United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 06-999**
	)	**Issued: February 26, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Greensboro, NC, 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

JURISDICTION

On March 22, 2006 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated January 31, 2006 rescinding acceptance of 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 case.

ISSUE

The issue is whether the Office met its burden of proof to rescind acceptance of appellant's emotional condition claim.

FACTUAL HISTORY

On November 12, 2002 appellant, then a 62-year-old distribution clerk, filed a claim for an emotional condition sustained on January 13, 2001. He alleged that his preexisting irregular heartbeat was aggravated due to allegations of improper clock rings (the specific time worked) by his supervisors. Appellant provided his clock rings from March 31 to May 25, 2001. He provided clock rings for other employees for the period July 14 to August 17, 2001 and alleged

that they clocked in early but did not receive letters of warning. Appellant indicated that the 0.08 hours (five minutes) leeway rule[1] applied to all; however, management harassed certain employees, including him. The record shows that on May 9, 2001 appellant clocked in early and was told by Faye Nicholson, his supervisor, not to deviate from his schedule. Ms. Nicholson told him that the five-minute leeway rule was to provide for delays in clocking in due to congestion at the time clock, not for routinely clocking in earlier and leaving earlier than the employee's official schedule. On May 10, 2001 appellant clocked in early again and received an official discussion for disregarding Ms. Nicholson's instructions. A May 24, 2001 step 1 grievance summary stated that the instruction that appellant was not permitted to begin his tour at 0692 and end his tour at 1542 (eight hours later) was contrary to an agreement between Mr. McArthur and Union Steward Sweeney.[2] Management's position stated: "To allow the grievant to clock in earlier than his scheduled begin tour time is a deviation from schedule. The new swipe time badges have each employee's base operation; therefore, there is no need to do anything else other than … swipe your badge. It has been documented that 62 swipes of employees' time cards can be completed in 100^{ths} clock rings. To allow this is a violation of the National Agreement; [Employee and Labor Relations Manual] and Handbooks on Attendance Control and the Attendance Policy Update." The union's position stated: "Management violated Article 15 of the National Agreement … when they did not uphold the step 1 agreement between SDO [supervisor, distributions operations] McArthur and [union steward] Sweeney regarding [appellant's] being allowed to clock in at 0692 and ending at 1542…." A step 2 decision dated June 18, 2001 stated that the union did not meet its burden of establishing a violation of the National Agreement. On July 11, 2001 Ms. Nicholson issued a letter of warning indicating that she had a discussion with appellant on May 9, 2001 to inform him that he was clocking in too early. She asked him to clock in no earlier than 0697 for his 0700 scheduled starting time. Ms. Nicholson explained that any prior agreement with appellant's supervisor was a deviation from his scheduled reporting time. She noted that appellant's grievance regarding this matter had been denied yet he continued to clock in too early. On August 6, 2001 Ms. Nicholson issued another letter of warning. She stated that appellant ignored her instructions not to clock in before 0697 and continued to clock in early. On December 18, 2001 the employing establishment withdrew the August 6, 2001 letter of warning. The parties agreed that there was a five-minute leeway in clocking in to allow for congestion at the time clock. It was agreed that the five-minute rule would apply to all employees equally. On June 27, 2003 the Office accepted appellant's claim for an acute reaction to stress and aggravation of hypertension. Appellant retired effective September 3, 2003.[3]

[1] A copy of the employing establishment rules indicates that employees were not permitted to clock in more than five minutes before their starting time or more than five minutes after their scheduled reporting time.

[2] Appellant's scheduled tour was 0700 to 1550. However, he was in the habit of clocking in at 0692 and clocking out at 1542.

[3] Appellant submitted medical evidence in support of his emotional condition claim. On May 10, 2001 Dr. W. Spencer Tilley, Jr., a Board-certified internist specializing in cardiology, indicated that appellant had hypertension and chest pain aggravated by work stress. On November 11, 2002 and July 6, 2003 Dr. Jeffrey C. Hooper, an attending family practitioner, stated that appellant had an irregular heartbeat aggravated by work stress and a generalized anxiety disorder due to harassment from Ms. Nicholson regarding clock rings.

In an Equal Employment Opportunity (EEO) investigative memorandum, Ms. Nicholson stated that appellant was the only employee who was not cooperative regarding the instructions for clocking in. All other employees were receptive to the explanation that early clock rings were not permitted except for congestion at the time clock. Ms. Nicholson noted that congestion never occurred in appellant's work area because there were five clocks and only 20 employees.

Appellant filed an EEO claim alleging discrimination by management based on race, sex and prior EEO activity. In a final decision dated June 4, 2003, an EEO administrative law judge (ALJ) determined that appellant failed to meet his burden of proof to establish that the employing establishment intentionally discriminated against him. He found that the evidence showed that appellant received discipline, including letters of warning, because he refused to follow his supervisor's direct instructions regarding clocking in. The ALJ noted that, although there was evidence that other employees had signed in earlier than scheduled, there was no evidence demonstrating that any other employee refused to sign in as instructed. He found that the employing establishment had provided legitimate, nondiscriminatory reasons for the disciplinary measures applied to appellant. In a June 11, 2003 notice of final action regarding appellant's EEO claim, the employing establishment noted that the EEO ALJ found no evidence of discrimination against appellant.

On August 27, 2003 the Office rescinded its acceptance of appellant's emotional condition claim and denied the claim on the grounds that he failed to establish any compensable factor of employment.

On September 8, 2003 appellant requested an oral hearing that was held on November 22, 2005.[4] He provided records of clock rings of employees who were allowed to clock in and leave five minutes early. Appellant stated that the December 18, 2001 step 2 employing establishment decision in which the parties agreed that all employees would be treated the same regarding the five-minute leeway, established that management had erred in issuing the letter of warning to him.

By decision dated January 31, 2006, the Office affirmed the August 27, 2003 rescission decision.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[5] The Board has noted, however, that the power to annual an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[6] It is well established that once the Office accepts

[4] The delay in scheduling the hearing occurred when appellant's September 8, 2003 request for an oral hearing by the Office was interpreted as a request for an appeal by the Board. On November 3, 2003 the Board dismissed the appeal.

[5] *See Andrew Wolfgang-Masters,* 56 ECAB ___ (issued March 22, 2005); *Linda L. Newbrough,* 52 ECAB 323 (2001); *see also* 20 C.F.R. § 10.610.

[6] *Doris J. Wright,* 49 ECAB 230 (1997).

a claim, it has the burden of justifying termination or modification of compensation.[7] This holds true where the Office later decides that it has erroneously accepted a claim for compensation.[8] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[9]

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 work 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 compensable factors of employment and may not be considered.[10] If a claimant does implicate a factor of employment, the Office should then consider whether the evidence of record substantiates that factor. 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.[11] Where the matter asserted is a compensable factor of employment and the evidence of record established the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[12]

ANALYSIS

In its June 27, 2003 acceptance of appellant's emotional condition claim, the Office did not identify the compensable factors of employment. The Office focused on the medical evidence instead of determining whether the employment factors implicated by appellant arose in the performance of duty. The June 27, 2003 decision contains no analysis by the claims examiner of employment factors identified by appellant as contributing to his emotional condition. As noted, in cases involving emotional conditions, the Board has held that the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable work factors of employment. Only when a compensable factor is established does the Office analyze the medical evidence to determine whether it establishes a causal relationship between the compensable employment factor and the emotional condition.

The Board finds that the Office properly rescinded acceptance of appellant's claim for an acute reaction to stress and aggravation of hypertension because the evidence of record did not establish that his condition arose from a compensable factor of employment. In rescinding acceptance of the claim, the Office provided reasons for the rescission and properly explained

[7] *Linda L. Newbrough, supra* note 5.

[8] *Id.; Gareth D. Allen*, 48 ECAB 438 (1997).

[9] *Delphia Y. Jackson*, 55 ECAB 373 (2004); *Belinda R. Darville*, 54 ECAB 656 (2003).

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

[11] *See Charles E. McAndrews*, 55 ECAB 711 (2004).

[12] *Jeral R. Gray*, 57 ECAB ___ (Docket No. 05-1851, issued June 8, 2006).

that no compensable employment factors were factually established. Appellant attributed his emotional condition to harassment from his supervisors regarding clock rings. The record shows that he clocked in early on numerous occasions and received an official discussion and letters of warning for disregarding specific instructions from management concerning the proper time for signing in and out for work. Administrative and personnel matters, although generally related to the employee's employment, do not concern the regular or specially assigned work duties of the employee and are not covered under the Federal Employees' Compensation Act.[13] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[14] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[15]

On June 3, 2003 an ALJ found that appellant provided insufficient evidence to establish his EEO claim that the employing establishment discriminated against him in taking disciplinary action regarding his failure to follow instructions concerning clock rings. He found that management provided legitimate, nondiscriminatory reasons for the disciplinary actions (letters of warning) against appellant. The letters of warning were issued because appellant failed to follow the instructions of his supervisor regarding employing establishment scheduling considerations, not for any discriminatory reason. Appellant submitted records of clock rings for other employees to demonstrate that they did not receive any discipline for signing in and out early for work. However, Ms. Nicholson indicated that all the other employees were willing to cooperate with her instructions. In contrast, the record shows that appellant was not cooperative and failed to follow Ms. Nicholson's instructions regarding clock rings. It was for this reason that disciplinary action was taken in appellant's case. Consequently, the clock rings of other employees do not substantiate error or abuse by the employing establishment. At the hearing, appellant argued that the employing establishment's withdrawal of the August 6, 2001 letter of warning on December 18, 2001 demonstrates error or abuse. The December 18, 2001 agreement states that the parties agreed that there is a five-minute leeway for congestion at the time clock and all employees will be treated the same regarding the five-minute leeway rule. The Board has held that the mere fact that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.[16] The Board finds that there is insufficient evidence of error or abuse by the employing establishment in this administrative matter of the procedures for clocking in and out.

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's emotional condition based on the evidence of record which establishes that the employing establishment did not err or act abusively in its handling of appellant's clock rings.

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

[14] *See William H. Fortner*, 49 ECAB 324 (1998).

[15] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[16] *See Lori A. Facey*, 55 ECAB 217 (2004).

Appellant argued at the hearing that the Office failed to consider the medical evidence in rescinding its acceptance of his emotional condition claim. However, unless he alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence.[17]

CONCLUSION

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's emotional condition because the evidence did not substantiate a compensable work factor.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2006 is affirmed.

Issued: February 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[17] *See Barbara J. Latham*, 53 ECAB 316 (2002).