U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSCOE C. BRIGHT and DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Pittsburgh, PA

Docket No. 98-236; Submitted on the Record;
Issued November 10, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act.

On December 11, 1996 appellant, then a 31-year-old civil engineer/project engineer, filed an occupational disease claim, alleging that he sustained stress and depression related to factors of his federal employment. He indicated that he sustained the alleged condition on July 2, 1996 and realized the condition was causally related on July 23, 1996. Appellant stopped work July 2, 1996 and returned to work in October 1996. In a supplemental statement appellant identified the following as causative factors of his emotional condition: appellant worked with Dave Black, a foreman, on dewatering projects and Mr. Black failed to cooperate with appellant in scheduling meeting times, used profanity in talking with appellant on several occasions and did not keep appellant apprised of information on the job site; appellant occupied a GS-12 level position for 120 days due to a vacancy for the period March 31 to July 20, 1996; appellant was promised a promotion to a permanent GS-12 project engineer position but the employing establishment reneged on this promise; appellant held a collateral position as a Black Employment Program (BEP) manager and due to his position as the BEP manager, appellant is often forced to file Equal Employment Opportunity (EEO) actions or to consult with Colonel Richard Polin to discuss minority advancement opportunities and inappropriate conduct by management toward black employees; after appellant reported Mr. Black for improperly addressing another minority employee, his promotion was put on hold; the employing establishment does not support the BEP; appellant's performance appraisal dropped from an outstanding rating to a highly effective rating from 1994 to 1996; during a repair job of 1993, Mr. Black used inappropriate language with another employee and appellant had reported the same to Colonel Polin; appellant filed a report in his personal log wherein he indicated that an employee had fallen through the scaffolding and Mr. Black removed this report from his personal log by cutting it out; appellant's supervisor Craig D. Cicconi and Mr. Black had a friendship which impacted on appellant's

ability to perform his job; a desk audit of a white female was permitted after appellant was denied a desk audit which would have established that he was performing GS-12 level work; and appellant was treated disparately with respect to timekeeping requirements and approval of overtime.

In a decision dated May 12, 1997, the Office denied appellant's claim on the grounds that the evidence of record did not establish that the accepted employment factors were causally related to appellant's claimed condition. By decision dated July 22, 1997, the Office denied appellant's request for a hearing.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established that he sustained an emotional condition that was causally related to factors of his federal employment.

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment contributing to his condition. Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] 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.[2] 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.[3]

In the present case, the Office found no factual basis for appellant's allegations that the employing establishment did not support the BEP and further found that the following identified

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

[2] *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985).

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

factors were not within appellant's performance of duty: that few blacks get promotions and a preexisting settlement agreement between the employing establishment and a class of employees in which the employing establishment did not admit to wrongdoing; the failure of the employing establishment to accept appellant's informal cost saving suggestions; appellant's pursuit of an EEO complaint; appellant's concerns over another employee's promotion and performance award; and Mr. Cicconi's relationship with Mr. Black. As there is no factual evidence to demonstrate that the employing establishment did not support the BEP, the Office properly found that this factor was not within appellant's performance of duty. In addition, as none of the other identified factors are included within appellant's regularly assigned duties or included in his special assigned duty as the BEP manager, these factors cannot be considered compensable under the Act. Appellant has not submitted any evidence of error or abuse with respect to the employing establishment's performance appraisal ratings of record, the denial of overtime to appellant or the employing establishment's request that he report to the foreman on duty when going to a work site. Thus, appellant's reaction to these factors is not compensable as it is deemed to be self-generated. Finally, appellant has not submitted reliable or probative evidence which supports his contention that the employing establishment promised him a promotion to the GS-12 level. Rather, the evidence of record indicates that appellant was encouraged to pursue this position once it became available. As there is no evidence of error or agency abuse in the administration of this personnel matter, this is not a compensable factor of employment.

The Office further found that the following factors were factually correct and within appellant's performance of duty: appellant reported Mr. Black regarding the way he addressed minority employees and Mr. Rogella, appellant's second-line supervisor, was criticized by Colonel Polin for not controlling the matter; Mr. Black swore at appellant on a work site in 1993 and Mr. Black improperly removed appellant's record of an accident at work from appellant's job notes and it was appropriate for appellant, as safety manager, to keep a record of this incident. 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 reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work.[4]

Appellant submitted a report dated September 26, 1996 by Dr. Sharon Rechter, a psychiatrist, in which she diagnosed major depression ensuing after two years of job distress and dissatisfaction. Dr. Rechter noted appellant reported a "prolong[ed] history of abuse at the hands of his employers." She concluded that it was highly probable that appellant's disability was the result of his place of employment. However, Dr. Rechter did not specifically identify any incident that was within the scope of appellant's regularly assigned duties or specially assigned duties as the BEP manager to substantiate her conclusion that appellant was subjected to a prolonged history of abuse at the hands of his employers. Therefore, her report is not sufficient to establish that appellant sustained any work-related emotional condition, arising out of and in the course of employment, as the medical evidence does not establish that appellant's emotional

[4] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

reaction was related to any of the identified causative factors that the Office deemed were factual.[5] Appellant has not established that he sustained an emotional condition within the performance of duty.

The Board also finds that the Office properly denied appellant's request for a hearing pursuant to section 8124 of the Act.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[6] As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[7]

In this case, the Office issued its last merit decision, *i.e.*, decision granting or denying compensation on May 12, 1997. The first request for a hearing on the record was postmarked June 13, 1997. In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday.[8] In the present case, the first day of the 30-day time period was May 13, 1997 and the time period ended June 11, 1997. Since appellant's request for a hearing was not within 30 days of the Office's decision, his request was untimely pursuant to section 8124(b)(1) of the Act and he was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved, and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that his injury or condition occurred within the performance of duty. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The decisions of the Office of Workers' Compensation Programs dated July 22 and May 12, 1997 are hereby affirmed.

---

[5] *Id.*

[6] 5 U.S.C. § 8124(b)(1).

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[8] *John B. Montoya*, 43 ECAB 1148 (1992).

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

Dated, Washington, D.C.
November 10, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member