U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS A. COLLINS and U.S. POSTAL SERVICE,
CONCORD POST Concord, Calif.

Docket No. 96-1504; Submitted on the Record;
Issued August 11, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On November 10, 1994 appellant, then a custodian, filed a claim for stress, which he related to his federal employment. Appellant stopped work on November 1, 1993. He was separated from the employing establishment effective April 4, 1994.

By decision dated September 26, 1994, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. In an accompanying memorandum, the Office found that appellant had failed to establish specific incidents as factual or as compensable factors of employment.

In a September 15, 1995 letter, appellant requested reconsideration of the Office's decision accompanied by factual and medical evidence.

By decision dated December 15, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

In a January 4, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by factual evidence.

By decision dated January 17, 1996, the Office denied appellant's request for modification of its prior decisions.[1]

[1] The Board notes that subsequent to the Office's January 17, 1996 decision, the Office received additional factual evidence. The Board, however, cannot consider this evidence, inasmuch as the Board's review of the case is limited to the evidence of record, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c).

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 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. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. 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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[3]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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.[4] Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.[5]

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[6] However, the Board has held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action

---

[2] *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

[3] *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 3.

[5] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Kryzcki*, *supra* note 4.

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

established error or abuse by the employing establishment superiors in dealing with the claimant.[7] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The employing establishment's failure to provide a specific job description and work assignments, handling of disciplinary actions involving appellant's unauthorized communication with a customer, failure to immediately report an injury or accident and the suspension and removal of appellant due to a guilty plea for opening United States mail and warnings regarding failure to timely report to work and to park one's car in a designated location[8] fall within the category of administrative or personnel actions. Further, the employing establishment's denial of higher pay for performance of higher level work,[9] investigations concerning the illegal possession of United States mail, scratching of employees' cars, putting glue in a locker, cutting a broom handle and keeping a weight in a locker,[10] the refusal of a supervisor to supply names of employees who spoke badly of appellant, the use and designation of sick and annual leave,[11] and a change in locker assignment fall into the category of administrative or personnel actions.

The Board finds that appellant has not shown that the employing establishment committed error or abuse with respect to the administrative function of these actions. In his September 15, 1995 request for reconsideration, appellant stated that he had a job description for his light-duty position, but that he had to inquire about his daily job assignments. There is no evidence of record, such as, a favorable result of a grievance, indicating that the employing establishment committed error or abuse in not giving appellant specific job assignments.

Andrew E. Warner, a customer services support supervisor, explained in a June 7, 1994 narrative statement, that a letter of warning was issued to appellant after it was determined that appellant had failed to follow instructions for timely reporting an injury and after official discussions and stand-up talks with appellant concerning this type of infraction. Mr. Warner further explained that appellant was given ample opportunity to respond to the proposed indefinite suspension and that the decision to uphold the suspension due to his guilty plea was made by Mr. Ralph T. Cherry, officer-in-charge of the employing establishment.

The employing establishment initially determined that appellant was not entitled to higher pay, but subsequently agreed to pay appellant for two weeks of work at the higher pay rate. The mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.[12] In this case, the evidence does not establish any error and,

[7] *Richard J. Dube*, 42 ECAB 916 (1991).

[8] *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[9] *Joe E. Hendricks*, 43 ECAB 850 (1992).

[10] *Sandra F. Powell*, 45 ECAB 877 (1994).

[11] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[12] *Michael Thomas Plante*, *supra* note 11.

although appellant appealed the employing establishment's decision to arbitration, the record does not reveal a decision finding that the employing establishment committed error or abuse.

Regarding the investigation of appellant's illegal activity, Mr. Warner noted in an August 17, 1994 statement, that he recommended removal of appellant from the employing establishment based on the evidence presented in an investigative memorandum and appellant's guilty plea. Regarding the investigation of whether appellant scratched employees' cars, appellant submitted an undated statement of Joe Sherman Tyler, a coworker, revealing that Jim Derkoff, a supervisor, badgered appellant and himself for two hours about the incident and threatened them with loss of their jobs, a prison sentence and harm by their coworkers for their action. Mr. Tyler also stated that they were denied union representation. Appellant, however, has failed to show that he was entitled to union representation in this situation. Regarding the investigation of whether appellant cut a broom handle, Mr. Warner stated in a December 5, 1995 statement, that he did not recall this incident. Mr. Warner also stated that he remembered that the maintenance manager related several incidents of vandalism and that appellant was mentioned as one of several maintenance employees who had played practical jokes on each other to the detriment of the employing establishment's facilities and equipment. Mr. Warner then stated that the manager was instructed to take the necessary corrective measures. Regarding the investigation of why a weight was found in appellant's locker, Mr. Warner stated that all employees' lockers were searched on that date and that he did not accuse appellant of lifting weights. Mr. Warner stated that he asked appellant if the weights belonged to him and that appellant responded that the weights belonged to Mr. Tyler and that he was storing them for him. Mr. Warner then stated that he told appellant's supervisor that the weights should be removed because no employee was authorized to workout at the employing establishment facility. Mr. Warner concluded that was the end of the entire incident.

In his June 7, 1994 narrative statement, Mr. Warner stated that no supervisor put any pressure or stress upon appellant. Mr. Warner explained that the denial of appellant's request for leave by Mr. Cherry while appellant was on indefinite suspension was within the bounds of the employing establishment's administrative procedures. In a January 24, 1995 decision, an arbitrator found that the employing establishment properly placed appellant on emergency leave. The record, therefore, does not establish, that the employing establishment committed error or abuse in denying appellant's request for leave.

Appellant has alleged that his financial problems caused his emotional condition. This concern does not relate to appellant's regular or specially assigned work duties. Therefore, the Board finds that appellant has failed to establish a compensable factor of employment.

Appellant claims that supervision by more than one supervisor caused his emotional condition because he was told by a supervisor to perform one task and then he was told by another supervisor to not perform the task or to do something else. Appellant has failed to submit corroborative evidence of this allegation. Therefore, the Board finds that appellant has failed to establish a compensable employment factor.

Appellant alleged that the employing establishment harassed, discriminated against and threatened him in varying ways since a prior back injury. Specifically, appellant alleged that he was harassed when he filed grievances against the employing establishment or called in sick. He

stated that when he called in sick for the third day in October 1992, Mr. Warner yelled at him, called him a phony and a fake, ordered him to return to work and threatened him with loss of his job if he did not do so. Appellant also alleged that he was watched by Mr. Warner. He stated that Mr. Warner always looked in the breakroom and walked by it to watch him. Appellant further alleged that he was harassed and threatened by Mr. Warner because he did not like rehabilitated employees. Additionally, appellant alleged that starting around March 1988, Walt Butler, a maintenance supervisor, accused him of being a fake and a phony due to his light-duty status resulting from an October 1983 back injury and threatened him with loss of his job. Appellant claimed that in April 1989, Walt O'Dwyer, a carriers supervisor, yelled at him in front of his current wife, Debbie Collins, who was a customer at that time, because he stopped to say hello. He further claimed that in approximately January 1993, he was told by Mr. Butler to refrain from associating with Mr. Tyler even off the clock while other employees were allowed to talk and have lunch with their friends. Appellant also claimed that in May 1993, Ed Adreason, a supervisor, yelled at him for asking Mr. Tyler to assist him in ordering maintenance supplies from a customer. In addition, appellant claimed that Mr. Andreason threatened him with loss of his job when he caught him in bulk mail checking the fire extinguishers. Appellant then claimed that he was treated differently than Sue Bush, a coworker, who was caught stealing money from the employing establishing in that she was not criminally prosecuted, but placed on administrative leave and then resigned. Finally, appellant claimed that he was harassed by a May 2, 1994 letter, from Mr. Warner regarding the payment of health benefit coverage.

The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.[13] Mere perceptions of harassment and discrimination, however, are not compensable under the Act.[14] To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.[15] The Board finds that appellant has provided probative and reliable evidence of harassment by the employing establishment in this case.

Regarding appellant's allegation of harassment due to the filing of grievances, this involves an administrative matter.[16] The record does not reveal any decisions that the employing establishment committed error or abuse in handling appellant's grievances. Therefore, the Board finds that appellant has not established a compensable employment factor.

Although appellant submitted several witness statements regarding his allegation that he was being watched by Mr. Warner, it is an administrative function to supervise employees and see that they are tending to their tasks during work hours.[17] Further, in a June 7, 1994 statement,

[13] *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990); *Pamela R. Rice*, 38 ECAB 838, 843 (1987).

[14] *Wanda G. Bailey*, *supra* note 2; *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[15] *Ruthie M. Evans*, *supra* note 14.

[16] *Jimmy Gilbreath*, *supra* note 11; *Michael Thomas Plante*, *supra* note 11; *Apple Gate*, *supra* note 11; *Joseph C. DeDonato*, *supra* note 11.

[17] *Id.*

Martha Fernandez, an employing establishment personnel/injury compensation representative, stated that contrary to the May 27, 1994 narrative statement of Becky Deckard, an acting supervisor and one of appellant's witnesses, that she did not recall Mr. Warner telling them to keep an eye on appellant during manager/supervisor meetings. Ms. Fernandez further stated that she could see no reason for Mr. Warner to give such an order because appellant worked in maintenance while they worked in mail processing. Ms. Fernandez also stated that she had never experienced or witnessed any discrimination or harassment towards herself or other employees by Mr. Warner. There is no evidence that Mr. Warner erred or acted abusively in this action.

Appellant has not submitted sufficient corroborative evidence that Mr. Butler accused him of being a fake and a phony and threatened him with loss of his job. Mr. Warner stated in a December 5, 1995 statement that did not recall the incident where he caught appellant in bulk mail checking the fire extinguishers, but that if appellant was performing that task, then appellant was not working within his work restrictions. The May 2, 1994 letter from Mr. Warner regarding the payment of health benefit coverage constitutes an administrative matter[18] and there is no evidence that the employing establishment committed error or abuse. In response to appellant's allegation that he was treated differently than other employees who had committed crimes against the employing establishment, Mr. Warner stated that appellant was treated like any other employee noting that this particular incident had never occurred before. Mr. Warner then stated that each employee was dealt with according to the seriousness of the infraction and/or the determined threat to the safety of other employees and the sanctity of the mails. Additionally, Mr. Warner stated that he made his decision to recommend removal of appellant from the employing establishment based upon the Employee and Labor Relations Manual, Part 661. Mr. Warner explained that Ms. Bush was caught embezzling funds from the employing establishment by the postal inspection service, that she was placed on administrative leave because she was not arrested by the inspection service and she fully cooperated with the investigation. Mr. Warner stated that Ms. Bush was allowed to resign at her own request and that he was unaware of any proceedings in federal court.

In a June 21, 1994 narrative statement, Mr. Tyler provided that while he was in the men's locker room in September or October 1993, he heard Mr. Warner ask appellant when he was going to stop being a rehabilitation employee and heard Mr. Warner state that appellant was not going to be working for the employing establishment much longer. The Board finds that appellant has established that this incident occurred as alleged.

Ms. Deckard's June 4, 1994 statement indicated that Mr. Warner stated that he wanted to get rid of appellant because he was not doing anything. Ms. Deckard stated that Mr. Tyler and appellant were not allowed to talk to each other or take their breaks and lunch together. An undated statement signed by Ms. Deckard, Mr. Tyler and appellant's coworkers, John P. Miller, Jr., Lynnea Evans and Joe Rubin, indicated that they were aware that appellant was not allowed to go on the side of the building where Mr. Tyler was assigned and that Mr. Tyler and appellant were not allowed to spend time together even during breaks. The Board finds that

[18] *Id.*

appellant has not established error or abuse by the employing establishment pertaining to this allegation.

A statement signed by Mr. Tyler indicated that he confirmed appellant's story that in May 1993, appellant was talking to a customer about ordering maintenance supplies from him and asked him to come over to answer a question about the type of floor wax they used when Mr. Andreason yelled at appellant to get away from him in front of the customer. Mr. Tyler also submitted an undated narrative statement reiterating the May 1993 incident. The Board finds that this incident occurred as alleged. Inasmuch as appellant has established that several incidents of harassment occurred as alleged, the Board finds that appellant has established a compensable employment factor.

Appellant has also alleged that he was required by the employing establishment to perform duties that were not within his work restrictions. Specifically, appellant alleged that on October 26, 1990, Mr. Butler assigned him to drill holes in carrier cases and that in September 1993, Mr. Warner assigned him to the supply room. In support of these allegations, appellant submitted Mr. Tyler's undated statement indicating that on October 26, 1990 he heard Mr. Butler instruct appellant to spend the rest of the day drilling holes in carrier cases. Mr. Tyler stated that he also heard appellant state that he could not perform this work due to his limitations and extreme back pain. Mr. Tyler further stated that he heard Mr. Butler accuse appellant of being a fake and a phony, that he was sick of appellant's excuses and that he did not care about appellant's back problem. Mr. Tyler then stated that Mr. Butler ordered appellant to work. Mr. Tyler indicated that he was in the area of appellant and Mr. Butler and overheard Mr. Butler tell appellant to get into a vert-a-lift. Mr. Tyler stated that appellant responded that he was not able to get into the vert-a-lift due to his back condition. Mr. Tyler then stated that Mr. Butler called appellant a fake and a phony and told appellant that if he did not comply with his request, then appellant would lose his job. Mr. Tyler then stated that after appellant got into the vert-a-lift, Mr. Butler told appellant that he was going to write him up because he did so without putting on a helmet. In a June 20, 1994 statement, Roger Bensing, an accounting technician, indicated that appellant's duties included putting stock away and filling orders for the employing establishment's branch offices. Mr. Bensing's statement also indicated that the boxes in the supply room weighed up to 30 pounds or more and that appellant was assigned to do the job. Mr. Bensing noted that he had previously performed the job.

In his June 7, 1994 statement, Mr. Warner indicated that appellant's limitations included no prolonged standing, sitting and walking, no reaching above the head, no work on ladders or scaffolds and no lifting more than 10 pounds. Mr. Warner also stated that appellant's actual duties included assisting in the stocking of custodial cleaning supplies such as, toilet paper, brushes and hand towels and assisting the tool and parts clerk in processing paperwork. Mr. Warner further stated that appellant's other duties included taking written inventory of the supplies in the main office supply room and transferring the information to the appropriate reorder supply forms and maintaining 3" x 5" cards used for the issuance of keys to employees for personal lockers. The Board finds that the employing establishment's assignment of appellant to drilling holes in carrier cases, a vert-a-lift and the supply room constitutes a

compensable factor of employment, as they arose from specially-assigned duties required of appellant.[19]

Inasmuch as incidents of harassment and the employing establishment's requirement that appellant perform additional specially-assigned duties, are established as having occurred by the evidence of record, they constitute compensable factors of appellant's employment.

However, appellant's burden of proof is not discharged by the fact that he has established employment factors, which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[20]

The medical evidence of record in this case fails to establish that appellant's emotional condition was caused by the accepted compensable employment factors. An undated report of Dr. John R. Brandes, a clinical psychologist, noted appellant's general allegations of harassment and threats by the employing establishment. Dr. Brandes opined that appellant's emotional condition was not permanent and stationary and that a work-related factor was involved in appellant's disability. Dr. Brandes' report is insufficient to establish appellant's burden inasmuch Dr. Brandes did not identify any of the compensable factors of harassment and failed to provide any medical rationale for his opinion.

A February 7, 1994 medical report from Dr. Michael Lozano, a Board-certified internist, revealed a history that appellant's emotional stress was due to harassment by management employees and that appellant had been harassed ever since his back injury at work 10 years ago. Dr. Lozano diagnosed adjustment disorder with mixed emotional features. Dr. Lozano's report is insufficient to establish appellant's burden because he failed to identify the specific compensable employment factors of harassment and to address a causal relationship between these factors and appellant's emotional condition.

The March 14, 1994 report, of Farrell Udell, a social worker, revealing that appellant would be a good, hard-working and valuable employee if he were allowed to return to work and the February 24, 1995 report from a doctor of philosophy, whose signature is illegible, indicating that appellant had adjustment disorder with mixed emotional features and no work restrictions do not constitute competent medical evidence inasmuch as they are not considered physicians under the Act.[21]

The December 31, 1991 and the May 27, 1994 medical reports and the May 27, 1994 treatment notes of Dr. Jason Appel, a Board-certified orthopedic surgeon, regarding the treatment of appellant's neck and back conditions are irrelevant to the issue in the present case.

[19] *See Lillian Cutler, supra* note 3.

[20] *William P. George, supra* note 14.

[21] *See* 5 U.S.C. § 8101(2).

The January 17, 1996 and December 15, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member