United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 07-1253**
	)	**Issued: November 23, 2007**
U.S. POSTAL SERVICE, OFFICE OF THE INSPECTOR GENERAL, NEW YORK FIELD OFFICE, Hoboken, NJ, Employer	)	

Appearances:
James K. Haney, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 5, 2007 appellant filed an appeal of April 26, 2006 and March 2, 2007 decisions of the Office of Workers' Compensation Programs denying his occupational disease claim. The March 2, 2007 decision also denied his request for subpoenas. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established that he sustained an emotional condition in the performance of duty. On appeal, appellant asserts that the Office hearing representative abused his discretion by allotting only one hour for the oral hearing, preventing appellant from calling several witnesses. He also asserts that he did not have 30 days notice of the time and location of the December 21, 2006 oral hearing as the November 20, 2006 notice was not mailed until November 28, 2006 and not received by him until December 1, 2006.

FACTUAL HISTORY

On August 3, 2005 appellant, then a 51-year-old special agent and law enforcement officer, filed an occupational disease claim (Form CA-2) claiming that he sustained anxiety, depression and insomnia in the performance of duty due to work factors from April 28, 2004 to July 12, 2005.[1] He attributed his condition to working under new management beginning in April 2004. Appellant alleged that he was overworked as Debra Alexander, his supervisor, asked him to work several cases in addition to a major fraud investigation. When he chose to allocate nearly all of his time to the fraud case, Ms. Alexander criticized his case management in an April 15, 2005 mid-year review. Appellant believed that being asked to work a regular case load signified a lack of supervisory support for his work on the fraud case. He also felt that Ms. Alexander and Jane Hughes, his second line supervisor, were not enthusiastic about the guilty plea he obtained in the fraud case on June 8, 2005. Appellant asserted that, on July 11, 2005, Ms. Alexander harassed him by sending him an e-mail and speaking with him regarding whether he could document additional monetary fraud in the case. He alleged that management wanted him to fabricate a larger dollar amount. Appellant stopped work and sought medical treatment on July 12, 2005.[2]

In an August 16, 2005 statement, Ms. Hughes explained that her lack of enthusiasm regarding the guilty plea stemmed from a press release, prepared by another agency and not involving appellant. She stated that the July 2005 discussions to ascertain the amount of the fraud were a normal part of case development. Regarding appellant's allegations of overwork, Ms. Hughes explained that agents were required to work on multiple cases. The average case load was 17 cases. As of September 28, 2004, appellant had two open cases in addition to the fraud matter. As of December 10, 2004, he had five cases but worked only on the fraud case. The large majority of cases assigned in April 2005 were immediately placed in closed-pending status, requiring no further action. After an agent left in May 2005, appellant was assigned five simple cases. As of July 11, 2005, he had 10 open cases, one of which could have been closed immediately. In an August 16, 2005 e-mail, Ms. Alexander asserted that she did not set appellant up for a bad year-end review.

In a September 29, 2005 letter, the Office advised appellant of the additional factual and medical evidence needed to establish his claim. The Office requested that appellant submit a detailed description of the employment factors that he believed caused or contributed to his condition.

In an October 18, 2005 statement, appellant asserted that in her initial October 2003 staff meeting, Ms. Hughes stated that she realized her management style would be different and that "if any of you do n[o]t like it here you can quit and find another job, and I w[ill] n[o]t take it

[1] On the claim form, appellant stated that he first became aware of his condition on April 28, 2004 and first related it to work factors on July 12, 2005. His statements detail work events and his reactions to them occurring from March 2004 through July 12, 2005. The Office adjudicated identified work incidents occurring from early March 2004 through July 12, 2005.

[2] In an August 16, 2005 statement, Todd J. Kowalski, one of appellant's coworkers, noted that appellant felt stressed while working on the fraud investigation.

personally." He experienced stress regarding his job security as he could not retire for four more years.[3] Appellant acknowledged that many cases assigned to him April 2005 were soon closed or required no further action. He asserted that Ms. Hughes and Ms. Alexander undermined his authority in the fraud case by assigning him additional cases and by deferring to postal managers. Appellant stated that he did not wish to work on these "low potential" cases as he was overworked and had to use a computerized database system. He was dismayed that others viewed the fraud case as only one case among many others. Appellant contended that he should have received a superior performance review.

In a March 7, 2006 e-mail, Ms. Alexander stated that in April 2004, appellant had only one other open case in addition to the fraud investigation. She discussed the dollar loss with appellant in July 2005 only to clarify the amount as his previous statements on the matter were equivocal. Ms. Alexander needed to resolve these uncertainties to prepare a case report for her superiors. At no time did she request that appellant fabricate evidence.[4]

By decision dated April 27, 2006, the Office denied appellant's emotional condition claim on the grounds that fact of injury was not established. The Office found that appellant failed to establish any compensable factors of employment as he did not establish his allegations of harassment and overwork as factual.

In a May 8, 2006 letter, appellant requested an oral hearing. In an August 14, 2006 letter, appellant's attorney submitted a list of possible witnesses.

Appellant returned to work on September 11, 2006 after being released by Dr. Richard M. Sostowski, an attending Board-certified psychiatrist.

In an October 12, 2006 letter, the Office advised counsel that, due to the large number of hearings to be held, no more than one hour would be allotted for the oral hearing. The Office noted that it was unlikely that there would be sufficient time to take testimony from 11 witnesses. The Office suggested that appellant submit written witness statements and medical reports. In a November 20, 2006 letter, the Office advised appellant's attorney that the hearing would be held on December 21, 2006.

In a December 5, 2006 letter, appellant's attorney requested that the Office issue subpoenas for Ms. Alexander, Ms. Hughes, Eugene Rear, retired supervisor, Michael Bentivigna and Reijo Finnila, coworkers, and Edward Sinning, postal manager. Appellant also submitted case tracking sheets and activity logs from April 14 to July 1, 2005 showing that he was assigned 10 cases in April 2005, 7 of which appear to have been closed within 60 days with no or little further action. He also submitted July 10 and 11, 2005 e-mails between himself, Ms. Hughes and another agent regarding increasing the dollar amount of loss in the fraud case. Appellant explained that there was "insufficient proof to establish a larger amount." He also submitted a copy of his April 15, 2005 performance review, stating that he was a reliable worker but should

[3] Appellant reiterated these contentions in January 25 and March 13, 2006 letters.

[4] Appellant also submitted medical evidence, including psychiatric reports. The employing establishment submitted a March 20, 2006 fitness-for-duty examination report.

improve his timeliness and case management skills as he did little or no work on cases other than the fraud investigation. Appellant also submitted medical evidence.

At the hearing, appellant newly alleged that in approximately March 2004, he reviewed the fraud case with Nelson Chen, supervisor. He stated that Mr. Chen disagreed with his assessment of a postal manager's statements. Appellant then sought medical treatment for stress. Two weeks later, he was transferred to Ms. Alexander. Appellant stated that, on June 30, 2005, he was assigned to write a "talking points" memorandum in the fraud case. He noted that he often prepared such memoranda, which named the individuals under investigation. Appellant explained that he did not wish to write this memorandum as he disagreed with his supervisors' decision to identify the parties under investigation. He then called an assistant U.S. attorney, hoping that she would release him from the assignment. The assistant U.S. attorney allegedly suggested that appellant obtain private legal counsel if he chose not to cooperate as he could be terminated. Appellant asserted that he experienced stress.

Two of appellant's coworkers also testified at the hearing. Mr. Bentivigna, a postal inspector, who worked with appellant on fraud cases, testified that appellant's workload was heavy at times. Mr. Finnila, an investigative agent, corroborated that at Ms. Hughes' initial staff meeting in October 2003, she stated that she would not "be offended if we all left." He testified that appellant worked on other cases besides the fraud investigation. Mr. Finnila asserted that appellant's supervisors did not properly prioritize appellant's workload. He corroborated appellant's account of multiple discussions with supervisors regarding the dollar amount lost in the fraud case.

After the hearing, appellant's attorney submitted a January 11, 2007 letter asserting that the employing establishment committed administrative abuse in processing the claim by showing Ms. Alexander a confidential psychiatric report. In a January 12, 2007 letter, he contended that the hearing representative prejudiced appellant's case by denying subpoenas and limiting the hearing to one hour.

The employing establishment submitted comments to the hearing transcript on January 23, 2007, contending that appellant was not overworked. The employing establishment submitted appellant's time sheets for April 17 to 20, 2004 and June 25 to July 8, 2005 indicating that he worked little or no overtime. The employing establishment denied that appellant was harassed or abused by management or asked to perform illegal acts. Appellant's attorney responded by January 29, 2007 letter, reiterating his arguments. He also submitted appellant's timeline of events.

By decision dated and finalized March 2, 2007, the Office hearing representative affirmed the April 27, 2006 decision. He found that appellant failed to establish his allegations of harassment and overwork as factual. The hearing representative found that appellant's reaction to the performance review was noncompensable, as performance appraisals are an administrative function of the employing establishment and no error or abuse was shown. He found that appellant's dissatisfaction with the way his supervisors exercised their discretion was noncompensable. The hearing representative found no evidence that any of the supervisory actions were erroneous, abusive or illegal or that appellant was asked to perform unethical or illegal acts. He found that management's response to the June 2005 press release was not in the

performance of duty as appellant had no role in preparing the release. The hearing representative also found that appellant's reaction to being asked to write the talking points memorandum was self-generated, noting that he was not required to call the assistant U.S. attorney. He found that appellant's reaction to the handling of his compensation claim was noncompensable as this concerned an administrative matter not in the performance of duty and no error or abuse was shown. The hearing representative found that appellant's attorney's December 5, 2006 request for subpoenas was not timely made.

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.[5] 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.[6]

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 employment factors.[7] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[8]

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.[9] 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.[10]

---

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[8] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[9] *See Norma L. Blank*, 43 ECAB 384 (1992).

[10] *Id.*

ANALYSIS -- ISSUE 1

In the present case, appellant alleged that he sustained anxiety and depression as a result of employment incidents and conditions which the Office found to be noncompensable. Therefore, the Board must review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

Appellant asserted and Mr. Finnila corroborated that in her initial October 2003 staff meeting, Ms. Hughes, appellant's second line supervisor, stated that, as her management style would be different from what the employees were used to, she would not be offended if the staff quit. The Board finds that appellant has established as factual that Ms. Hughes made these remarks. While verbal abuse in the workplace is compensable under certain circumstances, this does not mean that all statements uttered in the workplace gives rise to coverage under the Act.[11] In this case, the Board finds that, under the circumstances of this case, Ms. Hughes remarks were a reasonable part of her introduction to her staff. They do not rise to the level of verbal abuse. Appellant further alleged that Ms. Hughes' remarks made him fear for his job. However, disabling conditions resulting from an employee's feeling of job insecurity are not compensable under the Act.[12]

Appellant also attributed his condition, in part, to an April 15, 2005 performance appraisal. Ms. Alexander, appellant's supervisor, remarked that appellant needed to improve his timeliness and case management skills as he did little work on cases other than the fraud investigation. Appellant also asserted that his work on the fraud case deserved a higher rating. However, performance appraisals are administrative and are not compensable unless error or abuse is shown.[13] The Board finds that the evidence does not establish any administrative error or abuse in appellant's performance appraisal. Appellant acknowledged that he refused to work on assigned cases he felt were unimportant in comparison to the fraud case. Appellant has not established a compensable employment factor in this regard.

Appellant attributed his emotional condition to alleged harassment by his supervisors regarding the amount of monetary fraud in one of his investigations. Incidents of harassment by supervisors and coworkers, if established as occurring and arising from the employee's performance of his or her regular duties, could constitute employment factors.[14] For harassment to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.[15] Mere perceptions of harassment are not compensable under the Act.[16]

---

[11] *Fred Faber*, 52 ECAB 107, 109 (2000).

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

[13] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[14] *Janice I. Moore*, 53 ECAB 777 (2002).

[15] *Marlon Vera*, 54 ECAB 834 (2003).

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

In support of his allegations of harassment, appellant provided statements and Mr. Finnila's testimony that his supervisors repeatedly asked in July 2005 if there was any basis to increase the dollar amount lost in the fraud case. Ms. Alexander explained that these discussions were necessary as appellant made equivocal statements which required clarification before a final case report could be prepared. The Board finds that these discussions were reasonable and the evidence does not reflect error or abuse. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant also disliked the way his supervisors Mr. Chen, Ms. Alexander and Ms. Hughes performed their supervisory duties. He criticized their communication with postal managers and their decision to have him prepare a "talking points" memorandum naming the implicated individuals. Appellant contended that management did not appreciate the importance of the fraud case, such that they assigned him additional "low potential" cases. However, an employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.[17] In this case, Ms. Hughes and Ms. Alexander explained that appellant was required to work on multiple assigned matters although he was assigned fewer cases than other agents. Appellant stated that he had written "talking points" memoranda before, indicating that he was capable of doing so in the fraud case. The record does not demonstrate any error or abuse in the assignment of appellant's work. Appellant's dissatisfaction with how his supervisors developed the fraud case is noncompensable as it constitutes frustration from not being able to work in particular environment or to hold a particular position.[18]

Appellant also attributed his condition to being overworked. The Board has held that a heavy workload may be a compensable factor of employment if demonstrated by reliable, probative evidence.[19] Ms. Hughes explained that she assigned appellant fewer cases than other agents. The additional cases were either simple or required little action. Appellant acknowledged that many of his cases required no further action but that he did not wish to work on them as they were "low potential." The Board finds that, under the circumstances of this case, appellant has not established that he was overworked. Rather, appellant expressed his frustration at being assigned work in addition to the fraud investigation, which he viewed as his most important assignment. As set forth above, this reaction is a self-generated, noncompensable frustration over not being able to work in a particular environment.[20]

Appellant also attributed his condition, in part, to management's negative reaction to a press release in the fraud investigation. The press release was unrelated to any of appellant's regularly or specially assigned duties. Therefore, the Board finds that appellant's reaction is noncompensable as it did not occur in the performance of duty.[21]

[17] *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

[18] *Cyndia R. Harrill*, 55 ECAB 522 (2004).

[19] *Bobbie D. Daly*, 53 ECAB 691 (2002); *Sherry L. McFall*, 51 ECAB 436 (2000).

[20] *Cyndia R. Harrill*, *supra* note 18.

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

Appellant also alleged that the employing establishment committed administrative error or abuse by showing Ms. Alexander confidential medical records after she was no longer a supervisor. He also asserted that an assistant U.S. Attorney advised him to retain counsel. Appellant did not submit any evidence substantiating these assertions. Therefore, he has not established these allegations as factual.

On appeal, appellant alleged that the Office did not mail the November 20, 2006 notice of hearing until November 28, 2006, such that he did not receive 30 days notice of the December 21, 2006 hearing as provided by section 10.617(b) of the Office's implementing regulations.[22] The Board finds that appellant submitted no evidence, such as a postmark to support his contention. Appellant also alleged that the Office hearing representative improperly allotted only one hour for the oral hearing. Section 10.617(a) of the Office's implementing regulations provide, in pertinent part, that the hearing representative has "complete discretion to set the … amount of time allotted for the hearing, considering the issues to be resolved."[23] The Board notes that the Office advised appellant to submit written witness statements and exhibits. Appellant called two witnesses at the hearing and submitted numerous exhibits. Under the circumstances of the case, the Board finds that the hearing representative did not abuse his discretion by limiting the oral hearing to one hour.

For the foregoing reasons, 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.[24]

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.[25] The implementing regulations provide 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.[26] 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.[27] Section

[22] 20 C.F.R. § 10.617(b) provides, in pertinent part, that the Office hearing representative "will mail a notice of the time and place of oral hearing to the claimant and any representative at least 30 days before the scheduled date."

[23] 20 C.F.R. § 10.617(a).

[24] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[25] 5 U.S.C. § 8126(1).

[26] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[27] *Id.*

10.619(a)(1) of the implementing regulations provide 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.[28] 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.[29] 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.[30]

ANALYSIS -- ISSUE 2

In this case, appellant's counsel requested an oral hearing on May 8, 2006. As discussed, section 10.619(a)(1) provides that a subpoena request must be submitted in writing to the hearing representative no later than 60 days following the request for a hearing.[31] In a December 5, 2006 letter, appellant's attorney requested that the hearing representative issue subpoenas for three supervisors, one manager and two coworkers. The hearing representative properly found that the request for subpoenas was untimely as it was not made within 60 days of the hearing request dated May 8, 2006. Therefore, the Board finds that the hearing representative did not abuse his discretion in denying appellant's request for subpoenas.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for subpoenas.

[28] 20 C.F.R. § 10.619(a)(1).

[29] *See Gregorio E. Conde*, *supra* note 26.

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

[31] 20 C.F.R. § 10.619(a)(1).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated and finalized March 2, 2007 and dated April 26, 2006 are affirmed.

Issued: November 23, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board