United States Department of Labor
Employees' Compensation Appeals Board

R.V., Appellant	)	
and	)	**Docket No. 09-1131**
	)	**Issued: March 16, 2010**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Seattle, WA, Employer	)	

Appearances:
David Dillard, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 24, 2009 appellant filed a timely appeal from the November 3, 2008 decision of the Office of Workers' Compensation Programs that denied his claim and from a March 6, 2009 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the 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 duty; and (2) whether the Office properly denied his request for reconsiderations without further merit review under section 8128(a).

FACTUAL HISTORY

On May 8, 2008 appellant, then a 50-year-old mail handler, filed an occupational disease claim alleging that he developed depression and anxiety due to stress at work. He first became aware of his condition on May 19, 2006. Appellant did not stop work. On May 12, 2008 the Office requested a detailed description of the employment factors to which he attributed his claimed illness.

Appellant responded that his emotional condition began in May 2006 when Gary Huffer and John Ardis, coworkers, hung signs on trailers that said "Bob Sucks." Due to continuing problems with these coworkers, appellant bid out of the work section. On his new section, however, he became the object of harassment and verbal abuse by Jim Fermo, a coworker and friend of Mr. Huffer and Mr. Ardis. On March 24, 2008 Mr. Ardis and Don Brady, another coworker, yelled and cursed at him when he was driving a forklift. On March 25, 2008 Mr. Brady called him a loser and stated "watch where you [a]re going you f---ing moron." He alleged that on April 8 and 21, May 6 and 8, 2008, Mr. Fermo had made sounds like a crying baby and told appellant to move his f---ing forklift. Appellant alleged that on April 23, 2008 Mr. Fermo also called him "numb nuts" and "a--hole."

Appellant related that on May 8, 2007 he was in the employee parking lot backing up to park. Mr. Fermo drove behind appellant, honking his horn. After appellant clocked in, Mr. Fermo told him that he had better watch out when backing up and called him a "mother f--ker" and "f--king idiot." He suggested that they speak to the manager of distribution operations and Mr. Fermo again started verbally accosting him, calling him a "f--king pussy." Appellant told Mr. Fermo that he was not a supervisor and he went to work, subsequently notifying his supervisor of the incident.

On May 9, 2007 Mr. Fermo stated that he was driving in the employee parking lot on May 8, 2007 when he attempted to pass behind a car. The back up lights came on and the car started to move towards Mr. Fermo's truck. He honked his horn and saw that the driver was appellant. After clocking in, Mr. Fermo stated that he yelled at appellant "that he drives his car just like his forklift." He stated that appellant told him, "well, if you weren't doing 90 miles an hour in the parking lot you wouldn't have come so close to hitting me." Mr. Fermo responded: "you [a]re the one who came close to hitting me, you dumb f--k." He related that appellant became upset and responded: "What gives you the right, you're not my mother, or my f--king supervisor, you're a f--king nobody." Appellant turned and walked away, at which time Mr. Fermo stated, "[You [a]re not going to cry, are you." Mr. Fermo stated that he laughed and went to work.

The record reflects that the employing establishment investigated the incident in the parking lot. In a May 15, 2007 investigative interview, appellant noted that on May 8, 2007 Mr. Fermo drove up behind him while in the parking lot and honked his horn. Mr. Fermo subsequently confronted appellant and called him a stupid "mother f--ker" and "f--king moron." Appellant contended that Mr. Fermo routinely created stress through threatening language that made it difficult for him to come to work. The May 18, 2007 memorandum of Audrey Lyn M. Baldivino, supervisor of distribution operations, noted that both employees had used obscene language to each other. She noted that both employees had ongoing problems and she advised them as to postal policies concerning violence in the workplace. Both employees were given an official discussion for misconduct and given an offer to seek the Employee Assistance Program (EAP).

Appellant subsequently alleged additional verbal abuse and threats by Mr. Fermo while working in the distribution area on September 25, 28, 29 and October 23, 2007. He submitted a report of threat/assault on October 23, 2007 alleging that Mr. Fermo called him a "f--king idiot." The report noted that Mr. Fermo denied the obscenity but acknowledged referring to appellant as

an idiot twice.[1] In a December 14, 2007 investigative interview, Mr. Hooker noted that Mr. Fermo denied using obscenity towards appellant but contended that his remarks were intended as fitting putdowns of appellant.

In a May 28, 2008 statement, Mr. Hooker noted that appellant had voiced complaints about coworkers for years and had problems working with others. Although appellant alleged that he did not want to go to work or be in the same room as Mr. Fermo; he refused a reassignment to another section. Mr. Hooker advised that management had investigated and followed up with discipline as appropriate for each complaint filed by appellant.

On May 20, 2008 while appellant was talking to a coworker, Mr. Fermo approached them on a forklift and yelled "get out of my way, you [a]re blocking the way, you almost backed into me, watch what you [a]re doing." He stated that he reported the incidents to his supervisors, including Michael A. Hooker, supervisor of district operations.

In medical records dated February 26, 1998 to March 9, 2006, Dr. Gary Henriksen, a Board-certified internist, noted that appellant was treated for chronic anxiety and depressive disorder. In an April 11, 2008 report, Dr. Daniel M. Banken, Ph.D., a clinical psychologist, advised that he had treated appellant since May 2006 for depression. He diagnosed major depressive disorder.

In a November 3, 2008 decision, the Office denied appellant's claim, finding that his emotional condition did not arise in the performance of duty. It found that he failed to provide sufficient evidence to substantiate his allegations of verbal abuse or a hostile work environment.

On December 12, 2008 appellant requested reconsideration. He submitted a March 18, 2008 Equal Employment Opportunity settlement agreement withdrawing his complaint of discrimination. It was stipulated that management would have a general standup with supervisors on how to conduct an official discussion; management would arrange for a speaker from the district to discuss harassment and violence in the workplace; appellant was paid $3,000.00 for medical co-pays and time off.

Appellant submitted a July 22, 2008 witness statement from Dave Dillard, a coworker and union steward, who noted that, on July 21, 2008, appellant approached him in the cafeteria to discuss a grievance settlement and Mr. Brady proceeded to sift through the plastic recycling bin taunting appellant. On December 5, 2008 Mr. Dillard noted sitting in the cafeteria when appellant approached and heard Mr. Fermo stated "duh-ta-doh."

In a December 5, 2008 letter to the Office, Gene Rezac, local union branch president, addressed the situation at work. He had been approached in the past by appellant concerning inappropriate behavior by certain coworkers. Mr. Rezac's initial advice was that he should just ignore them; however, he directed appellant to report such instances to management. In early 2006, he spoke with Mr. Ardis and Mr. Huffer, who admitted that some of appellant's claims

[1] An October 24, 2007 questionnaire from Carlos Mosquera, a coworker, noted being verbally abused three times by Mr. Fermo in 2006 and 2007. On October 24, 2007 Sue Frost, a coworker, noted Mr. Fermo was intimidating and made inappropriate remarks. An undated note from appellant's wife stated that she received an undated anonymous letter advising that appellant was having an affair.

were true "but they also professed their belief in the righteousness of their actions." Mr. Rezac cautioned the men that their beliefs did not conform to postal policy. He addressed the signs placed around appellant's immediate work area and from roofs of trailers being loaded in his work section. Subsequently, appellant attempted to remove himself from his antagonists by taking another job assignment; however, "there is indeed an anit-[appellant] clique of mail handlers here whose members are present in several work sections including his new one." Mr. Rezac stated:

> "[Appellant's] problems escalated when he began working in the same section as Mr. Fermo. I did have further conversations with Mr. Fermo about acting out toward [appellant] but he was entirely too brazen and forthright with me about his dislike for [appellant]. Mr. Fermo has personally described to me in some detail and with obvious satisfaction his recollection of several of his attacks on [appellant]. I have continually chastised him for this and instructed him to refer his concerns to a supervisor rather than verbally harangue another employee. At one point this year, he even admitted that he had called [appellant] a 'f--king idiot' for yielding to traffic on his forklift and had called him a 'f--king moron' for getting too close to his own forklift. Mr. Fermo also stated that he did n[o]t think there was anything wrong with what he said since he felt [appellant] was dangerous in the work environment."

In a November 11, 2008 statement, Alan Williams, a coworker, noted working with appellant from 1999 to 2004. He observed numerous conflicts between appellant and Mr. Huffer and Mr. Ardis without resolution by management. Appellant submitted a statement from Walter A. Menzl, a coworker, dated December 10, 2008. He witnessed Mr. Fermo drive by on a forklift and make derogatory remarks to appellant.

In a March 6, 2009 decision, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

To establish an emotional condition in the performance of duty, a claimant must submit: (1) medical evidence establishing an emotional or psychiatric disorder; (2) factual evidence identifying those employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2]

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*,[3] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4]

[2] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

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 under the Act.[5] When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[6] 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 under the Act. 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 Act. On the other hand, the disability is not covered where it results from such factors 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.[7]

The Board has recognized the compensability of verbal altercation or abuse when sufficiently detailed by a claimant and supported by the evidence of record. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[8] In determining whether such instances constitute harassment under the Act, the Board will review the evidence to determine whether it establishes a persistent disturbance, torment, persecution or mistreatment of the claimant by coworkers or supervisors.[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 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.[10] 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.[11]

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[5] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[6] *Lillian Cutler*, *supra* note 3.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

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

[9] *See Ronad K. Jablanski*, 55 ECAB 616 (2005).

[10] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[11] *Id.*

ANALYSIS -- ISSUE 1

The Office denied appellant's claim, finding that appellant did not submit sufficient evidence to substantiate his allegations of harassment and verbal abuse by certain coworkers. Of note, the claims examiner reviewed the evidence pertaining to the May 8, 2007 incident and found that appellant's account differed from that of Mr. Fermo, such that neither account could be confirmed as having occurred. Similarly, a number of appellant's other allegations were rejected as they could not be confirmed by the evidence of record. The Board finds that the case is not in posture for decision as the Office failed to make sufficient factual findings based on the evidence of record.

Appellant submitted factual evidence pertaining to his allegations of stress from actions he characterized as harassment and verbal abuse by coworkers and delineated with specificity certain incidents to which he attributed his emotional condition. His allegations in this case cannot be characterized as vague or merely of general difficulties arising in his workplace.[12] Appellant's allegations pertain to repeated incidents involving primarily three coworkers at the employing establishment on different work shifts. It is obvious from the statements of the supervisors that certain incidents are confirmed as having taken place. The May 18, 2007 memorandum of Ms. Baldivino supports that the employing establishment investigated the matter and that certain action was taken to correct the problem existing between the employees. It is not sufficient for the claims examiner to simply note that Mr. Fermo's account is in disagreement with that of appellant; therefore, the incident could not be confirmed. For this reason, the Board will remand the case to the Office for further development on the issue of whether appellant established a compensable employment factor with regard to his allegations.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[13] the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[14] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the [Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

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

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[15]

ANALYSIS -- ISSUE 2

The Office's March 6, 2009 decision, denied appellant's reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision. The Board finds that the Office abused its discretion in not reopening appellant's claim for further merit review.

As discussed, the November 3, 2008 Office decision denied appellant's claim finding that he failed to submit sufficient evidence to establish his allegations as factual. Appellant's December 12, 2008 reconsideration request was accompanied by evidence relevant and pertinent to his allegations of harassment and verbal abuse by certain coworkers and an inadequate response to his complaints by management.

The March 18, 2008 Equal Employment Opportunity settlement agreement withdrawing appellant's complaint of discrimination is relevant new evidence. It was stipulated that management would have a general standup with supervisors on how to conduct an official discussion, management would arrange for a speaker from the district to discuss harassment and violence in the workplace, and appellant was paid $3,000.00 for medical co-pays and time off. This evidence is relevant to the issue of whether management properly responded to his complaints of harassment by coworkers.

Appellant submitted statements from additional coworkers and union representatives. This evidence is relevant to the issue of whether he supported his allegations of verbal abuse and harassment during the period 2006 to 2008. The local union branch president addressed the situation at work and provided a description of his conversations with appellant, Mr. Ardis, Mr. Huffer and Mr. Fermo. This is relevant to the issue of verbal abuse and harassment. For example, Mr. Rezac noted that Mr. Fermo acknowledged calling appellant a "f--king idiot;" while Mr. Fermo had denied doing so during an investigation of the matter held in October 2007. Such evidence goes to the credibility of the statements of record and the veracity of the individuals involved. Such evidence cures some of the deficiencies noted by the Office in the initial denial of the claim. The January 10, 2008 statement from appellant's supervisor Mr. Hooker, described a due process investigation of Mr. Fermo for mistreatment, derogatory remarks and insults. Mr. Fermo admitted making derogatory remarks to appellant while well aware of the agency's policy against workplace violence.

This evidence is relevant to whether appellant has substantiated his allegations of harassment and verbal abuse and was not previously considered by the Office in denying the claim. The requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[16] The Board finds that the Office improperly refused to reopen appellant's claim for

[15] *Id.*

[16] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

further review on its merits under 5 U.S.C. § 8128. Consequently, the case will be remanded for merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.[17]

CONCLUSION

The Board finds that the case is not in posture for decision on whether appellant established an emotional condition arising from his federal employment. The Board finds that the Office abused its discretion by denying his request for reconsideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2009 and November 3, 2008 decisions of the Office be set aside. The case is remanded for further development in accordance with this decision.

Issued: March 16, 2010
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

[17] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999), *see also Claudio Vazquez*, 52 ECAB 496 (2001).