U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNIE LEE DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Hickory, NC

Docket No. 00-1669; Submitted on the Record;
Issued August 22, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether appellant abandoned his request for a hearing.

On February 11, 1999 appellant, then a 48-year-old postal clerk, filed an occupational disease claim alleging that he sustained an aggravation of severe stress, panic, anxiety and addiction causally related to factors of his federal employment.[1] Appellant stopped work on February 10, 1999 and did not return.

By decision dated August 2, 1999, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish an injury in the performance of duty.

On August 31, 1999 appellant requested an oral hearing before an Office hearing representative. On December 27, 1999 the Office issued a notice advising that a hearing would be held at a specific time and place on February 1, 2000.

In a decision dated February 14, 2000, the Office found that appellant abandoned his request for a hearing. The Office noted that appellant failed to appear at the hearing and that the record gave no indication that appellant had contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear.

The Board finds that appellant has not established that he sustained an emotional condition while in the performance of duty.

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[1] Appellant filed a second emotional condition claim on April 22, 1999. In a letter dated June 9, 1999, appellant requested that the claims be consolidated as both pertained to the same incidents. The Office doubled the two claims into number A06-722064.

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 his 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.[2] 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[4] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[5]

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 factors of employment and may not be considered.[6] 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.[7]

Appellant's allegations that officials with the employing establishment falsely accused him of altering a physician's note, wrongly denied his request for a transfer and required him to begin work on his nonscheduled days at his regular starting time, are unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[8] Although the handling of starting times, requests for transfers and inquiries into medical reports

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[7] *Id.*

[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[9]

However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[10] In this case, appellant has not submitted any evidence that the employing establishment committed error or abuse in these actions. Thus, appellant has not established a compensable employment factor under the Act.

Appellant additionally attributed his stress-related condition to sexual harassment and verbal abuse by a coworker, Mark Wilson. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[11] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[12]

Appellant related that Mr. Wilson pointed at him and stated, "There goes my little queer. [C]ome over and give me a ____." Appellant indicated that he spoke with Jim Wilson, plant manager, about the incident and that he said "the matter would be taken care of and nothing was ever said to me regarding this incident." In support of his allegation, appellant submitted a witness statement from Mark Herbert, a coworker, who related:

> "While I cannot remember exactly what Mark Wilson said, I remember him addressing [appellant] rather loudly, using sexual language. I remember him using 'c___' and I believe he used language referring to homosexuality, although I cannot remember specifics. From my standpoint, the statements were inappropriate and unprovoked."

In a statement dated April 30, 1999, Brian Harris, a manager with the employing establishment, related that the plant manager with whom appellant spoke concerning Mr. Wilson had since died. Mr. Harris noted that, according to appellant's account of events, the situation apparently involved only one comment made by Mr. Wilson. He stated:

> "I was not aware that it was still an issue until late in 1998. The only thing [appellant] said to me was that sometimes this employee looks at him. Since then, this manager [and] Supervisor Mike Golby, have monitored the situation and have not noticed anything of an unusual nature."

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[9] *Id.*

[10] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[11] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[12] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

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] In this case, appellant has not shown how the isolated comment made by Mr. Wilson would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[14] Appellant submitted a witness statement from Mr. Herbert, who generally described sexual language used by Mr. Wilson towards appellant, but he did not provide specific details regarding the conversation.

Appellant further alleged that his supervisor harassed him by requiring him to begin his nonscheduled day at his usual starting time. In support of his allegation, appellant submitted a statement from Norman Allen, a coworker, who indicated that prior to August 31, 1999 employees were not required to begin at their usual starting time on a nonscheduled day. Appellant further submitted a statement by another coworker who maintained that he was not told when to come in on a nonscheduled day but noted that employees usually arrived within two hours of the usual start time. The coworker related that appellant "was singled out because Brian Harris wanted to change the way things have always been done."

In response to appellant's contention, Mr. Harris related that he had specifically informed appellant to report at his usual start time on his nonscheduled days unless otherwise directed. Mr. Harris stated: "Those mentioned who worked different schedules on their days off gained permission in advance and it was not to the detriment of [employing establishment] operations." Appellant has not submitted sufficient evidence that being required to report on his nonscheduled days at his regularly scheduled starting time constituted harassment or discrimination by management.[15]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition while in the performance of duty.[16]

The Board finds that appellant abandoned his request for a hearing before an Office hearing representative.

[13] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[14] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

[15] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[16] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[17]

The regulations were once again revised, effective January 4, 1999. The regulations now make no provision for abandonment. Section 10.622(a) provides that a claimant or representative may withdraw a hearing request. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions. Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.

The regulations do not address what action the Office should take when a claimant neither withdraws the request for a hearing nor requests postponement but nonetheless fails to appear at the scheduled hearing without notice.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving

[17] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[18]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on February 1, 2000. The Office mailed appropriate notice to the claimant at his last known address.

The record shows that appellant neither withdrew his request for a hearing nor requested postponement. The provisions of section 10.622, therefore, do not apply in this case. The record also shows that appellant failed to appear at the scheduled hearing and that he failed to provide notification for such failure within 10 days of the scheduled date of the hearing. Because this failure satisfies the criteria for abandonment specified in the Office's procedure manual, the Board finds that appellant abandoned his request for a hearing before an Office hearing representative.

On appeal, appellant explained that on January 24, 2000 he sent a certified letter and a physician's report to the Board maintaining that he could not attend the scheduled hearing. He noted that the letter was not delivered until February 8, 2000.[19] The Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.[20] When the Office issued its decision on February 14, 2000, the record contained no explanation for appellant's failure to appear. The Office's decision was, therefore, proper.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e. (January 1999).

[19] A letter requesting cancellation or postponement of the hearing should have been sent to the Branch of Hearings and Review rather than the Board.

[20] 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

The February 14, 2000 and August 2, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 22, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member