United States Department of Labor
Employees' Compensation Appeals Board

HAROLD S. MOSS, Appellant	)	
and	)	**Docket No. 05-122**
	)	**Issued: April 21, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Harold S. Moss, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 12, 2004 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated July 8, 2004, which denied his request for a hearing and a merit decision dated May 11, 2004, which denied his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

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

FACTUAL HISTORY

On October 24, 2003 appellant, then a 58-year-old first-line supervisor of customer services, filed a traumatic injury claim for high blood pressure due to factors of his federal employment. Appellant stopped work on November 7, 2003 and returned to work on November 16, 2003.

Appellant submitted several statements in which he identified the following work incidents and factors which he believed attributed to his elevated blood pressure: he was charged absence without leave (AWOL) during a dispute about leave; he had discussions over concerns that carriers should not have to deliver mail after dark/sunset or during inclement weather conditions; his supervisor, Shelia Lewis, shared information about his private and personnel affairs with craft employees; there were improprieties in the station; he sustained high blood pressure when he asked Ms. Lewis to stop harassing him; Ms. Lewis pressured him to lie about information on the Customer Service Delivery Reporting System (CSDRS); someone stole and cheated carriers out of their time, which resulted in their paychecks being short; Ms. Lewis claimed that she misplaced his injury claim form and wanted him to rewrite his statement based on her recollection of what he wrote; on October 18, 2003 Ms. Lewis had insisted that all excess mail be delivered on routes 2 and 20 and, as this was a Saturday, he would have to stay in the station until the last carrier returned, while during the week, when she had to stay until the last carrier returned, she instructed him not to send out the excess mail on those routes as darkness became an issue; on October 22, 2003 he had a conversation with Ms. Lewis about carrier 22, which caused his blood pressure to elevate; and Ms. Lewis issued unsafe instructions, lied, cheated and stole in performing her position as manger of customer service. Appellant submitted statements from his pastor and a witness statement dated May 20, 2003, pertaining to his character a witness statement defining the term "first class and dailies" a statement from an anonymous person advising why he or she did not want to become a supervisor and a November 23, 2003 witness statement summarizing the issues and concerns appellant had shared over several months with regard to the performance of his job as a supervisor.

In an October 29, 2003 report, Dr. Joseph A. James, a Board-certified internist, noted that appellant's blood pressure became elevated during stress testing and diagnosed labile hypertension that was probably associated with stressful situations. Appellant was instructed to avoid stressful environments socially and professionally. In a December 22, 2003 report, Dr. James noted that appellant had returned several times for requests for additional information on his Family Medical Leave Act (FMLA) form, which appellant alleged his supervisor had requested. Dr. James stated that he found such requests to be inappropriate as it caused additional stress for appellant and wasted his time as appellant's primary care physician. Dr. James advised that he had no objective information to support any significant restrictions that might cause appellant not to perform his usual duties. He also opined that appellant's elevated blood pressure could be related to increased work stress and suggested that appellant work a regular 40 hours per week. He further stated that it would be in appellant's best interest if his supervisors could define constructive feedback and unacceptable job performance. In a February 9, 2004 report, Dr. James diagnosed hypertension, anxiety disorder and depression. He stated it was quite possible that appellant had an underlying hypertension, which was exacerbated by his stressors at work since his home life seemed relatively stable. He noted that he could not give explicit description as to what appellant's current work environment was and, therefore, he could not say whether or not he should work mail. Physical therapy notes as well as copies of an October 24, 2003 stress echocardiogram and the accompanying report of appellant's cardiovascular assessment was provided along with a January 30, 2004 certificate of illness from the Veterans Affairs Medical Center, advising that appellant could not work from January 30 to February 1, 2004.

In several statements, Ms. Lewis advised that she has had several conversations with appellant instructing him to do his job as opposed to waiting for instructions from her. She denied appellant's allegations and advised that he was not harassed. On October 22, 2003 she gave appellant her opinion that a couple of carriers, including carrier 22, needed discipline for safety infractions and she denied discussing appellant's private or personal affairs with craft employees, noting that appellant often took his blood pressure in clear view of bargaining unit or craft employees. She explained that the mail appellant referred to for routes 2 and 20 were slated for Saturday delivery and that she had instructed him to stay at work and move all the mail that was for Saturday delivery. Ms. Lewis denied giving unsafe instructions to carriers but noted that at times the volume of mail and staff shortages led to carriers being on the street after dark. She denied any improprieties at the station and advised that she never falsified records or harassed appellant to do the same. She denied giving false statements or requiring appellant to give false statements on the CSDRS report or any report or having done anything unethical or unprofessional in fulfilling either her duties. In a December 4, 2003 statement, Eddie Archer, manager, customer service operations, asserted that he never directed or instructed any managers to do anything unethical or unprofessional.

The Office processed appellant's claim as an occupational disease claim because the work factors he identified occurred during more than one work shift. By decision dated May 11, 2004, the Office denied the claim, finding that the evidence of record did not establish that he sustained an injury in the performance of duty. The Office found that appellant did not establish any compensable employment factors.

In a letter dated June 11, 2004 and postmarked June 12, 2004, appellant requested a hearing from the Office's Branch of Hearings and Reviews. He contended that as June 11, 2004 was a National Day of Observance, in memory of President Ronald Regan, he had no choice but to mail his request on June 12, 2004.

By decision dated July 8, 2004, the Office denied appellant's request for a hearing as being untimely.

LEGAL PRECEDENT -- ISSUE 1

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty he 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] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical

[1] *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[2]

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or 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 factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[3] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[4] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[5]

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[6]

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[7]

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[2] *Id.*

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

[4] *Artice Dotson*, 41 ECAB 754 (1990).

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

[6] *Alice M. Washington*, 46 ECAB 382 (1994).

[7] *Martha L. Watson*, 46 ECAB 407 (1995).

In cases involving emotional conditions, when working conditions are alleged as factors causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensation 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.[8] Perceptions and feelings alone are not compensable to establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence. Only when the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, should the Office consider the medical evidence of record to determine the causal relationship between the accepted factors and the diagnosed condition.[9]

ANALYSIS -- ISSUE 1

Appellant attributed his elevated high blood pressure condition to being improperly charged AWOL. The Board has held that disciplinary matters consisting of oral reprimands, counseling sessions, discussions or letters of warning for conduct, including being found AWOL and treated accordingly, are administrative or personnel matters and are generally not covered under the Act unless there is evidence of administrative error or abuse.[10] Likewise, matters pertaining to leave are considered administrative in nature.[11] Appellant has presented insufficient evidence that being found AWOL was in error or abusive. Therefore, he has not established that the employing establishment's actions regarding the AWOL were erroneous or abusive.

Appellant attributed his diagnosed conditions to stressful conversations with his supervisor, Ms. Lewis, which dealt with his concerns over the carriers safety of delivering mail after dark and during inclement weather conditions, a disciplinary concern regarding carrier 22 and an order given by Ms. Lewis on October 18, 2003 pertaining to excess mail delivered on routes 2 and 20, which encompassed his concern that she had issued unsafe instructions and the fact that he had to work until the last carrier returned. As a first-line supervisor, appellant has responsibility for the safety and discipline of his employees. However, he submitted no evidence to show that the employing establishment engaged in unsafe safety practices by having its carriers work after dark or during inclement weather conditions or that the employing establishment was erroneous in the manner and extent in which it disciplined its carriers. The witness statements appellant provided in support of his claim are very general in nature and do not address any of the specific allegations alleged. The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of the Act.[12] This principal recognizes that a supervisor or manager must be allowed to perform their duties and that

[8] *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[9] *Fred Faber*, 52 ECAB 107, 110 (2000).

[10] *See Janet I. Jones*, 47 ECAB 345 (1996); *Gregory N. Waite*, 46 ECAB 662 (1995).

[11] *See Judy L. Kahn*, 53 ECAB 321, 325 (2002).

[12] *See Frank B. Gwozdz*, 50 ECAB 434 (1999).

employees will at times disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse. The record discloses appellant's disagreement with Ms. Lewis' instructions, but does not disclose any error or abuse in any safety or disciplinary considerations appellant may have had regarding the carriers he was responsible for. Appellant's concern for the manner and circumstances in which the carriers perform their duties equates to his frustration in not being permitted to work in a particular environment, a situation which is not covered under the Act.[13] However, as appellant alleged on October 18, 2003 that he had to work until the last carrier returned from delivering mail on routes 2 and 20 and there is no evidence to contradict such allegation, the Board finds that appellant has established a compensable factor of employment as this was a requirement imposed by the employment under *Cutler*.

Appellant alleged that he experienced harassment by Ms. Lewis in her position as manager, customer services to engage in the above-mentioned incidents concerning the carriers. He alleged that Ms. Lewis shared information about his private and personnel affairs with craft employees; that he had a conversation with Ms. Lewis to stop harassing him; that she pressured him to lie about information on the CSDRS report; that someone stole and cheated carriers out of their time, which resulted in their paychecks being short; that Ms. Lewis claimed she misplaced his compensation claim form and wanted him to rewrite his statement based on what she remembered he wrote. The Office found that these allegations were not established to have occurred, as alleged. Ms. Lewis specifically denied these allegations and Mr. Archer, manager, customer service operations, advised that he has never directed nor instructed any of his managers to do anything unethical or unprofessional in the fulfillment of their duties. As noted, mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence. Appellant submitted insufficient evidence supporting his allegations of statements made or actions taken. The witness statements appellant provided in support of his claim are very general in nature and do not address any of the specific allegations alleged. Therefore, he has not established that the alleged harassment actually occurred and has not substantiated these compensable factors of employment.

Appellant has established a compensable factor of employment in having to work until the last carrier returned from delivering mail on routes 2 and 20 on October 18, 2003. The medical reports of record, however, fail to attribute appellant's diagnosed condition to this compensable factor. Dr. James generally attributed appellant's diagnoses to stressors at work, but fails to mention any specific work factors, other than noting in a December 22, 2003 report that appellant's supervisor caused additional stress by requiring information on FMLA requests. As appellant has not substantiated his allegation of harassment, this report does not address the causal relationship between appellant's condition and an accepted employment factor and cannot meet his burden of proof. Therefore, Dr. James' opinions are not sufficient to establish appellant's claim.

[13] *See Lillian Cutler*, *supra* note 3.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[14] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[15]

The Office regulations provide that a hearing request must be sent within 30 days (as determined by postmark or other carrier's marking) of the date of the decision for which a hearing is sought.[16]

ANALYSIS -- ISSUE 2

In this case, the Office issued its decision denying appellant's claim on May 11, 2004. The request for a hearing was postmarked June 12, 2004.

In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.[17] Thus, in calculating the 30-day period during which appellant would be entitled to a hearing as a matter of right, May 12, 2004 is the first day of the time period and the 30th day of the required time period is June 10, 2004. Appellant's request for a hearing was postmarked June 12, 2004. Since appellant's request for a hearing was not within 30 days of the Office's decision, his request was untimely pursuant to section 8124(b)(1) of the Act and he was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that his injury or condition occurred within the performance of duty. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[18] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

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[14] 5 U.S.C § 8124(b)(1).

[15] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[16] 20 C.F.R. § 10.616(a).

[17] *John B. Montoya*, 43 ECAB 1148 (1992).

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing his emotional condition claim. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for a hearing as untimely.[19]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 8, 2004 is affirmed and the May 11, 2004 decision is affirmed, as modified.

Issued: April 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[19] On appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c).