U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFERSON A. MARBLEY and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

Docket No. 99-160; Submitted on the Record;
Issued May 22, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

On August 22, 1997 appellant, then a 30-year-old distribution clerk, filed a claim alleging that he developed an emotional condition due to a "hostile working environment." Specifically appellant alleged that the employing establishment forced him to work outside of his medical limitations, that he experienced leave problems and pay problems and that he was being called names because of his physical disability, which he identified as "back and knee problems." Appellant alleged constant harassment from supervisors, that his duty station was changed from the Duluth to the Decatur facility,[1] that he was forced to work next to a woman with hepatitis, that he was refused admission to "his" facility, that supervisors were telling lies about him, that he was constantly being watched, intimidated and threatened by management, that he had debt, that he was required to report all breaks when others were not and that his sick leave was disapproved. Appellant subsequently alleged that as a black male he received different treatment than white males, that people said that there was nothing physically wrong with him when he contended there was, that supervisors said he was lazy and ignorant, that they made him lift parcels from the floor, that he was made to stand longer than three hours, that he was forced to stay home without pay, that they forced him to drive to Kennesaw, that he would fall asleep driving there and that a lady there had hepatitis and was coughing on him. Appellant stopped work on August 23, 1997 and returned to work in October 1997. He failed two proficiency tests on December 12 and 17, 1997, was retested on February 10, 1998 with unsatisfactory results and

[1] Appellant had been placed on enforced leave on July 11, 1997 due to his medical restrictions and the lack of appropriate light-duty work assignments; however, a light-duty assignment was offered at the Kennesaw facility.

was notified on February 26, 1998 of his proposed removal for failure to meet the requirements of his position.

The employing establishment controverted appellant's claim. By letters dated August 25 and September 16, 1997, the employing establishment noted that appellant was temporarily assigned to the Decatur facility as no light/limited duty was available at his base installation, the Duluth facility. The employing establishment noted that appellant had previously filed a compensation claim alleging that his duties aggravated his existing back condition, but indicated that it had no knowledge that the Office had accepted the claim. The employing establishment noted that on August 22, 1997 appellant's supervisor had a discussion with appellant regarding his failure to properly clock in and out of the facility and that following that discussion appellant requested sick leave due to "harassment of MSPB [Merit System Protection Board] meeting." It noted that appellant was advised that medical documentation was required for his absence, and that he left the facility and returned with verification from Kaiser Permanente stating that he was seen that date and could return to duty on August 23, 1997. The employing establishment noted that thereafter he requested a claim form, stated that he was stressed out and left the facility. The employing establishment noted that appellant was scheduled to begin his previously approved vacation on August 23, 1997. The employing establishment noted that appellant had been assigned to the Decatur facility only since August 11, 1997, but that he claimed on his claim form that he first became aware of his emotional condition and its employment relationship on July 24, 1997.

On September 15, 1997 appellant indicated that he wanted to file a grievance about being given only four hours of work per day when another light-duty employee was receiving eight hours per day. Appellant also wanted to grieve his receipt of two hours absent without leave when he was at an MSPB meeting and to grieve the stopping of his direct deposit. He further wanted to grieve being asked to work outside of his medical restrictions and his inability to promptly see the union steward when he requested to do so. Appellant additionally wanted to grieve his having to repay a $250.00 debt to the employing establishment as a result of a salary advance. On October 1, 1997 appellant's grievances were settled without admission of wrongdoing, with the agreement that he would work four hours per day on temporary light duty and would be paid for the four hours per day he missed until a fitness-for-duty examination could be performed.

By letter dated October 7, 1997, the Office requested further information including the specifics of all incidents claimed, witness statements, grievances, and outcomes and his history of previous illnesses and treatment.

An October 16, 1997 letter from the postmaster requested repayment by appellant of a $250.00 debt for a salary advance he had received on July 5, 1997. On October 30, 1997 the postmaster advised appellant of the imposition of an involuntary administrative salary offset under the Debt Collection Act as he had not acted to repay this debt.

In response to the Office information request, appellant submitted a Kaiser Permanente data sheet indicating that he had experienced his emotional problem since June and that he was taking Prozac. Multiple reports from a nonphysician therapist were also submitted. In an undated, unsigned statement, appellant claimed that he was denied a change of schedule, that he

was being punished by having to work the shift he was assigned, and that he was being treated that way due to his race, his color, his sex, his disabilities and as retaliation for his prior grievances. In another undated, unsigned statement appellant alleged back injury due to lifting tubs of magazines and due to bending and standing for long periods. He alleged that he was told to work faster, which he found to be cruel, abusive, unacceptable and unprofessional and that mind games were being played. Appellant also alleged that embarrassing, humiliating and degrading remarks were made to him in front of others. He further alleged physical abuse by being made to lift things. Appellant claimed that he was a disabled veteran currently receiving Veterans Administration compensation for military-related disability.

An October 30, 1997 medical report noted that appellant developed some back pain after jumping out of an airplane in the military, that three out of five Waddell's signs were positive and that he could return to full duty without restrictions. Low back pain with functional overlay was diagnosed.

An undated coworker statement alleged that regardless of appellant's medical condition, he was told to retrieve heavy parcels and that he was put on another shift when there were several "sit down" jobs he could have performed on his present shift. No specifics were provided. In an October 28, 1997 statement Crystal Sensabaugh, a coworker, claimed that supervisor Jessie Stalling always gave appellant a hard time with his doctor's statements, that she stated he was just lazy and was an embarrassment to her unit, that she often called him names such as stupid, lazy, old man, etc., that he had to reach the cases over his head "even though his limitations stated otherwise," and that she told appellant Duluth did not have any light duty available, when Ms. Sensabaugh felt otherwise. No specific dates, times or circumstances were identified. In an October 31, 1997 unsigned statement, a coworker claimed that appellant requested light duty but was told that he could not be accommodated. The coworker noted that a clerk on her tour was working on light duty from another facility.

By letter dated November 6, 1997, the postmaster disagreed with appellant's statements relative to his claim and he noted that every effort had been made to accommodate all duty restrictions appellant had provided. The postmaster noted that appellant had been treated no differently than any other employee requesting limited duty, that the office of injury compensation had been involved in all limited-duty work and that assignments were in compliance with all policies and requirements. The postmaster noted that appellant had been properly compensated based upon employing establishment regulations, that his statements and allegations were without merit and he had provided no evidence or documentation to support "his frivolous accusations." The postmaster noted that appellant had used all available forms to hear his complaints and that none had been upheld.

By decision dated March 17, 1998, the Office rejected appellant's emotional condition claim finding that he had failed to establish that his emotional condition was caused by any compensable factors of his federal employment. The Office found that appellant's allegations of implicated causal factors were either not arising in the performance of duty, as they were administrative actions without evidence of error or abuse, or were unsubstantiated allegations, without evidence of having occurred as alleged. The administrative actions found not be erroneous or abusive included appellant being instructed to work at the 155-flat case on April 1,

1997, being sent home on June 6, 1997 on enforced leave as no work was available within his physical restrictions, being given only four hours of work at the Duluth facility beginning September 9, 1997, being told to wait outside to see a supervisor when others were allowed in, not being allowed to work on October 6, 1997 because his return-to-work certificate was not signed by a physician, being required to obtain medical documentation, having his wages garnished due to his failure to repay a salary advance as requested, having his tour of duty changed, being denied a schedule change to accommodate medical appointments, having back pay withheld, being forced to commute to the Kennesaw facility to work light duty and having to report his breaks to a supervisor when others were not required to do so.

Allegations that the Office found were unsubstantiated included appellant's claims of verbal harassment, verbal assault and verbal abuse by managers and coworkers and of being forced to work next to a woman with hepatitis.

By letter dated April 16, 1998, stamped as received by the employing establishment on April 17, 1998, mailed to the Branch of Hearings and Review postmarked April 17, 1998 and date stamped as received by the district Office on April 20, 1998, appellant requested an oral hearing.

By decision dated June 10, 1998, the Branch of Hearings and Review noted that appellant's oral hearing request was untimely, such that he was not, as a matter of right, entitled to a hearing and it denied his request on the basis that the issue could equally well be addressed by requesting reconsideration from the Office and by submitting new and relevant evidence.

The Board finds that appellant has failed to establish that he developed 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.[2] 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.[3]

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

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

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

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 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.[4] 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.[5] 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.[6]

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.[7] 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. Mere perceptions and feelings alone are not compensable.[8] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[9] 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.[10] However, if a claimant fails to implicate a compensable factor of

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

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

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

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

[8] *Frank A. Catapano*, 46 ECAB 297 (1994).

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

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

employment, the medical evidence of record need not be considered. In the instant case, appellant has failed to implicate any compensable factors of his employment in the causation of his emotional condition.

Most 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*[11] 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.[12] 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: the assignments given to appellant,[13] the hours assigned to appellant,[14] the location, position and environment to which appellant was assigned,[15] commuting,[16] leave problems,[17] pay problems with debt and direct deposit,[18] appellant being watched and monitored,[19] being refused admission to the facility, the reporting of breaks, being put on leave without pay,[20] and being required to provide medical documentation for absences.[21] 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 also alleged harassment, verbal abuse, discrimination, being lied about, being intimidated and being threatened by management. 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.

[11] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[13] *Helen Casillas*, 46 ECAB 1044 (1995).

[14] *Id.*

[15] *Clara T. Norga*, 46 ECAB 473 (1995).

[16] *Adele Garafolo*, 43 ECAB 169 (1991).

[17] *Martha L. Watson*, *supra* note 3.

[18] *See generally Drew A. Weissmuller*, 43 ECAB 745 (1992).

[19] *Id.*

[20] *See, e.g., Gregory N. Waite*, 46 ECAB 662 (1995).

[21] *Helen Casillas*, *supra* note 13.

Mere perceptions of harassment or discrimination are not compensable.[22] 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 entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[23] Words and actions that appellant implicated as being harassment include his perception of being called names, being lied about, being threatened, and having embarrassing, humiliating and degrading remarks being made toward him. In this case, appellant failed to submit any factual evidence or specific witness statements, which supported that any of these words or actions actually occurred. Therefore, this harassment is not supported by the record as having occurred.

Appellant additionally alleged that he was retaliated against, that he was refused prompt access to his union steward, that he was refused admission to his facility when others were not, that he was being made to perform tasks that were outside of his medical restrictions and that he was being told to work faster. While one or more of these allegations could possibly rise to compensable factors if they were indeed supported and proven by factual evidence, no such supportive or factual evidence of their occurrences as alleged was submitted to the record.[24] Appellant, therefore, failed to establish that they occurred as alleged and any condition arising from them would not be compensable under the Act.

Further, the employing establishment controverted appellant's allegations and claims, indicating that there were legitimate reasons for appellant's reassignments and work schedules, that he had been treated no differently than other employees requesting limited duty, that assignments were in compliance with his work restrictions and were overseen by the employing establishment office of injury compensation, that appellant had been properly compensated based upon postal regulation and that his statements were without merit.

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

The Board further finds that the Office properly denied appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[25]

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[22] *Helen Casillas*, *supra* note 13; *Ruth C. Borden*, 43 ECAB 146 (1991).

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

[24] Appellant's witness statements were not specific as to date, time, place and circumstances, but were very general and nonspecific. Accordingly, these statements are insufficient to establish appellant's claims.

[25] 5 U.S.C. § 8124(b)(1).

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[26]

The Board has held that the Office, in its Broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[27] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right for a hearing,[28] when the request is made after the 30-day period for requesting a hearing[29] and when the request is for a second hearing on the same issue.[30] In these instances the Office will determine whether a discretionary hearing should be granted of, if not, will so advise the claimant with reasons.[31] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[32]

In the present case, the Office issued its merit decision rejecting appellant's emotional condition claim on March 17, 1998. Appellant requested a hearing in a letter dated April 16, 1998, but not postmarked as mailed until April 17, 1998. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request,[33] and April 17, 1998 was the 31st day following the March 17, 1998 Office decision.[34] Since appellant

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[26] 20 C.F.R. § 10.131(a).

[27] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[28] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[29] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[30] *Johnny S. Henderson*, *supra* note 27.

[31] *Id.*; *Rudolph Bermann, supra* note 28.

[32] *See Herbert C. Holley, supra* note 29.

[33] 20 C.F.R. § 10.131(a).

[34] April 16, 1998 was not a weekend nonworkday or a holiday.

did not request a hearing within 30 days of the Office's May 15, 1998 decision, he was not entitled to a hearing under § 8124 as a matter of right.

However, the Office, in its discretion, considered appellant's hearing request in its June 10, 1998 decision, and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence supporting that he developed an emotional condition in the performance of duty, causally related to compensable factors of his employment.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[35] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 10 and March 17, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 22, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

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