U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK B. GWOZDZ and DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Washington, D.C.

Docket No. 97-2621; Submitted on the Record;
Issued June 25, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

The Board has given careful consideration to the issue in question, the entire case record and appellant's contentions on appeal. The Board finds that the January 22, 1997 decision of the Office of Workers' Compensation Programs' hearing representative was in accordance with the law and the facts in this case and hereby adopts the findings and conclusions of the hearing representative.

On June 29, 1995 appellant, then a 48-year-old engineer, filed both a traumatic injury claim and an occupational disease claim regarding the same incident and alleging that on April 27, 1995 he suffered anxiety, tremors and psychological damage when he was told of a sign on his door replacing his name which stated "John Doe II." This incident occurred after the Oklahoma City Murrow building bombing when authorities were looking for John Doe II. In an accompanying statement appellant noted that on April 27, 1995 his supervisor, Pat Burke, opened his door and asked if he had changed his name. Appellant alleged supervisory harassment, error and abuse.

On April 22, 1997 appellant requested reconsideration of the January 22, 1997 decision, alleging that the John Doe II sign was put up because he looked like the suspect, that it was a lie that Mr. Burke immediately questioned the coworker perpetrator, that Mr. Burke's first action was to ask appellant if he had changed his name, that Mr. Burke looked for a scapegoat after appellant called personnel to complain, that Mr. Burke's actions were inappropriate and inflammatory and that he, the victim, should be considered in judging harassment. Attached were several statements: a memorandum regarding the confidentiality of an Equal Employment Opportunity Commission settlement agreement where in it was noted that the employee who placed the sign apologized to appellant; Mr. Burke's statement admitting that he asked appellant if he had changed his name; a coworker's statement opining that Mr. Burke seemed to be trying

to antagonize or irritate appellant by asking if he had changed his name, and alleging that sometimes Mr. Burke criticized appellant regarding work; another coworker's statement claiming that appellant called him upset after the John Doe II sign incident, alleging that Mr. Burke harassed him as a result of the sign; appellant's wife's statement addressing the shock and serious emotional problems the sign had caused them; and a physician's report and a federal circuit court of appeals decision stating that it was not the harasser's views that counted but that it was whether a reasonable person would have found the conduct hostile or abusive.

By decision dated June 18, 1997, the Office denied appellant's request for a review of his case on its merits finding that the evidence submitted in support was immaterial and repetitious and was insufficient to warrant a review of the prior decision. The Office noted that appellant's opinion that his supervisor's actions were inappropriate was already discussed at length during the hearing, that several of the statements were already part of the record and had been previously considered, that the medical evidence was duplicative, and that the federal circuit decision involved sexual harassment and disgraceful conduct and had no bearing on this case.

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized 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.[1] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[2]

Workers' compensation law is not applicable 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 concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise 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. Where the disability results from an emotional reaction to regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the

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

[2] *See Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell supra* note 2.

disability is not compensable where it results from such factors as an employee's fear of a reduction-in-force, his frustration from not being permitted to work in a particular environment or to hold a particular position, or his failure to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[3] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[4] In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[5]

When working conditions are alleged as factors in 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 considered.[6] 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 factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[7] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.[8]

In this case, appellant alleged that he was harassed by his supervisor, Mr. Burke. With regard to his allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[9] An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish

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

[4] *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

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

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

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

[8] *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

[9] *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10] In this case, appellant did submit evidence which confirmed that Mr. Burke opened his office door on April 27, 1995 and asked appellant if he had changed his name.

To the extent that disputes and incidents alleged as constituting harassment by coworkers and supervisors are established as occurring and arising from appellant's performance of his regular or specially assigned duties, these could constitute compensable employment factors.[11] Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment.[12]

However, in the instant case, the evidence does not establish harassment or abuse by Mr. Burke. With respect to the incident on April 27, 1995, appellant alleged that Mr. Burke's question to him as to whether he had changed his name constituted harassment and noted that such statement was verified by a coworker and admitted to by Mr. Burke. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[13] Appellant has not explained how such an isolated comment by Mr. Burke would rise to the level of verbal abuse or otherwise fall within coverage of the Act. Appellant has alleged that Mr. Burke swore at him and yelled on various occasions, however, he did not submit sufficient evidence to establish these alleged instances.[14]

Further, the Board notes that this comment was not related to the performance of appellant's regular or specially assigned duties, was not an epithet and was not derogatory in any way. Additionally appellant's other complaints about Mr. Burke's handling of the sign posting incident and other administrative functions such as performance appraisals do not deal with his interactions with the supervisor but rather deal with the supervisor's performance of his own duties, in which the supervisor exercises his supervisory discretion, and, as a rule, falls outside the scope of coverage provided by the Act.[15] This principle recognizes that a supervisor or manager in general must be allowed to perform their duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[16] In the instant case, appellant has not submitted evidence of error or abuse sufficient to establish that his supervisor acted

[10] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

[11] *See Pamela R. Rice*, 38 ECAB 838 (1987).

[12] *David W. Shirey*, 42 ECAB 783 (1991).

[13] *See Christophe Jolicoeur*, 49 ECAB ___ (Docket No. 96-597, issued June 11, 1998); *Leroy Thomas, III*, 46 ECAB 946 (1995).

[14] *See, e.g., Alfred Arts*, 45 ECAB 530 (1994); *compare Abe E. Scott*, 45 ECAB 164 (1993).

[15] *See Abe E. Scott, supra* note 15.

[16] *Id.*

unreasonably in the performance of his duties.[17] The record reflects that Mr. Burke spoke to the employee who had posted the sign and who, in turn, apologized to appellant. At the hearing, appellant noted the sign posting had not bothered him, rather he became upset at Mr. Burke for approaching him on this matter.

As appellant has not submitted the necessary factual evidence to establish that his allegations are compensable under the Act, he has not met his burden of proof in this case.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a further review on its merits.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[18] Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[19] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[20]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of

[17] Employment evaluations and assignment of work are administrative functions of the employer, not duties of the employee, but where the evidence discloses error or abuse on the part of the employing establishment, coverage may be provided; *see Jimmy Gilbreath*, 44 ECAB 555 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993); *Apple Gate*, 41 ECAB 581 (1990).

[18] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.* 41 ECAB 458 (1990).

[19] *See Charles E. White*, 24 ECAB 85 (1972).

[20] 20 C.F.R. § 10.138(b)(1).

this section will be denied by the Office without review of the merits of the claim.[21] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Act.[22]

Evidence which does not address the particular issue involved,[23] or evidence which is repetitive or cumulative of that already in the record,[24] does not constitute a basis for reopening a case. In this case, the factual evidence submitted by appellant in support of his request for further review of the case on its merits was already of record and previously considered by the Office for its previous decisions. Thus, it was cumulative. The medical evidence, additionally, was immaterial, as appellant had not established a compensable factor of employment. Therefore, appellant did not submit evidence sufficient to warrant a reopening of his case for further review on its merits. Consequently, the Office did not abuse its discretion by denying further merit review.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 18 and January 22, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 25, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[21] 20 C.F.R. § 10.138(b)(2).

[22] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[23] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[24] *Eugene F. Butler*, 36 ECAB 393 (1984).