U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDY W. RIVERS and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 00-222; Submitted on the Record;
Issued December 4, 2000

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a stress-related myocardial infarction in the performance of duty.

On December 19, 1997 appellant, then a 51-year-old customer services supervisor, filed a claim alleging that on September 6, 1997 he sustained a myocardial infarction which he attributed to stress in his federal employment.

Appellant addressed specific factors of his employment which he implicated as causing him stress. He alleged that his supervisor, Ms. Fortenberry embarrassed and harassed him, both when by themselves and in front of others; he alleged that she followed him around, criticized him and/or his actions, yelled at him, called his name repeatedly, called him on the phone repeatedly, micro-managed him, moved his desk into a high traffic area, made him stand the entire shift, even when she knew he had a bad back, and made him attend a remedial training class twice, where people made fun of him.

Appellant alleged that Ms. Fortenberry told him once that he had bad breath and had an odor, that she issued him two letters of warning which caused him to fear losing his job, that he was made to come in for a two-hour meeting on his day off, for which he was not paid, that he was not treated equally, that he was issued conflicting instructions and that Ms. Fortenberry countermanded some of his instructions to a janitor.

Appellant alleged that Ms. Fortenberry called him from the parking lot telling him that she would be in an hour, but then showed up in five minutes to "catch" him, that while discussing his performance on the workroom floor she stated "now if we could just do something with your mouth," that she used the term "piss poor" to describe a facet of his performance, that she wanted all overtime to go through her and she wanted her hand in everything, that she told him that he gave her a headache, that she misplaced a form that he had submitted to her and that she accused him of not doing his job.

Appellant stated that on the morning of the heart attack he had just arisen and was preparing to go watch his son play basketball when it occurred, and indicated that for the week prior to the attack he had chest pains and sleepless nights.

Ms. Fortenberry denied that she had ever harassed appellant and noted that it was her responsibility to oversee daily operations which meant checking up on supervisors and correcting any inefficient work practices, that appellant did not have his own desk but used the same stand up desk as all supervisors, that the desk was moved in response to an equipment limitation effort to improve efficiency and to bring the employing establishment branch into compliance with a prior audit, that the desk was only there for supervisors to use to update their mail volume reports, that appellant's job description required him to be on his feet checking on employees throughout his shift and that she was not aware that appellant had any back problems or was on any type of light duty. She stated that, after appellant attended the first remedial class, his performance did not improve, such that he had to repeat the class, that appellant was issued a letter of warning for failure to improve his performance, that no supervisors got paid for attending meetings on their days off, but that it was required anyway, as the meetings had to be held sometime, that she called appellant to advise him of a meeting, that she also called him several times due to a problem with express mail, that as a manager her responsibility was to ensure that personnel personal hygiene was maintained on a daily basis, as appellant had to work closely with his subordinates, that appellant exaggerated in his statements, and that she never yelled at him, but that he had told her not to "holler" at him as a figure of speech as she was telling him about something that was wrong.

Ms. Fortenberry stated in a supplementary response that she did not recall ever saying that appellant gave her a headache, that his performance continued to be unsatisfactory, that she apologized for the "piss poor" comment when she realized appellant was offended, that appellant did not want to hear that anything was wrong with his operation, that she merely offered corrective suggestions, and that appellant's letters of warning were for just cause. She also enclosed a statement from an employee who alleged that appellant treated her in the same manner he was alleging Ms. Fortenberry had treated him.

Also submitted was appellant's job description which indicated that the position's duties included prolonged standing, walking and reaching.

Further submitted were letters of warning for unsatisfactory work performance.

Appellant submitted several medical reports; in a December 10, 1997 statement Dr. Richard W. Terry, a Board-certified cardiologist, which noted that appellant was seen on September 9, 1997 and was diagnosed with a heart attack, that he subsequently underwent

cardiac catheterization, coronary angioplasty in two areas, and coronary angioplasty or balloon dilatation in two arteries. Dr. Terry opined:

> "[I]t would appear that among the factors contributing to aggravating [appellant's] underlying process ... one must consider the stresses that he has at work. I do feel that stress does contribute to worsening in atherosclerotic coronary artery disease, and on reading his description of some of the difficulties he has had in the workplace ... I must feel that it did play some role."

Appellant provided several statements from coworkers: a November 18, 1997 statement indicated that the coworker witnessed Ms. Fortenberry verbally abuse appellant with a raised voice and harass him in a "hostile manner" following him around and paging him; a November 28, 1997 statement indicated that the coworker used to see Ms. Fortenberry yelling at appellant about everything he used to do, that she would ask him questions and then tell him his answer was not good enough and that he was not thinking, and that she would then page him to her office; a November 29, 1997 statement indicated that a coworker saw Ms. Fortenberry scold appellant on the workroom floor, one time in a loud voice; and a January 13, 1998 statement indicated that the coworker witnessed Ms. Fortenberry harassing and disrespecting appellant "on many occasions," follow him around and scold him.

Excerpts from medical and other informational publications were also submitted.

By decision dated April 23, 1999, the Office of Workers' Compensation Programs rejected appellant's claim finding that he failed to establish any compensable factors of employment in the development of his cardiac condition. The Office found that the factors implicated by appellant were either not supported by the record as having occurred, or were administrative and personnel matters absent evidence of error or abuse. The Office found that the joke appellant's manager made at his second attendance at the remedial class about him now being an expert and receiving two free lunches was in poor taste but did not rise to the level of harassment, and that there was no evidence that anyone at the class made fun of him. The Office found that Ms. Fortenberry's comments to appellant regarding bad breath and odor were within her administrative responsibilities to ensure that personal hygiene was maintained on a daily basis, and were not error or abusive. The Office also found that, although the "piss poor" phraseology was tactless, it was an informal performance appraisal and not harassment or abusive. The Office further found that none of the coworkers' statements identified a specific event or occurrence by time and place, and therefore did not establish it as having occurred.

By undated letter received May 25, 1999, appellant requested reconsideration and in support he submitted another medical report from Dr. Terry, who stated in an April 21, 1999 report that appellant had mentioned at the onset that he had been under a fair amount of stress at work and he opined, "the stresses of [appellant's] work could well have played a role in aggravating underlying coronary disease and accelerating his atherosclerotic process."

Additionally submitted were more excerpts from medical publications.

By decision dated August 23, 1999, the Office denied modification of the April 23, 1999 decision finding that the evidence submitted in support was insufficient to warrant modification.

The Office found that appellant had failed to establish or implicate any compensable factors of employment, that Dr. Terry's opinion was couched in speculative terms, and that excerpts from publications had no specific application in this case.

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

To establish appellant's occupational disease claim that he sustained an emotional stress-related myocardial infarction 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 stress-related aggravation of his underlying cardiac disease; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional stress-related myocardial infarction.[1] Rationalized medical opinion evidence is medical evidence that 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 based on a complete factual and medical background of the claimant, 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 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 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-related condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.[3] Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment, and does not come within the

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

[2] *Id.*

[3] *Donna Faye Cardwell, supra* note 1, *see also Lillian Cutler*, 28 ECAB 125 (1976).

coverage of the Act.[4] Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."[5]

Appellant did not allege that he developed an emotional stress-related condition arising out of his regular or specially assigned duties, or out of specific requirements imposed by his employment. He alleged, for the most part, that his condition was caused by supervisory embarrassment and harassment. 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.[6] However, in order for harassment to give rise to a compensable disability under the Act, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment alone are not compensable under the Act.[7] The Board finds that appellant has failed to submit any specific, reliable, probative and substantial evidence in support of his harassment allegations. Appellant has the burden of establishing a factual basis for his allegations, however, the allegations in question are not supported by specific, reliable, probative and substantial evidence and have been refuted by statements from appellant's supervisor. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them.

Many of appellant's allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*[8] the Board 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. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[9] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: appellant being followed around and monitored,[10] supervisory oversight of appellant's work and staff,[11] micromanagement,[12] calling appellant frequently regarding work,[13] appellant being instructed on

[4] *Id.*

[5] *See Joseph C. Dedonato,* 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

[6] *Sylvester Blaze*, 42 ECAB 654 (1991).

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

[8] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[10] *Id.*

[11] *Id.*

[12] *Id.*

how to perform his duties,[14] the issuance to two letters of warning to appellant,[15] a change in the physical working environment to be in audit compliance,[16] required attendance at training,[17] criticism of personal presentation, including personal hygiene, required attendance at administrative meetings, and general performance criticism.[18] Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions, and therefore they are not compensable now under the Act.

Appellant has also not demonstrated that he received any unequal treatment, and he has not submitted any evidence or findings in his favor supporting his EEO allegations of discriminatory treatment. His fear of job loss with the receipt of one more letter of warning is additionally not a compensable factor of employment.[19] Appellant's feelings about being made fun of when he was required to attend training for a second time were not supported by the record and the manager's joking comments about him now becoming an expert and getting two free lunches does not rise to the level of harassment, ridicule, or insult as it did not involve name calling, immutable characteristics or derogatory slurs. Ms. Fortenberry's comment, for which she apologized, about appellant's "piss poor" performance, while tactless, also does not rise to that level. Her comment about doing something about appellant's "mouth" does not rise to the level of harassment.

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.[20] 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.[21] When the matter asserted is a

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[13] *Id.*

[14] *Id.*

[15] *See Gregory N. Waite*, 46 ECAB 662 (1995); *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[16] *See Clara T. Norga*, 46 ECAB 473 (1995) (disability not covered when it results from frustration from not being permitted to work in a particular environment).

[17] *See Jose L. Gonzalez-Garced, supra* note 15.

[18] *See O. Paul Gregg*, 46 ECAB 624 (1995); *Sammy N. Cash*, 46 ECAB 419 (1995).

[19] *See Leroy Thomas, III*, 46 ECAB 946 (1995); *Mary L. Brooks*, 46 ECAB 266 (1994).

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

[21] *Ruthie M. Evans, supra* note 7.

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.[22] If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

In this case, the Office properly found that none of the causative factors appellant alleged in aggravating an emotional stress-related myocardial infarction were compensable factors of employment. Therefore, he has not established that the stress he experienced was causally related to compensable factors of his federal employment, and consequently, he has failed to establish an employment relationship with his coronary artery disease and consequent myocardial infarction.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 23 and April 23, 1999 are hereby affirmed.

Dated, Washington, DC
December 4, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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