

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

GARY E. KRUGER, Appellant

and

**U.S. POSTAL SERVICE, CAPE CORAL POST
OFFICE, Cape Coral, FL, Employer**

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**Docket No. 05-1110
Issued: September 30, 2005**

Appearances:
Gary E. Kruger, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 21, 2005 appellant filed a timely appeal from a March 1, 2005 merit decision of the Office of Workers' Compensation Programs' hearing representative which affirmed an April 9, 2003 merit decision, finding that he did not sustain an emotional condition while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On April 9, 2002 appellant, then a 51-year-old city letter carrier/modified distribution clerk, filed an occupational disease claim alleging that on February 9, 2002 he first realized that his stress was caused by factors of his federal employment. He stated that he had filed five workers' compensation claims and that every time he returned to work, the employing

establishment kept assigning him to jobs that did not conform to his restrictions. Appellant stopped work on November 24, 2001.

Appellant submitted an April 25, 2002 letter from an Office referral nurse, who requested that the Office assist her in the handling of appellant's claim as he had refused to return to work due to stress and his disagreement with the findings of a recent orthopedic evaluation which addressed his injuries. Appellant also submitted medical reports regarding a left shoulder injury and surgery and the results of a preemployment examination performed on October 27, 1987. An April 9, 2002 report from Judith S. Sims, Ph.D., a clinical psychologist, found that he appeared to be suffering from stress-induced agitated depression. Unsigned treatment notes dated January 30 and November 30, 1987 contained the typed name of Dr. Harold A. Westervelt, a Board-certified orthopedic surgeon, and addressed appellant's left shoulder and back injuries and his ability to work. His November 30, 1987 prescription found that he had a healed vertebral compression in 1976 and that he was fit for full-duty work.

In a March 19, 2002 narrative statement, appellant alleged that his stress began two years prior when he had to obtain approval for surgery related to an employment-related wrist injury and experienced problems in obtaining reimbursement for the surgery. He addressed four other work-related injuries he sustained which included two surgeries on the left wrist, surgery on both shoulders and a left ankle and right elbow injury. Appellant experienced problems with the Office's handling of the claims. He stated that not only was he stressed by his injuries but also by not being able to do what he was able to do two years ago and not working because the employing establishment offered him the same jobs he held on November 24, 2001.

The employing establishment controverted the claim, noting that appellant was going through a divorce, had financial concerns resulting from the divorce and was not currently receiving any form of compensation.

Appellant submitted the employing establishment's November 6, 2001 offer for a modified distribution clerk position which he accepted on November 9, 2001. The position required the delivery of express mail, processing of return to sender (RTS) mail, answering telephones and other duties as assigned by management within his current restrictions. The physical requirements included sitting and walking up to 4 hours continuously, standing up to 3 hours continuously, intermittent lifting and carrying up to 10 pounds, bending, squatting and reaching above the shoulders 8 hours a day and simple grasping, pushing, pulling and fine manipulation for 8 hours a day. Appellant indicated that his performance of the modified job resulted in a lot of pain in the left wrist. In addition, he submitted a copy of his job application for the position of clerk/carrier at the employing establishment.

By letter dated July 22, 2002, the Office advised appellant about the factual and medical evidence needed to establish his claim. He submitted the employing establishment's January 26, 2002 offer for a modified distribution clerk position which he rejected on February 2, 2002. Appellant contended that the job offer was the same as the prior offer. He further stated that it referenced the wrong Office claim number and it should have been based on his ankle injury not his shoulder injury. Appellant indicated that he had already tried to perform the offered job and that he left this position on November 24, 2001 because it aggravated three other injuries. He believed that the offered position did not address all of his injuries and limitations. Appellant

stated that he could not deliver express mail because of the amount of walking and driving required which bothered his ankle, wrist and elbow. He also stated that processing RTS mail bothered his wrist and elbow and he could not walk continuously up to four hours as his treating physician limited him to standing for four hours only. Appellant contended that the Office failed to respond to the information he provided regarding the similarity between the current job offer and the previous one and the reasons why he left the previous position. He also alleged that the employing establishment mishandled his claims. Appellant noted that his 1997 divorce was an open and shut case.

Appellant submitted a December 19, 2002 duty status report of a physician whose signature is illegible which indicated that his unidentified diagnosis was related to his employment-related injuries. It found that he could perform sedentary work with restrictions which included lifting and carrying up to 10 pounds continuously, continuous sitting up to 5 hours a day, intermittent standing from 1 to 2 hours a day, continuous walking from 1 to 2 hours a day, no climbing, kneeling, pulling or pushing and bending, stooping and twisting 1 to 2 hours a day. Appellant was allowed to perform simple grasping intermittently, reach above the shoulder and drive a vehicle eight hours a day. He was not allowed to be exposed to temperatures below 30 degrees and above 98 degrees.

In letters dated January 13 and March 19, 2003, appellant again alleged that the employing establishment's January 26, 2002 job offer contained tasks that were not covered under his functional capacity evaluation and his attending physician's restrictions. On March 26, 2003 he alleged that he was sitting in an armless chair and resting his arm on the seat of some type of bar when a supervisor came up from behind him and pulled the bar out from under his arm without saying a word. He related that an hour later, he was called a "loser prick" by the acting manager of distribution operations.

By decision dated April 9, 2003, the Office found that appellant failed to submit evidence establishing that his emotional condition arose from a compensable factor of his employment. He disagreed with the Office's decision and requested an oral hearing before an Office hearing representative by letter dated April 22, 2003.

Appellant submitted documents regarding the filing of his EEO grievance his selection of mediation to resolve the grievance. He also submitted a section of the employing establishment's employee and labor relations manual regarding return to work responsibility and alleged that the employing establishment violated a provision as it failed to describe the specific physical requirements of the position in its job offer. He also submitted an October 14, 2004 letter from Dr. John F. Prater, a psychiatrist, in which he found that appellant, suffered from work-related stress and depression and that he had completely recovered from his conditions.

In a March 1, 2005 decision, a hearing representative affirmed the April 9, 2003 decision. The hearing representative found that appellant failed to establish that his emotional condition was caused by compensable factors of his federal employment.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.¹ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his 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 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.

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.⁷ 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

¹ *Pamela R. Rice*, 38 ECAB 838 (1987).

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

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

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

⁶ *Lillian Cutler*, *supra* note 3.

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

Where the disability results from an employee's emotional reaction to his or her 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.⁹ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.¹⁰ 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.¹¹

ANALYSIS

Appellant primarily attributed his emotional condition to the employing establishment's offer for the modified distribution clerk position which he alleged did not meet the physical requirements set forth by his attending physician. While being required to work beyond one's physical limitations may constitute a compensable employment factor, this allegation must be substantiated by probative and reliable evidence.¹² Contrary to appellant's contention, the employing establishment's job offer specifically described the physical requirements of the modified distribution clerk position. The physical requirements included, among other things, walking up to four hours a day and standing up to three hours a day. Appellant submitted a report from a physician whose signature is illegible which found that he could only stand and walk from one to two hours a day. This report, however, is insufficient to establish his allegation because it is not clear that it is from a physician.¹³ As the report lacks proper identification, the Board finds that it does not constitute probative medical evidence. The record does not contain any probative evidence establishing that appellant had specific limitations that were not accommodated by the employing establishment in its offer for the modified distribution clerk position. Accordingly, appellant has not substantiated his allegation of work outside his limitations.

Appellant further attributed his emotional condition to being harassed by an employing establishment supervisor who pulled a bar from where his arm was resting and a manager of distribution operations, who following this alleged incident, called him a "loser prick." Harassment and verbal abuse when shown to have occurred is considered a compensable factor

⁸ *Id.*

⁹ *Lillian Cutler*, *supra* note 3.

¹⁰ *Michael L. Malone*, 46 ECAB 957 (1995).

¹¹ *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

¹² *Diane C. Bernard*, 45 ECAB 223 (1993); *Lizzie McCray*, 36 ECAB 419, 421 (1985).

¹³ *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988). (Reports not signed by a physician lack probative value).

of employment. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.¹⁴ Appellant did not identify the supervisor or manager of distribution operations who allegedly harassed him and the date of the alleged harassment. Further, he did not submit any evidence to substantiate the alleged instances of harassment, such as a witness statement. As appellant has the burden of establishing a factual basis for his allegations, he has not met this burden of proof in this case where the allegations in question are not supported by specific, reliable, probative and substantial evidence. Accordingly, the Board finds that these allegations, therefore, cannot be considered to have occurred as alleged and are, therefore, not compensable factors of employment since he has not established a factual basis for them.

Appellant's frustration with the processing of his claims by the Office and employing establishment¹⁵ and the filing of an EEO grievance regarding the alleged physical assault and name calling incidents involve an administrative function of the employer and not to the employee's regular or specially assigned work duties.¹⁶ As noted above, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act absent error or abuse. Appellant, however, has failed to establish that the Office and employing establishment committed error or abuse in handling the above noted administrative matters. He did not submit any evidence establishing that the Office or the employing establishment committed error or abuse in processing his claims. Regarding the EEO grievance, appellant has not submitted any evidence, such as a decision finding fault on the part of the employing establishment. Without substantiated evidence of error or abuse on the part of the Office and employing establishment in handling the above administrative matters, he has failed to establish a compensable factor of employment under the Act.

Appellant's frustration with being required to prepay medical services does not relate to his regular or specially assigned work duties and, thus, does not constitute a compensable employment factor under the Act.

¹⁴ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

¹⁵ *Janet L. Terry*, 53 ECAB 570 (2002).

¹⁶ *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

CONCLUSION

As appellant has not identified any compensable factors of his employment, the Board finds that he has failed to establish that he sustained an emotional condition while in the performance of duty.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁷ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of his emotional condition, the medical evidence relating his emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB __ (Docket No. 02-25, issued July 2, 2003).