United States Department of Labor
Employees' Compensation Appeals Board

G.J., Appellant	)	
and	)	**Docket No. 06-633**
	)	**Issued: February 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, 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 January 23, 2006 appellant filed a timely appeal from an October 20, 2005 merit decision of the Office of Workers' Compensation Programs' hearing representative who affirmed the denial of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of his federal duties during the period July 2000 through March 2001; and (2) whether the Office abused its discretion in denying his request for subpoenas.

FACTUAL HISTORY

On May 8, 2000 appellant, then a 45-year-old mail handler, filed an occupational disease claim alleging that he sustained stress as a result of factors of his federal employment.[1] He alleged that he was subjected to retaliation after he brought forth confidential information concerning fraud. Appellant noted that an arbitrator found that the employing establishment acted improperly in an attempt to remove him on October 1, 1999. A copy of an April 24, 2000 arbitration decision stated, in pertinent part, "that the [employing establishment] has [not] established the basis for a removal in this case." Appellant returned to full-time employment in July 2000 and retired in March 2001.

The claim was initially denied. However, in an October 4, 2001 decision, an Office hearing representative accepted the claim for a temporary aggravation of preexisting depression for the period May to July 2000. The compensable employment factor was identified as the October 1, 1999 improper removal of appellant due to a sexual misconduct charge with respect to a female coworker, Becky Walden. The Office hearing representative noted that "it had not been accepted as factual that subsequent factors of employment after [his] return to work have impacted on [appellant's] emotional condition." The case was remanded to the Office for further development of whether employment factors after appellant's return to work in July 2000 through his retirement in March 2001 aggravated his emotional condition.

In a letter dated November 27, 2001, appellant alleged that he returned to a hostile work environment after he was absolved of the sexual harassment charges. He stated that Ms. Walden was given a lucrative position on the inbound docks, which was usually afforded for senior personnel. Ms. Walden was allowed to stay in that position after he left in March 2001. Appellant stated that he was put on restrictions even though he was not found guilty of any wrongdoing. He stated that he chose not to converse with anyone and was cut off from people on the inbound docks who were his close acquaintances because of his restrictions. Appellant alleged that everyone was watching him, his restrictions were without basis, he was unable to see his friends because of the restrictions and he had to work directly for the person who tried to unjustly fire him. He alleged that he was considered a "mole" and he was always going to be guilty for exposing management's fraud.

In a letter dated May 21, 2002, Richard P. Hohenstatt, manager, responded to appellant's allegations. He stated that Ms. Walden's assignment on the inbound dock was that of a mail handler and was the same as the other mail handlers in that location. Mr. Hohenstatt also stated that Ms. Walden was kept on the inbound dock until appellant's disability retirement was approved as management did not know if he was returning. He noted that appellant was found guilty as to his conduct regarding Ms. Walden, but was not removed as proposed. Mr. Hohenstatt stated that appellant was free to socialize with his peers, but was advised on several occasions that he should refrain from going into Ms. Walden's work area.

[1] The record reflects that appellant filed two other stress-related claims on April 26, 1996 and October 21, 1997, which the Office assigned File No. 090415717 and File No. 090434200, respectively.

By decision dated September 8, 2004, the Office denied appellant's claim on the basis that he failed to establish any compensable factors of employment. It found that the factual evidence of record failed to establish appellant's allegations of ongoing harassment.

On September 10, 2004 appellant requested an oral hearing before an Office hearing representative. In a November 26, 2004 letter, he requested subpoenas for certain individuals he alleged were responsible for mail fraud in 1997. In a February 4, 2005 letter, the Office hearing representative denied appellant's request for subpoenas on the basis that the issue presented dealt only with incidents occurring after July 2000. He noted that appellant alleged that he needed to subpoena certain individuals concerning incidents which allegedly occurred in 1997 and, thus, were not relevant to the present claim. Appellant could appeal the denial of his subpoena request following the decision on the hearing.

An oral hearing was held March 23, 2005. Appellant explained the history of his prior claim and the investigation that ensued. After he returned to work in July 2000, he believed there was ongoing falsification of mail counts and he continued to report the problem. Appellant stated that management wanted him out and his disability retirement was approved very quickly. He also discussed the investigation that occurred after he was accused of sexually assaulting Ms. Walden and its effect on his life.

With respect to the alleged fraudulent mail counts, appellant submitted an August 7, 2001 congressional correspondence requesting an investigation, copies of media coverage and newspaper articles, a copy of the employing establishment's policy on whistle-blowers, a September 30, 1998 letter from the Office of Inspector General and a February 2, 1999 letter from his former attorney. He also submitted statements regarding the investigation into the allegations against him for a sexual assault of Ms. Walden. In a June 10, 2004 medical report, Robert R. Nestheide, Ph.D., a clinical psychologist, opined that appellant's current psychiatric disability appeared to be attributable to events experienced at the employing establishment.

By decision dated October 20, 2005, an Office hearing representative affirmed the September 8, 2004 decision. He found that there was no evidence to support that appellant was retaliated or harassed against during the period July 2000 to March 2001.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] On the other hand, the disability is not covered where it results from such factors as an

[2] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[4] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[5] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[6] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[7]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[8] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that his emotional condition was aggravated by retaliation and a hostile work environment after he returned to work in July 2000. His claim was accepted for a temporary aggravation of depression based on his removal in 1999 arising from a prior incident concerning Ms. Walden. As previously noted, for harassment to give rise to a compensable

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[4] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[5] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

[7] *Beverly R. Jones*, 55 ECAB 411 (2004).

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

[9] *Id.*

disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[10]

The factual evidence fails to support appellant's claims regarding harassment, retaliation or that he was subjected to a hostile work environment upon his return to work in July 2000. Appellant asserted that there was an ongoing falsification of mail counts which he reported. The evidence reflects that an investigation into mail count reporting was initiated or continued. However, an investigation alone does not substantiate appellant's allegations that he was retaliated against or subject to a hostile work environment because of his previous whistle-blower activities. The Board notes that investigations are administrative functions of the employer and are not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, is not a compensable employment factor.[11] Appellant has not submitted any evidence supporting that the actions taken by the employing establishment in continuing to investigate any alleged fraudulent mail count constituted error or abuse in an administrative or personnel matter. The material he submitted either predates the period in question (July 2000 to March 2001) or supports that there was an investigation into the alleged fraudulent mail count issue. While appellant's reports may have lead to the employing establishment's investigation of the issue there is no evidence to support any claim of retaliation or harassment on the part of management. Appellant stated that he was considered to be a "mole" based on his prior claims. He alleged being scrutinized by management and that management wanted him out.[12] However, there is insufficient evidence to support appellant's allegations of harassment or retaliation. Thus, he has not established a compensable employment factor.

The factual evidence fails to support that appellant was subject to harassment as a result of a previous incident concerning Ms. Walden. His statements regarding the allegations against him for sexual assault of Ms. Walden are not relevant to the current claim as it occurred prior to the time period in question. While the employing establishment acknowledged that appellant was advised not to go into Ms. Walden's work area, it denied that he was restricted from interacting with his coworkers. Appellant has failed to submit any evidence of harassment or retaliation. In his November 27, 2001 statement, appellant advised that he chose not to interact with people. It appears that his isolation from his coworkers was self-generated. Appellant has not presented corroborating evidence that he was harassed or retaliated against by his coworkers or Ms. Walden. Thus, he has not established a compensable employment factor with regard to these allegations.

To the extent that appellant attributed his emotional condition to dissatisfaction with his job assignment after he returned to work in July 2000, the Board notes that assignment of work is an administrative function of the employer and would not be compensable absent error or abuse by the employing establishment.[13] The Board has held that the disability is not covered where it

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

[11] *See generally Bobbie D. Daly*, 53 ECAB 691 (2002); *James E. Norris*, 52 ECAB 93 (2000).

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

[13] *See Donney T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005).

results from frustration from not being permitted to work in a particular environment or to hold a particular position. The employing establishment explained the reasons for its staffing assignments. The Board finds that appellant has not established that the employing establishment erred or acted abusively in its assignment of work. His frustration arose from his desire to work in a particular environment.

For the foregoing reasons, the Board finds that appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[14]

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.[15] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who 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. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[16] Section 10.619(a)(l) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[17] The Office hearing representative retains discretion on whether to issue a subpoena.

The function of the Board on appeal is to determine whether there has been an abuse of discretion.[18] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[19]

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[14] As appellant has not established any compensable employment factors after his return to work in July 2000, the Board need not consider the medical evidence of record. *Karen K. Levene*, 54 ECAB 671 (2003).

[15] 5 U.S.C. § 8126.

[16] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[17] 20 C.F.R. § 10.619(a)(l).

[18] *See Gregorio E. Conde*, *supra* note 16.

[19] *Claudio Vazquez*, 52 ECAB 496 (2001); *Martha A. McConnell*, 50 ECAB 128 (1998).

ANALYSIS -- ISSUE 2

Appellant requested that subpoenas be issued to certain individuals with regard to incidents that occurred in 1997. He did not clearly explain why a subpoena was the best method to obtain this evidence. The hearing representative properly noted that the incidents referred to in 1997 were not relevant to the present claim which concerned incidents arising after his return to work in July 2000. There was no evidence submitted as to why such individuals should be present at an oral hearing in the present claim. The Board reviews the hearing representative's decision to determine if there was an abuse of discretion. The Board finds that the evidence of record does not establish that the hearing representative abused his discretion by denying the subpoena request.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty for the period July 2000 through March 2001. The Board further finds no abuse of discretion in the denial of appellant's subpoena request.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2007
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