U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOLLIS LEWIS and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, N. J.

Docket No. 95-414; Submitted on the Record;
Issued August 7, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

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

This is the second appeal in this case. In an April 29, 1994 order,[1] the Board remanded the case to the Office of Workers' Compensation Programs to make factual findings as to whether the specific incidents alleged by appellant constituted compensable employment factors.

Pursuant to the remand order, the Office, in a decision dated July 7, 1994, denied benefits on the grounds that appellant failed to establish that he sustained an emotional condition in the performance of duty.

The Board finds this case not in posture for decision.

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. To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identify 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]

Worker's 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

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[1] Docket No. 93-816.

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

illness has some connection with the employment but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where 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.[3]

The initial question here is whether appellant has identified compensable employment factors as contributing to his condition. The Office, on remand, found that appellant's allegations were unfounded and denied the claim.

In support of his claim, appellant, in a narrative received by the Office on August 14, 1991, cited a series of instances where he asserted that management harassed him in such way so as to cause a work-related anxiety reaction. Appellant stated that, on March 23, 1991, his initial workday, he was assigned to a location based on his light-duty restrictions. When he reported for work that morning, he alleged that Charlie Higham, a supervisor, yelled at him in a furious tone demanding to know, "Who the hell are you?" Later the same day, appellant inquired about additional work and alleged that Mr. Higham stated, "What do you want now, Lips?" which appellant considered to be a racial slur. On March 25, 1991 appellant alleged that Walter Shelmet, in response to his question about what work assignment he had that day, snapped at him and told him to see the supervisor. On March 26, 1991 appellant was called into a meeting with Joseph D. Cesario, the postmaster, and Vanessa Bradley, a supervisor. After responding to a question regarding his physical limitations, he alleged that Ms. Bradley referred to him as "useless and nonproductive." On March 28, 1991 he alleged that Mr. Higham again referred to him as "Lips" while he was in the postmaster's office. On April 12, 1991 he alleged that Mr. Cesario squeezed his hand while in the men's room and stated, "This doesn't hurt." On May 2, 1991 he alleged that Mr. Cesario forcefully poked him at least four times while telling him to move to another code. Later that day he alleged that Mr. Cesario apologized for his actions stating that he did not "know what got over me," and that he "was sorry and would [not] do that again." On May 9, 1991 he alleged that Mr. Cesario told him that "Your hand does [not] hurt," and "hurry up!" On July 18, 1991 he alleged that Mr. Cesario allegedly shoved him three times in the chest and wanted to know why the Department of Labor was taking so long to authorize further medical treatment.

Appellant also stated that he felt harassed when management, on March 25, 1991, used the loud speaker to advise whoever had improperly parked a car to move it immediately. Appellant was the employee who had improperly parked his car.

On October 3, 1991 John Graves, a union steward, stated that in the middle of May 1991 appellant approached him with a complaint that Mr. Cesario "put his hand on him." Mr. Graves then asked Mr. Cesario about the incident which resulted in an apology from Mr. Cesario with a commitment not to put his hands on appellant again.

[3] *Lillian Cutler*, 28 ECAB 125 (1976).

On October 6, 1991 Louis C. Manadier, a coworker, stated that appellant told him that Mr. Cesario had gripped his hand painfully and that he had endured instances of similar conduct by Mr. Cesario. Mr. Manadier noted also that Mr. Higham referred to him as "Lips," and that appellant asserted that Mr. Higham referred to him in a similar way. He noted further that management's reference to appellant as a nonproductive employee was "very upsetting" to appellant because he worked diligently and accurately, noting that the only function he could not accomplish was to "tray the flats."

On December 23, 1991 a coworker, Chico D. Lavette, stated that he had heard appellant referred to by management as an unproductive employee, and that he witnessed Mr. Cesario "poking" appellant and touching his hand on two occasions. He also stated that Mr. Higham referred to appellant and to other black employees as "Lips."

Appellant also submitted multiple reports from Dr. Joseph Dr. Glickel, an osteopath, who noted that he had been treating appellant since July 25, 1991 for work-related acute anxiety.

Statements were submitted from several employing establishment personnel denying appellant's allegations.

As the Board observed in the case of *Lillian Cutler*,[4] workers' compensation law does not cover each and every illness that is somehow related to one's employment. When an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his 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 resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. On the other hand, these are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from 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.

When working conditions are alleged as factors causing 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 so considered.[5] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a

[4] 28 ECAB 125 (1976).

[5] *See Barbara Bush*, 38 ECAB 710 (1987).

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 submitted.[6]

The Board has held that actions of a supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Federal Employees' Compensation Act; however, for harassment to give rise to a compensable disability under the Act, there must be some evidence that such implicated acts of harassment or discrimination did, in fact, occur. [7] Mere perception of harassment and discrimination are not compensable under the Act.[8] Appellant must establish a factual basis for his allegations that his emotional condition was caused by factors of his employment.[9] Neither the mere fact that a condition becomes apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors is sufficient to establish a causal relationship between the two.

Regarding the March 23, 1991 incident when a supervisor yelled at him in a furious tone; the March 25, 1991 incidents when a supervisor "snapped" at him and when management used the loud speaker to advise him to move his car; the March 26, 1991 incident when a supervisor allegedly referred to him as useless and unproductive; and the May 9, 1991 incident when Mr. Cesario told appellant that his "hand does [not] hurt," and "hurry up," appellant has failed to submit sufficient evidence substantiating that these allegations of harassment occurred, as alleged. These complaints concern his perceived treatment that he alleged he received from supervisors over a period of several weeks. To discharge his burden of proof, a claimant must establish a factual basis for the claim by supporting his allegations of harassment with probative and reliable evidence.[10] Appellant, however, failed to provide sufficient probative and reliable evidence in support of these instances.[11] Thus, appellant has not established a compensable employment factor under the Act as to these allegations.

Regarding the incident of April 12, 1991 that Mr. Cesario squeezed appellant's injured hand, a coworker stated that appellant told him that Mr. Cesario had gripped his hand painfully. However, this statement does not represent an eyewitness account of the alleged incident. The coworker made no reference to a time frame, the subject matter being discussed between the supervisor and appellant, or any reference as to when the event occurred, thus lessening its probative value that an act of harassment occurred. Furthermore, Mr. Cesario specifically denied

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

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

[8] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[9] *Id.*

[10] *See supra* note 7.

[11] The Board notes that appellant submitted a statement from a coworker wherein he alleged that he overheard supervisors refer to appellant as unproductive. However, this statement does not reflect any context of time or place and thus has little probative value.

squeezing appellant's injured hand. Thus appellant has not established a compensable employment factor under the Act as to this allegation.

Appellant alleged on May 2, 1991 Mr. Cesario forcefully poked him at least four times. Mr. Cesario noted in an October 8, 1991 statement that on that date, while gesturing to appellant with his hands, his fingers brushed against his chest. Mr. Cesario noted he had apologized to appellant at the request of the union. Regarding the incident on July 18, 1991 when Mr. Cesario allegedly poked appellant in the shoulder and chest, Mr. Cesario stated that he approached appellant from behind during a tour of the workroom floor and tapped him on the right shoulder to get his attention. He noted that he asked appellant why the Department of Labor was "was delaying approval of his operation," but denied poking or shoving him regarding this discussion.[12] The Board finds that Mr. Cesario acknowledged touching appellant on several occasions. While the evidence is insufficient to establish appellant's allegations of being shoved or poked by Mr. Cesario, physical contact arising in the course of employment, when substantiated by the evidence of record, constitutes a compensable factor of employment.[13]

Regarding the incidents on March 23 and 28, 1991 when appellant alleges Mr. Higham referred to him as "Lips," appellant submitted a statement from Mr. Lavette who stated that he had overheard Mr. Higham's remark to appellant. Mr. Manadier, another coworker, also noted that Mr. Higham referred to him as "Lips."[14] Abusive language by a supervisor directed at an employee would be considered a factor of employment.[15] Use of an epithet which is derogatory in nature can constitute harassment under the Act.[16] Appellant alleged that Mr. Higham referred to him as "Lips" on March 23 and 25, 1991 and a coworker stated that he overhead Mr. Higham call appellant by that term. As there is no evidence refuting the evidence of record, the Board finds that the use of the epithet "Lips'' constitutes harassment. Therefore, a medical question is presented as to whether this expression contributed to appellant's emotional condition.[17]

The case will be remanded to the Office for the preparation of a statement of accepted facts to include the established factors delineated above. The Office shall then submit the statement of accepted facts to an appropriate medical specialist for an opinion on the causal relationship between the compensable factors of employment and appellant's diagnosed condition. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate final decision on appellant's entitlement to benefits.

[12] Mr. Cesario's statement was corroborated by an eyewitness.

[13] *See Alton L. White*, 42 ECAB 666 (1991).

[14] The record does not contain evidence that the employing establishment denied that these comments were made.

[15] *Supra* note 4.

[16] *Abe E. Scott*, 45 ECAB 164 (1993).

[17] *Id.*

The July 7, 1994 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
August 7, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member