United States Department of Labor
Employees' Compensation Appeals Board

F.M., Appellant	)	
and	)	**Docket No. 06-1279**
	)	**Issued: November 7, 2006**
U.S. POSTAL SERVICE, PITTSBURGH PERFORMANCE CENTER, SHARED SERVICE CENTER, Pittsburgh, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2006 appellant filed a timely appeal from a February 17, 2006 decision of an Office of Workers' Compensation Programs' hearing representative 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 the emotional condition issue.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On January 24, 2005 appellant, then a 46-year-old sales, service and distribution associate, filed a claim alleging that his psychiatric condition was due to stress. He first become aware of his condition on January 26, 2004 and attributed it to his employment on January 19, 2005. The evidence of record reflects that appellant was removed from service twice

and eventually returned to work in a different location under a different supervisor. Following a conversion of appellant's employee status from temporary to permanent he was directed to return to his former work location and assigned to work with a former supervisor, Tanya Wright. Appellant worked one day, November 26, 2004, under Ms. Wright's supervision. He stopped work on November 27, 2004 and has not returned.

In a January 25, 2005 statement, appellant noted that he worked for Ms. Wright on November 26, 2004 and that he experienced symptoms similar to those he had endured during three years under her supervision. He alleged that Ms. Wright had previously harassed him by refusing to accept medical documentation when he was away from work and would write him up absent without leave (AWOL). Appellant stated that, when he had to leave work to take his son to the doctor after he broke his wrist at day camp, Ms. Wright refused all his medical documentation of his son's incident and said he was AWOL. He noted, however, that Ms. Wright accepted his medical documentation after a conference with the officer-in-charge. Appellant also stated that Ms. Wright had issued him two or three letters of warning, placed him on restricted sick leave and removed him from service twice. The second removal occurred two weeks after he had returned from the first removal. Although Ms. Wright had removed him from service, she was not his supervisor. Appellant further noted that every disciplinary action Ms. Wright had brought against him had been overturned or removed from his personnel file. He alleged that Ms. Wright had no cause to bring the removals and that she had lied about the facts in both cases. Upon being placed back under her supervision, appellant alleged a hostile work environment as she caused his psychiatric condition. He alleged that the employing establishment knew that Ms. Wright was a hazard to employees. Appellant provided a copy of an Equal Employment Opportunity (EEO) claim of a former coworker, George Shipp. The EEO decision on Mr. Shipp's claim found that no discrimination had occurred.

In a report dated January 19, 2005, Dr. Peter J. Smith, a licensed clinical psychologist, opined that appellant developed anxiety disorder and symptoms of depression as a result of retaliation from his supervisor, Ms. Wright, for pursuing his discrimination claims. Dr. Smith indicated that Ms. Wright had wrongfully terminated appellant on two occasions, which resulted in more than a year of missed work. Although appellant had recently attained permanent employee status, he was being directed to return to his former work location at Chapel Hill and assigned to work again with Ms. Wright. Dr. Smith opined that appellant could return to work at his current work setting (the Timberlyne Station) so long as he has no contact with Ms. Wright and if the employing establishment took appropriate action to insulate him from additional harassment and retaliation.

Appellant submitted a July 28, 2003 award summary from the regular arbitration panel, which concluded that the employing establishment failed to meet its burden to prove its case that appellant had not paid his box rent, used postal property for his personal aggrandizement or attempted to cheat the employing establishment. He was reinstated to return to work effective August 17, 2003 with full back pay and all other benefits and entitlements. All records and documentation associated with the removal were to be expunged from his records.

In a February 7, 2005 statement, Ms. Wright stated that she was appellant's immediate supervisor the first time he was removed from service for misuse of postal property and funds. She indicated that appellant had rented a post office box to himself and failed to pay the initial

fee as well as any yearly fees after that. The discovery was made by a fellow clerk and, when she reported her findings to the officer-in-charge, Patrick Harkin, she was instructed to terminate appellant. When the arbitrator ruled in appellant's favor, the postmaster and appellant's assigned supervisor, Annie Gorham, notified him of when to report to duty. When appellant failed to report to duty, Ms. Wright signed the second letter of removal given to her by the postmaster because she was appellant's last immediate supervisor. Ms. Wright denied any form of retaliation against appellant for either disciplinary action or because of his prior EEO activity.

In a letter dated February 18, 2005, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested additional details about the alleged hostile work environment and the events of November 26, 2004.

In a February 18, 2005 statement, Ms. Wright stated that she had been appellant's supervisor for approximately one and one-half years, as opposed to the three years claimed. She reiterated that appellant's first removal from service was a result of an investigation which found that he misused postal property and funds. Appellant's second removal was a result of his failure to report to work at the assigned date and time under the arbitration award. Ms. Wright stated that the postmaster had signed the August 12, 2003 letter advising appellant to report to work. With respect to appellant's other allegations, she stated that appellant was placed on restricted sick leave because of poor attendance and a pattern of sick leave usage in conjunction with the holidays. Appellant was paid 4.11 hours of emergency annual leave on June 27, 2002 when his son injured himself and had six EEO complaints filed to date with no finding of discrimination.

Ms. Wright submitted letters from the employing establishment in 1999 placing appellant on restricted sick leave; copies of a March 17, 1999 notice of proposed removal for failing to meet the qualifying requirements of the job assignment; letters of warnings dated February 20, 2001 and October 5, 2001; an August 8, 2002 investigative memorandum which revealed that no box rent had been received in either June 2000 or June 2001 for the post office box being used by appellant; an October 7, 2003 notice of decision from the Postmaster Russell T. Racine removing appellant October 21, 2003; and a February 8, 2005 investigative memorandum which noted that appellant's interaction with Ms. Wright on November 26, 2004 was normal with nothing out of the ordinary occurred.

In a March 7, 2005 report, Dr. Smith discussed the work factors which contributed to appellant's psychiatric condition. He advised that appellant began to work for Ms. Wright in 1999 and that the relationship was fine until appellant spoke up when he observed Ms. Wright scolding and harassing another employee in a very public manner. Ms. Wright reportedly continued to berate the other employee in front of customers. In July 2002, she suspended and then fired appellant given the allegations that he had used a post office box without payment. Dr. Smith stated that the subsequent investigation revealed that Ms. Wright had failed to properly inquire about this matter with other involved employees and the arbitrator found appellant innocent of all charges. Appellant was out of work for 10 months during this wrongful dismissal which resulted in an extremely psychological distressful situation for him and his wife. Following arbitration, the employing establishment contacted appellant and he promptly returned to work. However, Ms. Wright later claimed that she had mailed appellant an earlier letter ordering him to return to work at an earlier date. Although appellant never received Ms. Wright's letter, she fired him a second time two weeks after he returned to work. Dr. Smith

opined that more uncertainty and intense psychological stress resulted from this second termination. He stated that the second termination was also found to be wrongful and appellant was reinstated in a different location, the Timberlyne Station. Dr. Smith additionally alleged that Ms. Wright and the employing establishment made errors which resulted in the wrongful termination of appellant's family health insurance and she had denied appellant's requests for approved leave and found him to be AWOL even when appropriate medical documentation had been provided. Ms. Wright's harassment towards appellant reflected a pattern she manifested with other employees, as noted in another coworker's claim. Dr. Smith stated that, after appellant's two wrongful terminations, the employing establishment moved appellant away from Ms. Wright's work setting, where he flourished. However, given appellant's reclassification, he was ordered to work back under her supervision. Dr. Smith opined that appellant's condition acutely deteriorated with anxiety, panic and depressive symptoms when he learned and was faced with returning to work under Ms. Wright.

By decision dated July 8, 2005, the Office denied the claim finding that appellant failed to establish a compensable factor of employment.

On July 29, 2005 appellant requested a teleconference, which took place on January 5, 2006. He submitted additional evidence including copies of correspondence related to grievances filed; an August 26, 2002 notice of proposed removal for misuse of postal property; an October 5, 2001 letter of warning for unacceptable attendance and grievance material relating to appellant's AWOL status on September 4, 2001. There was also an October 18, 2004 request for pay adjustment from appellant as indicated by a grievance settlement; and a June 20, 2005 return to duty report, from Katheryn J. Sherrill, a registered nurse, stating that appellant could return to duty as long as he did not work for Ms. Wright.

In a November 23, 2002 determination, the Employment Security Commission of North Carolina found that appellant's discharge on July 12, 2002 was not for misconduct or substantial fault connected with work. In a January 10, 2003 settlement agreement, management agreed to change appellant's AWOL status on September 4, 2001 to four hours of sick leave and four hours of leave without pay. A September 4, 2003 prearbitration settlement stipulated that appellant would be reimbursed for those days he was in nonpay status due to the emergency suspension under his second termination. In a September 10, 2003 settlement agreement, appellant was granted two days of annual leave on the dates of his choice; a September 10, 2003 grievance settlement noted that appellant's name would be removed from the restricted sick leave list and that "both parties agree that this settlement is nonprecedent setting and will not be cited by either in any grievance or arbitration hearing." An October 1, 2003 letter relating to appellant's second termination noted the parties agreed that "this resolution establishes neither precedent nor practice for either party." In a February 18, 2004 prearbitration settlement agreement, the AWOL charges for August 17 to September 5, 2003 were dropped.

In a January 15, 2006 medical report, Dr. Smith reiterated that appellant's psychological condition was caused by Ms. Wright's actions of aggression and/or omission. He alleged a pattern of harassing behavior, wrongful firings, and a series of accusations; noting that appellant had been charged AWOL and had been issued letters of warning. Dr. Smith reiterated that each of the cases in which appellant filed an appeal or a grievance, such discipline had been overturned.

By decision dated February 17, 2006, an Office hearing representative affirmed the July 8, 2005 decision finding that appellant did not establish any compensable factors of employment.

LEGAL PRECEDENT

To establish a 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]

The Board has held that 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 illness has some connection with employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to his regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of his work or his fear and anxiety regarding his ability to carry out his work duties.[2]

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 reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

The Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable work factors, which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed factors of employment and may not be considered.[4] 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

[1] *Leslie C. Moore*, 52 ECAB 132 (2000).

[2] *Ronald J. Jablanski*, 56 ECAB ___ (Docket No. 05-482, issued July 13, 2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *Id.*

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

evidence.[5] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence.[6]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[7] To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[8] However, for harassment to give rise to a compensable disability under the Federal Employees' Compensation Act there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Federal Employees' Compensation Act.[9] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[10]

ANALYSIS

In the instant case, appellant attributed his emotional condition to an alleged pattern of harassment, discrimination and retaliation by his supervisor, Ms. Wright, and the employing establishment for failing to protect him from his supervisor. The Office found that appellant failed to establish any compensable factors of employment.

Appellant and Dr. Smith largely attributed his emotional condition to the action of his supervisor, Ms. Wright, and the employing establishment. It is noted that appellant's allegations of harassment pertain to disciplinary and personnel actions which include two removals from service, letters of warning, and other personnel matters, such as being placed on a restricted sick leave list, issued AWOL's, the employing establishment's delay in paying the terms of the approved settlement; Ms. Wright's failure to submit paperwork in a timely fashion in a recently approved Family Medical Leave Act request; the wrongful termination of appellant's health insurance; and Ms. Wright's failure to accept appellant's medical documentation and her writing up appellant AWOL. As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.[11] However, 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.[12] An employee's

[5] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[6] *See Charles E. McAndrews*, 55 ECAB ___ (Docket No. 04-1257, issued September 10, 2004).

[7] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[8] *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[10] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[11] *Roger Williams*, 52 ECAB 468 (2001).

[12] *Dennis J. Balogh*, *supra* note 5.

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;[13] or mere disagreement of supervisory or management action,[14] as a rule, fall outside the scope of coverage provided by the Federal Employees' Compensation Act. An employee's frustration from not being permitted to work in a particular environment is not compensable.[15] Reactions to disciplinary matters, such as a letter of reprimand also pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively.[16]

Appellant alleged that Ms. Wright lied about the facts in his removal from service both times; his two removals from service were wrong and every disciplinary action Ms. Wright brought against him was overturned. Initially, the Board notes that there is no factual basis for appellant's allegation that Ms. Wright lied about the facts surrounding his removals from service. Regarding appellant's first removal from service, the evidence reveals that appellant was terminated after an investigation by the employing establishment revealed that no box rent was collected by the employing establishment during June 2000 or June 2001 for the box used by appellant. However, the July 28, 2003 arbitration award found that the employing establishment failed to meet its burden of proof with respect to the charges brought against appellant; thus, the arbitration decision constitutes substantial evidence in support of appellant's allegation that he was wrongfully terminated by the employing establishment. Therefore, this is a compensable factor of employment.[17] Appellant's second removal from service involved appellant's failure to report to work at the assigned date and time per the arbitration award. There is no finding of error or abuse by either party in this regard. Furthermore, there is no factual basis for Dr. Smith's claim that Ms. Wright had mailed appellant an earlier letter ordering him to return to work at an earlier date. Although Ms. Wright was not appellant's supervisor at the time of the second removal, her explanation that she signed the second termination letter as she was appellant's immediate supervisor when he was removed the first time appears reasonable. Thus, appellant has only established a compensable factor of employment with respect to his first termination.

Appellant has not submitted any evidence of error or abuse with respect to the other disciplinary actions of letters of warning or the other personnel matters of being placed on a restricted sick leave list, issued AWOL's, the employing establishment's delay in paying the terms of the approved settlement; Ms. Wright's failure to submit paperwork in a timely fashion in a recently approved Family Medical Leave Act request; or the wrongful termination of appellant's health insurance. Ms. Wright's explanation that appellant was placed on restricted sick leave because of poor attendance and a pattern of sick leave usage in conjunction with the holidays is a reasonable explanation for issuance of such disciplinary action. Moreover, there is no finding of error or abuse with respect to the other personnel matters alleged by appellant. As

[13] *Margaret J. Toland*, 52 ECAB 294 (2001).

[14] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

[15] *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

[16] *See Sherry L. McFall*, 51 ECAB 436 (2000).

[17] *Jamel A. White*, 54 ECAB 224, 229 (2002).

previously noted, mere disagreement of supervisory or management action falls outside the scope of coverage of the Federal Employees' Compensation Act absent a finding of error or abuse.[18] Moreover, the record reflects that appellant received 4.11 hours of emergency annual leave on June 27, 2002 when his son injured himself. Although appellant filed a number of grievances and EEO complaints with respect to the personnel matters, the Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[19] The prearbitration settlements of record fail to disclose any evidence of error or abuse on either party. Appellant, thus, has submitted insufficient evidence of error or abuse to support his allegation that the disciplinary matters issued against him were issued in bad faith or that the personnel matters were abusive.

While appellant may have disliked Ms. Wright's handling of a situation with a coworker, he has presented no evidence of error or abuse that Ms. Wright acted unreasonably in the situation in rejecting appellant's suggestion. Appellant also has not submitted sufficient evidence to support his allegation that the employing establishment promoted a hostile work environment when it ordered him to work under Ms. Wright's supervision after he attained permanent work status or that the employing establishment knew that Ms. Wright was a hazard to employee's and did nothing to protect employee's under Ms. Wright's supervision. The fact that Ms. Wright may have had other EEO claims filed against her does not, without a showing of error or abuse, establish a pattern of harassment. The EEO claim on the coworker alleged by appellant to substantiate his claim of the employing establishment's knowledge that the employing establishment knew that Ms. Wright was a hazard to employees found that no discrimination had occurred as alleged. An employee's frustration from not being permitted to work in a particular environment is not compensable.[20] Therefore, appellant has not established a pattern of harassment or discrimination with respect to Ms. Wright's supervision or acted unreasonably in discharging her responsibilities. Thus, appellant has not established a compensable factor in this regard.

In the present case, appellant has established a compensable factor of employment with respect to error by the employing establishment regarding his first termination. Appellant's burden of proof, however, is not discharged by the fact that he has established an employment factor, which may give rise to a compensable disability under the Federal Employees' Compensation Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[21] As the Office found that there were no compensable employment factors, it did not address the medical evidence. The case, therefore, will be remanded to the Office to address the medical evidence and determine whether it establishes that his emotional condition is causally related to the compensable factor of employment. After such further development as is deemed necessary, the Office should issue a *de novo* decision on appellant's claim.

[18] *Christophe Jolicoeur, supra* note 13.

[19] *James E. Norris*, 52 ECAB 93 (2000).

[20] *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

[21] *See William P. George*, 43 ECAB 1159, 1168 (1992).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 7, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board