellant in an attempt to harass him.²² The Board has therefore held that the use of the derogatory epithet "ape" directed at an employee by a supervisor could be compensable,²³ but the Board has found that isolated statements made in frustration such as "I could just kill you"²⁴

¹⁹ *Marie Boylan*, 45 ECAB 338 (1994).

²⁰ *See David W. Shirey*, 42 ECAB 783 (1991).

²¹ *Donna J. DiBernardo*, 47 ECAB 700 (1996).

²² *Daniel B. Arroyo*, 48 ECAB 204 (1996).

²³ *Abe E. Scott*, 45 ECAB 164 (1993).

²⁴ *Leroy Thomas, III*, 46 ECAB 946 (1995).

or the use of profanity such as “God damn people pleaser” which was used to describe the employee but not directed at the employee are not compensable.²⁵ The circumstances of this case indicates the previous nature of the relationship between appellant and Mr. Barczewski, who had previously reached out to help appellant. The statements of three coemployees also indicated that they had never witnessed appellant being harassed. Therefore the statements of Mr. Wiggers and Ms. Rutz are not sufficient to establish harassment by Mr. Barczewski on the once occasion when Mr. Barczewski told a co-employee “I want this son of a bitch off the dock, so call the police if he doesn’t leave.” This statement while uttered about appellant, was not addressed to appellant and was obviously made in frustration; as such it does not constitute verbal harassment.

Although appellant provided documentation concerning class action grievances against the employing establishment, these documents do not concern the specific facts of appellant’s case and are therefore not sufficient to establish harassment of appellant. Union steward, Mr. Rapps stated that management harassed appellant, required him to use all of his sick and annual leave prior to using LWOP and was slow in processing appellant’s compensation claim form in violation of federal time requirements. However, Mr. Rapps provided insufficient evidence to establish that the employing establishment harassed appellant. He did not provide specific details of the harassment such as dates, the individuals who were involved and what occurred. These allegations which were labeled as harassment by the supervisor actually constitute personal or administrative actions. The Board will therefore review these allegations as personnel or administrative matters, not as acts of harassment.

Regarding appellant’s allegations concerning administrative or personnel actions, appellant alleged that the employing establishment lost, mishandled and refused to accept his paperwork regarding his requests for leave and his compensation claim. The Board finds that these allegations concern administrative or personnel matters, unrelated to the employee’s regular or specially assigned work duties and do not fall within the coverage of the Act.²⁶ Although the handling of leave requests and compensation claims are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.²⁷ However, the Board has also found 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 the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁸ There is insufficient evidence that the employing establishment acted abusively in its handling of appellant’s requests for leave and his compensation claim and, to the extent that the evidence may support error by the employing establishment in misplacing documents or failing to timely submit his compensation claim form, the Board finds that these errors do not rise to the level that would constitute a compensable factor of employment based on the details provided. Although

²⁵ *Supra* note 21.

²⁶ *Michael Thomas Plante, supra* note 18.

²⁷ *Id.*

²⁸ *Richard J. Dube, 42 ECAB 916 (1991).*

appellant alleged intentional mishandling by the employing establishment of his compensation claim and leave requests, there is insufficient evidence to support this allegation as factual. In response to appellant's grievance alleging that management did not forward his compensation form to the district office as required, the employing establishment indicated that it was not aware of the time guidelines until advised by appellant, at which point the parties deemed the grievance resolved. Considering all the circumstances, the allegations concerning these administrative matters cannot be deemed a compensable employment factor under the Act.

CONCLUSION

The Board finds that appellant failed to establish that his emotional condition was causally related to any compensable factors of employment. Unless he alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence.²⁹ The Board further finds that the Office properly denied appellant's request for a hearing under section 8124.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 10, 2004 and December 23, 2003 are affirmed.

Issued: November 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁹ See Gary M. Carlo, 47 ECAB 299 (1996).