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

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| **J.D., Appellant** | ) | |
| **and** | ) | **Docket No. 09-818** |
| | ) | **Issued: August 10, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer** | ) | |

*Appearances:*
*Ron Watson*, for the appellant
*No appearance*, for the Director

Oral Argument May 12, 2009

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On February 4, 2009 appellant filed a timely appeal from an April 28, 2008 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issue of this case.

### ***ISSUE***

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

### ***FACTUAL HISTORY***

On May 13, 1975 appellant, then a 41-year-old city carrier, filed an occupational disease claim, alleging that employment factors caused stress. He stopped work on May 1, 1975 and returned on June 16, 1975. On December 3, 1975 the Office accepted that he sustained an employment-related depressive reaction with anxiety. Appellant sustained a recurrence of

disability in 1979 and came under the care of Dr. James Petroske, a Board-certified psychiatrist.[1] This claim was adjudicated under file number xxxxxx578 and he received compensation for the periods May 1 to July 24, 1975 and November 16 to 30, 1979.

On May 3, 1984 appellant filed a second occupational disease claim, alleging that work factors in 1983 and 1984 caused dysthymic and generalized anxiety disorders.[2] He stopped work on January 13, 1984 and has not returned. Appellant was hospitalized from January 12 to February 9, 1984. On March 15, 1984 he applied for disability retirement. The employing establishment submitted a May 16, 1984 statement in which David V. Ellis, station manager, rebutted appellant's contentions, together with additional statements describing events beginning in November 1983.

Appellant submitted statements from union representatives, his wife and postal patrons regarding events from October 1983 to January 1984, grievance information and medical evidence. In a March 27, 1984 report, Dr. Petroske advised that appellant could not work because he would become apprehensive and distraught and would not be able to function. This claim was adjudicated under file number xxxxxx405 and became the master claim.

On March 19, 1985 the Office prepared a statement of accepted facts and referred appellant to Dr. Thomas T. Bennett, a Board-certified psychiatrist, for a second opinion evaluation. In a May 6, 1985 report, Dr. Bennett diagnosed anxiety disorder, dysthymic disorder, atypical personality disorder with latent or borderline psychotic elements and probable contributory organic brain syndrome of a mild degree. He advised that appellant's psychiatric problems were not directly caused by his employment, but that he was very vulnerable to stress. As a result, appellant's preexisting emotional condition was materially aggravated by his employment. Dr. Bennett concluded that he was permanently disabled from his former employment.

In a May 24, 1985 report, Dr. Carrie E. Sylvester, Board-certified in psychiatry and an Office consultant, reviewed the medical record. She diagnosed atypical depression with anxiety, panic and paranoia; a mixed, atypical, personality disorder with obsessive compulsive and narcissistic features; and status-post coronary bypass surgery with possible mild organic brain syndrome. Dr. Sylvester advised that appellant's depression was either precipitated or aggravated by conditions of his employment and that he could not return to full-time employment. Appellant could possibly be retrained for other work with shorter hours and less interpersonal stress. Dr. Sylvester recommended continued psychotherapy and medication.

[1] On August 2, 1978 appellant underwent coronary artery bypass surgery and on November 20, 1979, filed a claim that employment factors aggravated his heart disease. The record does not contain a final decision on this issue. Appellant also filed additional claims for orthopedic conditions dating from May 2, 1959 to October 22, 1976. By decision dated November 30, 1988, the Office found that appellant's claimed eye condition was not causally related to medications taken for his accepted emotional condition.

[2] Appellant initially filed a recurrence claim and by letter dated May 1, 1984, the Office instructed him to file a Form CA-2 because he was claiming new factors.

On May 3, 1985 the Office accepted that appellant sustained employment-related atypical depression with anxiety, panic and paranoia. Appellant was placed on the periodic rolls. In August 1998, he came under the care of Dr. Robert Gold, a Board-certified psychiatrist.

On August 17, 2005 the Office prepared a statement of accepted facts. It found that there were no compensable employment factors. By letter dated September 2, 2005, the Office issued a notice of proposed rescission. It found that the previous statement of accepted facts had no discussion of the alleged incidents found to arise out of employment. Appellant's case was therefore reexamined to determine if his emotional condition was related to compensable factors of employment. It concluded that there were no compensable employment factors.

Appellant disagreed with the proposed rescission and submitted an August 25, 2005 report from Dr. Gold.

By decision dated November 4, 2005, the Office finalized the rescission, finding that his medical and wage-loss benefits were terminated effective November 3, 2005.

On November 23, 2005 appellant requested a hearing, that was held on February 14, 2007. He submitted additional medical evidence. In a March 9, 2007 letter, the employing establishment noted its agreement with the rescission. By decision dated May 3, 2007, an Office hearing representative affirmed the November 4, 2005 decision.

On January 25, 2008 appellant, through his representative, requested reconsideration, arguing that he was forced to work beyond an eight-hour medical restriction (for his heart condition) and that the Office failed to assist him in necessary development of his claim. Evidence submitted included a January 23, 2008 letter in which Robert N. Kolln, a retired union steward, noted that appellant was required to work overtime in 1983 and 1984.[3] By decision dated April 28, 2008, the Office denied modification of the prior decision.

## ***LEGAL PRECEDENT***

Section 8128 of the Federal Employees' Compensation Act[4] provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.[5] 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. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim

[3] Appellant also submitted evidence previously of record.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8128.

for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[6]

## ***ANALYSIS***

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's emotional condition claim. In its September 2, 2005 notice of proposed rescission, the Office noted that the claim was accepted without a finding regarding which of the alleged incidents arose in the course of employment. It then found that appellant had not established a compensable factor of employment. The Board disagrees.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[7] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[8]

Appellant asserted that a number of factors caused his emotional condition, including that in 1975 he was designated to participate in the Kolomo Plan, a time and motion study and that as a result, 53 minutes were added to his route. The Board finds that his participation in the study and the resultant additional work pertains to the regular and specially assigned duties of his employment. As such, this is a compensable factor of employment under *Cutler*.[9]

Regarding appellant's additional allegations, the Board notes that several involve disputes and discussions or verbal altercations with supervisory personnel. A verbal altercation, when sufficiently detailed by the claimant and supported by the evidence, may constitute a compensable employment factor.[10] This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[11] Furthermore, the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act. Absent evidence establishing error or abuse, a claimant's disagreement or dislike of such a managerial action is not a compensable factor of employment.[12] Perceptions of unfair treatment are not enough to establish error or abuse. A claimant must submit real proof that management did in fact commit error or abuse.[13] The record contains a number of statements regarding events that occurred in

[6] *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[7] 28 ECAB 125 (1976).

[8] *See Robert W. Johns*, 51 ECAB 137 (1999).

[9] *See supra* note 7.

[10] *C.S.*, 58 ECAB ____ (Docket No. 06-1583, issued November 6, 2006).

[11] *J.C.*, 58 ECAB ____ (Docket No. 07-530, issued July 9, 2007).

[12] *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[13] *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006).

the fall of 1983. The Board, however, finds that the statements are too general in nature to support that appellant was treated unfairly or to establish error or abuse on the part of employing establishment management. There also is no evidence here to substantiate appellant's allegations regarding the discussion he had with management on January 15, 1984, when he stopped work, that he was treated unfairly at any other time. He therefore failed to establish a compensable factor of employment regarding these allegations.

Appellant also alleged that he was improperly given a letter of warning and submitted a grievance settlement that voided the letter of warning. Grievances and Equal Employment Opportunity complaints by themselves do not establish that workplace harassment or unfair treatment occurred. 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. 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.[14] Although the record supports that the grievance settlement directed a remedial action, there was no finding of managerial error and the Board finds that this does not rise to the level of error contemplated under the Act such as to constitute a compensable factor of employment.[15] Appellant did not establish an employment factor in this regard.[16]

Regarding appellant's contention that the employing establishment refused to accommodate his nonwork-related heart condition, administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[17] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[18] Although appellant alleged that the employing establishment did not accommodate this nonwork-related condition, the record shows that employing establishment management asked him to furnish specific medical information regarding his ability to work. Allegations that the employing establishment engaged in unfair disciplinary actions, improperly handled work accommodation requests and mishandled or ignored employee inquiries about workload issues relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall

[14] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

[15] *Joe M. Hagewood*, 56 ECAB 479 (2005).

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

[17] *Charles D. Edwards*, 55 ECAB 258 (2004).

[18] *Kim Nguyen*, 53 ECAB 127 (2001).

within the coverage of the Act.[19] In this case there is insufficient evidence of error or abuse in the record regarding this administrative or personnel matters to support appellant's contention.[20]

Finally, appellant contended that he was forced to work overtime. The Board has held that overwork may be a compensable factor of employment.[21] As with all allegations, overwork must be established on a factual basis to be a compensable employment factor.[22] In a January 23, 2008 statement, Robert Kolln, a retired union steward, alleged that appellant worked overtime in 1983 and 1984. The only direct evidence submitted, however, is a clock rings report for the second pay period in 1984. This shows that appellant worked 23.06 hours in week one and did not work in week two. There is therefore insufficient evidence to establish that he was overworked.

## ***CONCLUSION***

The Board finds that the Office did not meet its burden of proof to rescind acceptance of his emotional condition claim.

[19] *Robert Breeden*, 57 ECAB 622 (2006).

[20] *M.D.*, 59 ECAB ____ (Docket No. 07-908, issued November 19, 2007).

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

[22] *Id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 28, 2008 be reversed.

Issued: August 10, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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