U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FELIX FLECHA and SMITHSONIAN INSTITUTION,
NATIONAL MUSEUM OF THE AMERICAN INDIAN,
New York, NY

Docket No. 00-596; Submitted on the Record;
Issued February 26, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

On September 20, 1997 appellant, then a 41-year-old maintenance mechanic, filed an occupational disease claim alleging that he sustained stress due to discrimination and stalking by Thomas Murdy, his former supervisor. He stopped work on August 12, 1997.

By letter dated November 11, 1997, the Office of Workers' Compensation Programs requested that appellant submit additional information in support of his claim. In response to the Office's request, appellant submitted witness statements, copies of grievances and copies of disciplinary actions by the employing establishment against Mr. Murdy, his former supervisor. Appellant also submitted a medical report dated December 5, 1997 from Dr. Howard D. Isaacs, a Board-certified psychiatrist, who discussed the factors of employment to which appellant attributed his condition.

By decision dated April 24, 1998, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish an injury in the performance of duty. The Office found that appellant had established that he was improperly instructed to strip copper wire but further determined that the medical evidence was insufficient to establish that he sustained an emotional condition due to the inappropriate work assignment. The Office concluded that appellant had not established that Mr. Murdy harassed him or inappropriately changed his duty shift and work location in July 1996.

In a letter dated March 16, 1999, appellant requested reconsideration of his claim. By decision dated May 21, 1999, the Office denied modification of its prior decision.

The Board finds that the case is not in posture for decision.

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

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.[3] 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.[4]

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.[5] 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.[6]

Some of appellant's allegations of employment factors that caused or contributed to his emotional condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[7] the Board held that an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered under the Act because such matters pertain to procedures and requirements of the employer and are not directly related to the work

[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).

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

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

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

[6] *Id.*

[7] S*ee supra* note 2.

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.[8] 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 the category of administrative or personnel actions include: the denial of a promotion;[9] the assignment to work alone three days per week;[10] the letter of reprimand in August 1993;[11] and the unsatisfactory performance appraisal in 1992.[12] Appellant has presented no evidence of administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

Appellant primarily attributed his condition to harassment and discrimination by Mr. Murdy. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[13] 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.[14]

In this case, appellant has submitted evidence in support of his contention of harassment and discrimination by Mr. Murdy. Specifically, appellant filed a grievance against Mr. Murdy alleging that he changed his work hours and duty station as reprisal for his testimony to an investigator. The record indicates that on July 1, 1996 appellant provided information to an investigator, Mr. Kaplan, who was gathering evidence regarding allegations of misconduct by Mr. Murdy. In a letter dated July 3, 1996, Mr. Murdy informed appellant that, effective July 8, 1996, his work hours and duty station were being changed because he had not done his preventative maintenance assignments. He further stated in the letter that appellant "was not serving the [employing establishment] any purpose." In a decision on appellant's grievance, Howard Wink, an official with the employing establishment, stated:

> "I conclude that there is not enough evidence to show that you were performing your PM [preventative maintenance] inadequately. Even if you were performing poorly, I agree that Mr. Murdy and/or Mr. Hansen should have counseled you about your performance and how to complete the log. As far as I can determine,

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

[9] *Tanya A. Gaines*, 44 ECAB 923 (1993).

[10] *Janet Yates*, 49 ECAB 240 (1997).

[11] *Effie O. Morris*, 44 ECAB 470 (1993).

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

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

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

> they did not communicate their dissatisfaction until they changed your shift. I do not believe that it was appropriate to say that you were 'not serving the [employing establishment] any purpose.'"

Mr. Wink further stated, "I have not yet reached a firm conclusion about whether Mr. Murdy acted in good faith or out of malice, bias and/or reprisal. I will continue to consider and seek evidence on this issue."

On October 16, 1996 Mr. Wink issued Mr. Murdy a proposal to remove him from employment. Regarding Mr. Murdy's transfer of appellant to another shift and location, Mr. Wink stated:

> "I find inadequate evidence in support of your allegations that [appellant's] performance was poor. I found no evidence that you counseled him or tried to help him improve…. I find … your actions as a supervisor harmful rather than constructive. At a minimum, I believe the nature and timing of your behavior led to the appearance of reprisal for [appellant's] cooperation in the investigation."

In a decision to demote Mr. Murdy dated December 20, 1996, Patrick Miller, an official with the employing establishment, noted that Mr. Murdy accused appellant of lying on his employment application, being dishonest and performing poorly. Mr. Miller found Mr. Murdy's accusations against appellant were not well supported. He concluded, "Finally, I find your explanation of events concerning [appellant] confusing and difficult to believe. Based on the evidence contained in the proposal file, I sustain the charge of creating the appearance of reprisal."

The Office found that Mr. Murdy's action in transferring appellant did not constitute harassment because the employing establishment found only the appearance of reprisal. However, the employing establishment determined that Mr. Murdy made serious, unsubstantiated allegations against appellant, including that he lied on his employment application, was dishonest, and did not adequately perform his work. The employing establishment further found that Mr. Murdy inappropriately informed appellant that his work was of no value. In the decision demoting Mr. Murdy, the employing establishment found that reprisal appeared his motive in transferring appellant. In view of the employing establishment's findings, the Board concludes that appellant has established harassment and discrimination by Mr. Murdy in his attempt to transfer appellant following his testimony to an investigator.

The Office found that Mr. Murdy abused his authority in making appellant strip copper wire at work and that the error in the assignment of work constituted a compensable factor of employment. In the proposal to remove Mr. Murdy from employment, Mr. Wink stated:

> "I am particularly disturbed that you would assign a subordinate to spend a substantial amount of time on an activity that is repetitive, unpleasant, probably physically painful to hands and wrists, and of very little value to the [employing establishment]. I cannot believe that there was no more constructive work that you could have assigned to [appellant]. The very nature of the assignment causes me to question your motives in making such a[n] assignment."

In a letter dated February 1, 1997, Carmine Tarantino, a coworker, related:

> "Mr. Murdy also assigned demeaning work to [appellant]. This work was not in our job descriptions. One assignment Mr. Murdy delegated to [appellant], was to strip the plastic coating off of [number] 12 copper wire every day for months. Mr. Murdy then sold this copper as well as other metal, as scrap, keeping the proceeds. (This was done illegally and Mr. Murdy was severely reprimanded.) Mr. Murdy once expressed his disbelief in the fact that [appellant] would do this type of work for so long without leaving the department. He said that [appellant] was hard to break."

In view of the statements by Mr. Wink and Mr. Tarantino, the Board finds that the evidence supports the Office's finding that Mr. Murdy's instruction to appellant to strip copper wire constituted an abuse of his authority to assign work and, consequently, a compensable factor of employment.

Appellant also alleged that Mr. Murdy told him that he "was a dumb Puerto Rican and lazy." The use of an epithet, which is derogatory in nature can constitute harassment and discrimination under the Act.[15] In his February 1, 1997 statement, Mr.Tarantino indicated that Mr. Murdy expressed dislike for Hispanics. Mr. Tarantino related that, regarding appellant, Mr. Murdy told him that he had "got to get rid of this lazy spick" and also described more general statements made by Mr. Murdy against Puerto Ricans. As the evidence supports that Mr. Murdy used a derogatory epitaph in reference to appellant, the Board find that he has established a compensable factor of employment in this regard.[16]

The Office reviewed the medical evidence of record and determined that the evidence was insufficient to establish that appellant sustained an emotional condition causally related to his assignment to strip copper wire. As appellant has also established harassment and discrimination by Mr. Murdy as compensable factors of employment, the medical evidence must be further evaluated.

In a report dated December 5, 1997, Dr. Isaacs, a Board-certified psychiatrist, diagnosed major depressive disorder and adjustment disorder with mixed emotional features, which he found were "both related and secondary to harassment on the job." In a report dated

[15] *Abe E. Scott*, 45 ECAB 164 (1993).

[16] In a statement dated February 6, 1997, Officer William Simmons related that he "personally witnessed [Mr. Murdy's] racist behavior towards [appellant]." However, Officer Simmons did not describe any specific instances of racist behavior.

February 17, 1999, Dr. Jacob Jaffe, a psychologist, described appellant's hospitalization in 1993 and 1995 for personal problems. Dr. Jaffe opined:

> "After these problems were resolved, [appellant] had been able to return to work and performed his duties satisfactorily. However, prior to seeing me, the harassment of his supervisor made it increasingly difficult for him to work and he experienced the above-mentioned symptoms. At the time Mr. Murdy was being investigated for the way he was treating [appellant] and for other improprieties. This harassment exacerbated [appellant's] emotional problems, which up until then had not interfered with his ability to work."

Dr. Jaffe found that appellant was not able to work from August 13, 1997 to February 23, 1998 and that his disability was "job related."

The Board finds that, although the medical evidence of record is insufficiently rationalized to establish that accepted factors of employment caused or contributed to appellant's emotional condition, the evidence is supportive of appellant's claim and is sufficient to require further development by the Office.[17] The case will, therefore, be remanded to the Office for the preparation of a statement of accepted facts to include the establish factors delineated above. The Office shall then submit the statement of accepted facts to an appropriate medical specialist for an opinion on the causal relationship between the compensable factors of employment and appellant's diagnosed condition. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate decision on appellant's entitlement to benefits.[18]

[17] *John J. Carlone*, 41 ECAB 354 (1989).

[18] Subsequent to the Office's May 21, 1999 decision, appellant submitted new evidence. The Board has no jurisdiction to review evidence for the first time on appeal that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated May 21, 1999 is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
February 26, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member