United States Department of Labor
Employees' Compensation Appeals Board

HENRY R. MEARIS, Jr., Appellant **and** **U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, San Jose, CA, Employer**	)	**Docket No. 06-100** **Issued: February 16, 2006**

Appearances:
Henry R. Mearis, Jr., pro se
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

JURISDICTION

On October 20, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 20, 2004, denying his claim for an emotional condition, a May 13, 2005 decision of a hearing representative affirming the denial of his claim and a nonmerit decision dated September 22, 2005 denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the September 22, 2005 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied his request for merit review under section 8128.

FACTUAL HISTORY

On October 30, 2004 appellant, then a 48-year-old mailhandler/forklift driver, filed a traumatic injury claim alleging that he experienced a blackout, irregular heartbeat and difficulty

breathing due to racial discrimination and the failure of management to address his concerns. He stopped work on October 20, 2004.

In a statement dated November 2, 2004, Valentine Gomez, a supervisor with the employing establishment, related that on October 20, 2004 he checked to make sure that appellant and Anthony Del Rey, a coworker, were working on the prepping belt. Appellant was angry that Mr. Del Rey was not working on the belt and stated that he should be suspended. Mr. Gomez related that he saw Mr. Del Rey on a forklift and questioned why he was not working on the prepping belt as instructed. He stated that appellant "walked back to the dock, still irate and complaining about Mr. Del Rey driving the Hyster forklift. [He] worked himself up to the point that he had a hard time breathing. He requested to go see his doctor."

Appellant, in a statement received by the Office on November 29, 2004, attributed his employment-related stress primarily to working with a coworker, Mr. Del Ray. He related that Mr. Del Ray had "serious behavioral problems" that management refused to address. Appellant noted that Mr. Del Ray threatened coworkers, including Joe A. Marquez, a senior group leader. He stated that Mr. Del Ray did not perform his assigned duties but instead rode around on a forklift "to physically check, watch and keep track as his means to control the process." Mr. Del Ray was caught walking around for 45 minutes on October 5 and 6, 2004, but did not accept the blame for his actions. Appellant noted that management instructed him to work on the prepping belt "so Mr. Del Ray would [not] get mad." He reported to the prepping belt but Mr. Del Ray did not. Instead, he took appellant's forklift and rode around. When appellant complained to management, he "was told they would be handing it. In the meantime I had no vehicle to drive and was completely at the end of my rope." Appellant also related that one of Mr. Del Ray's cohorts, Leonard Williams, had Tourette's syndrome and would "issue a rapid stream of violent, explicit, vulgar words" and hide behind equipment and then jump out in front of the forklifts. He stated that management refused to correct Mr. Williams behavior. Appellant further related that while he had always experienced some racism, it "surfaced strongly" after a recent change in management.

In an electronic mail message regarding appellant's allegations, Mr. Gomez related that the vehicles did not belong to specific workers but were "checked on a first come basis." He noted that management issued a letter of warning to Mr. Del Ray about the events on that date and that Mr. Del Ray was suspended for one week after "the [Mr.] Marquez incident." Mr. Gomez further noted that Mr. Williams' supervisor talked with him when he "flair[ed] up on the floor" and concluded that "[m]anagement is taking the appropriate action at [the] given time."

An accident report form from the employing establishment indicated that on October 20, 2004 appellant was instructed to work on the prepping belt with another employee. The form indicated, "The other employee did not report to the prepping belt as instructed. [Appellant] got upset [with] the other employee for disregarding the instructions and he also got upset with the other employee for using the Hyster Forklift instead of the Toyota Forklift."[1]

[1] Appellant submitted medical evidence in support of his claim.

By decision dated December 20, 2004, the Office denied appellant's claim for an emotional condition in the performance of duty. The Office found that he had not established any compensable employment factors.

On January 13, 2004 appellant requested a review of the written record.

In a statement dated December 3, 2004, received by the Office on January 18, 2005, Mr. Marquez related that Mr. Del Ray disregarded orders from his supervisors and broke safety rules. Mr. Marquez stated that management had not adequately disciplined Mr. Del Ray.

By letter dated January 31, 2005, the Office acknowledged appellant's request for a review of the written record and noted that the case would be "assigned to a hearing representative shortly."

On March 11, 2005appellant requested an oral hearing instead of a review of the written record. He related that he wanted to bring witnesses "to testify before a jury of peers." Appellant included the form on which he had previously requested a review of the written record on January 13, 2004, with a notation that he now desired an oral hearing.

In a decision dated May 13, 2005, a hearing representative, following a review of the written record, affirmed the Office's December 20, 2004 decision.[2]

On September 15, 2005 appellant requested reconsideration of his claim. With his request for reconsideration, he resubmitted the form on which he had previously indicated that he desired an oral hearing. Appellant requested that the Office "subpoena all doctors and relevant witnesses for my requested hearing in person." He argued that he deserved due process.

By decision dated September 22, 2005, the Office denied appellant's request for reconsideration on the grounds that it was insufficient to warrant a merit review of his claim.

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

[2] The Office's procedure manual provides: "After requesting a review of the written record, the claimant may decide that he or she would rather have an oral hearing. Such a request may be granted if the claimant submits a written request within 30 days after [Hearings & Review] issues its letter to the claimant acknowledging the initial request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.5 (January 1999). In this case, the Office acknowledged appellant's request for a review of the written record in a letter dated January 31, 2005. Appellant requested an oral hearing rather than a review of the written record on March 11, 2005, more than 30 days after the letter from the Office acknowledging his initial request. Thus, he was not entitled to an oral hearing on his claim.

Act.[3] 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.[4]

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.[5] 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.[6] 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.[7]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[8] Claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[9] 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.[10] 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.[11]

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

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[3] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[5] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

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

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

[8] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[9] *See Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

[10] *See James E. Norris*, 52 ECAB 93 (2000).

[11] *Beverly R. Jones*, 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[12] 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.[13]

ANALYSIS -- ISSUE 1

Appellant primarily attributed his emotional condition to management's failure to adequately discipline a coworker, Mr. Del Ray. He maintained that Mr. Del Ray threatened other coworkers and failed to perform his job duties. He stated that on October 20, 2004 Mr. Del Ray did not work with him on the prepping belt as assigned but instead took his forklift and drove around. Appellant alleged that management did not effectively discipline Mr. Del Ray for behavioral problems. He also noted that another coworker, Mr. Williams, had Tourette's syndrome and would use "violent, explicit [and] vulgar words" without any intervention by management. The Board has held that matters involving discipline are considered administrative in nature and are not generally compensable factors of employment.[14] An administrative or personnel matter will be considered an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.[15] In this case, appellant has not provided sufficient evidence to establish that the employing establishment erred in the disciplinary action taken regarding Mr. Del Ray or Mr. Williams. Mr. Gomez, a supervisor, noted that management issued Mr. Del Ray a letter of warning for the events occurring on October 20, 2004 and suspended him for one week for threatening a coworker. He further noted that Mr. Williams' supervisor would talk to him when he "flair[ed] up on the floor." Accordingly, appellant has not met his burden of proof to show error or abuse in management's discipline of his coworkers. Additionally, the Board notes that appellant's dissatisfaction with what he perceives as inadequate discipline is self-generated and thus does not constitute a compensable employment factor.[16]

Appellant contended that management assigned him to work the prepping belt in order to appease Mr. Del Ray. Assigning work is an administrative function of a supervisor and, absent a showing of error or abuse, is not compensable.[17] In this case, appellant has submitted no proof that his supervisor acted erroneously in assigning him to the prepping belt with Mr. Del Ray; consequently, he has not established a compensable employment factor.

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

[13] *Id.*

[14] *Cyndia R. Harrill*, 55 ECAB ___ (Docket No. 04-399, issued May 7, 2004); *Roger Williams*, 52 ECAB 468 (2001).

[15] *Dennis J. Balogh*, *supra* note 12.

[16] *See Mary A. Sisneros*, 46 ECAB 155 (1994).

[17] *Beverly R. Jones*, *supra* note 11.

Appellant also alleged that Mr. Del Ray erroneously took his Hyster forklift on October 20, 2004. Mr. Gomez, however, maintained that vehicles were not designated for specific workers but available on a first come basis. Thus, appellant's dissatisfaction with not having his Hyster forklift on October 20, 2004 is considered self-generated and not compensable under the Act.

Regarding appellant's allegation of discrimination, the Board has held that, to the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of regular duties, these could constitute employment factors. However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable.[18] In this case, appellant noted that he had always endured some racism at the employing establishment but that it had increased significantly after a management change. He did not, however, provide any specific allegations of discriminatory actions or any substantiating evidence and thus failed to establish a factual basis for his allegation.[19]

As appellant failed to establish a compensable employment factor, the Office properly denied his claim for compensation.[20]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[21] To require the Office to reopen a case for merit review under section 8128(a) of the Act,[22] the Office's regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[23] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[24]

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[18] *Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004).

[19] *Jesse J. Starcher*, 51 ECAB 314 (2000).

[20] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record. *Roger Williams*, *supra* note 14.

[21] 5 U.S.C. § 8128(a).

[22] *Id*.

[23] 20 C.F.R. § 10.606(b)(2).

[24] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

The Office denied appellant's emotional condition claim because he did not establish a compensable work factor. Appellant requested reconsideration of his claim on September 15, 2002. He resubmitted a form on which he had previously indicated that he desired an oral hearing. Appellant asked that the Office subpoena all relevant persons for the hearing and argued that he deserved due process.

The relevant issue in this case is whether the incidents and work factors alleged by appellant as causing his emotional condition constitute compensable factors of employment within the meaning of the Act. On reconsideration, appellant did not submit new and relevant evidence with respect to a compensable work factor. He alleged that he deserved due process but did not provide a valid legal argument or show that the Office erroneously applied or interpreted a specific point of law.[25] Appellant requested that the Office subpoena relevant witnesses but his request does not constitute relevant evidence or argument sufficient to meet the requirements of section 10.606(b)(2). Subpoenas are only issued as part of the hearings process.[26] The issue at hand is appellant's request for reconsideration of the denial of his emotional condition claim.[27] Accordingly, the Board finds that the Office properly denied the reconsideration request without merit review of the claim.

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 refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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[25] A legal premise must have a reasonable color of validity to require reopening the case for merit review. *See Charles A. Jackson*, 53 ECAB 671 (2002).

[26] 20 C.F.R. § 10.619.

[27] Appellant previously received a review of the written record. While he informed the Office prior to the issuance of the hearing representative's May 13, 2005 decision that he desired an oral hearing in lieu of a review of the written record, his request was not timely and thus the Office was not required to provide him with an oral hearing. *See supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and May 13, 2005 and December 20, 2004 are affirmed.

Issued: February 16, 2006
Washington, DC

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

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