U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY L. FREEMAN and DEPARTMENT OF THE NAVY, NAVAL SUPPLY CENTER, Norfolk, VA

Docket No. 99-1086; Submitted on the Record;
Issued June 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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

On November 3, 1998 appellant, than a 41-year-old fire fighter, filed a notice of occupational disease, alleging that he suffered stress from a hostile work environment. He indicated that he became aware of the disease or illness and that it was caused or aggravated by his employment on May 6, 1998. In an accompanying statement also dated November 3, 1998, appellant attributed his stress to the hostile work environment created by his supervisor, assistant chief Steve Johnson. In this regard, he stated that Mr. Johnson harassed him for being Jewish, assaulted him physically, temporarily removed him from driving or operating emergency fire apparatus and removed him from the acting assistant chief rotation. Appellant further explained that the physical assault occurred on April 18, 1998 when Mr. Johnson showed him a wrestling move, which involved the assistant chief gripping his throat and throwing him down. Appellant stated that the move was repeated three more times.

On November 8, 1998 Mr. Johnson denied that appellant was subject to a hostile work environment. He stated that he never made anti-Semitic comments and indicated that he disciplined subordinates who did so. Mr. Johnson supported his assertion with a November 4, 1998 statement from Raymon J. Hoeflein, a fire fighter, who confirmed that Mr. Johnson disciplined workers who made anti-Semitic remarks. He stated that appellant approached him on April 18, 1998 and asked advice concerning how to respond to a hypothetical physical assault. Mr. Hoeflein stated that he asked appellant if he would like him to demonstrate a "take-down" move. He stated that he explained the move to appellant, but that appellant requested a demonstration. Mr. Hoeflein stated that he proceeded to demonstrate the move and that appellant requested additional demonstrations and thanked him. Appellant submitted statements from coworkers Daniel M. Wickert, Sean Edmondson and Lawrence E. Irvin, Jr., verifying his account of the wrestling incident and a June 7, 1998 letter he wrote to the employing establishment security director, which repeated his account of the April 18, 1998 incident. Mr.

Johnson further indicated that appellant was removed from driving "Engine One" due to his ineptness as a drive operator. He stated that appellant performed poorly on December 15, 1997 during engine company pump operations training and that on April 14, 1998 appellant was suspended from driving any fire apparatus. Mr. Johnson also stated that appellant was removed from the acting assistant chief's rotation due to his willful disobedience and incompetence. He submitted his March 26, 1998 letter to acting fire chief Benjamin H. Miller and Mr. Miller's April 14, 1998 response to that letter, which further indicated that appellant's duties were changed only due to his willful disobedience and incompetence.

By decision dated December 1, 1998, the Office found that appellant failed to establish that he sustained an injury in the performance of duty.

On December 14, 1998 appellant requested reconsideration. In support, he submitted a June 18, 1998 statement from fire fighter William Melton stating that he observed Mr. Johnson slam appellant into a couch and choke him vigorously until gasping sounds were heard. Appellant also submitted a June 22, 1998 statement from firefighter Jack A. Gormley. He stated that appellant told him that his throat hurt after the incident and that he had trouble sleeping. Mr. Gormley stated that Mr. Johnson told him that he put a firm choke hold on appellant and noticed appellant choking and making a scared face.

By decision dated January 6, 1999, the Office reviewed the merits of the case and found that the evidence was insufficient to warrant modification of its prior decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her 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.[1] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in 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

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

factors of employment and may not be considered.[3] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a 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.[4]

In the present case, appellant alleged that Mr. Johnson physically assaulted him on April 18, 1998 and that this caused his emotional condition. The Board has recognized the compensability of verbal and physical altercations or abuse in certain circumstances.[5] Appellant, however, has not established that factual aspect of his allegation that Mr. Johnson physically assaulted him. In this regard, Mr. Johnson and three witnesses maintain that appellant volunteered to have the wrestling maneuvers performed and that, therefore, a physical assault never occurred. Moreover, appellant has failed to submit any evidence corroborating his assertion that he was the victim of a physical assault. In this regard, neither that statement from Mr. Melton nor the statement from Mr. Gormley establish that the April 18, 1998 wrestling incident was involuntary. Thus, appellant has not established a compensable factor of employment with respect to the April 18, 1998 incident.

Appellant also alleged that Mr. Johnson harassed him with comments about his religious background. Mr. Johnson, however, denied this allegation and submitted a statement from Mr. Hoeflein stating that Mr. Johnson had disciplined workers for making anti-Semitic remarks. In addition, appellant failed to submit any evidence supporting this allegation such as specific instances of when such remarks were made. Consequently, because appellant failed to provide any corroborating evidence that such statements were uttered by Mr. Johnson, he failed to meet his burden of proof of establishing that the harassment occurred.[6]

Appellant also alleged that the employing establishment acted abusively in removing him from driving or operating emergency fire apparatus and in removing him from the acting assistant chief rotation. These actions are administrative or personnel matters and will be considered an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.[7] Appellant, however, submitted no evidence supporting his assertion that the employing establishment acted in error or abusively in these administrative matters. Moreover, Mr. Johnson provided reasonable explanations for his actions in these administrative matters. Mr. Johnson indicated that appellant's removal from these duties stemmed from documented instances of willful disobedience and incompetence. Accordingly,

[3] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[4] *Id.*

[5] *Harriet J. Landry*, 47 ECAB 543 (1996); *Alton White*, 42 ECAB 666 (1991).

[6] *Janet I. Jones*, 47 ECAB 345 (1996).

[7] *Martin Standel*, 47 ECAB 306 (1996).

appellant's mere perceptions of error or abuse in these administrative matters are not sufficient to establish entitlement to compensation.[8]

Appellant, therefore failed to establish a compensable factor of employment and did not meet his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

The decisions of the Office of Workers' Compensation Programs dated January 6, 1999 and December 1, 1998 are affirmed.

Dated, Washington, D.C.
June 21, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[8] *Janet I, Jones*, *supra* note 6.