U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. VILLA and U.S. POSTAL SERVICE,
POST OFFICE, San Juan, PR

Docket No. 00-2633; Submitted on the Record;
Issued October 16, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

The Office of Workers' Compensation Programs accepted appellant's claim for post-traumatic stress syndrome, claim No. A02-682966. On February 22, 1999 appellant filed a claim for a recurrence of disability commencing January 12, 1994. The Office developed the claim as a new occupational disease claim, No. A02-758146, as it was based on new factors of employment. The two claims were combined into claim No. A02-682966.

As part of his claim, appellant stated that his condition was stable but he had a need for continued medical treatment and that since he returned to work, he had been going to his physician on a regular basis. He stated that his supervisor, Juan Rodriguez, requested an evaluation of his mental condition and fitness for work. Appellant stated that Mr. Rodriguez might have needed to clarify his thoughts of appellant's fitness to work. He stated that since his original injury, he had been on treatment and was still under medical treatment and not fully recovered.

The record shows that on August 4, 1997 the employing establishment asked appellant to report to "Dr. Jose R. Vigoreaux" for a neuropsychiatric examination to determine his fitness for duty in his regular position as a city carrier. In a memorandum dated June 15, 1977, the manager of employee relations stated that on June 14, 1977 appellant had had a physical examination by their medical officer, Dr. Luis A. Echavarria, "triggered by an altercation [appellant] had with a fellow employee on June 10, 1977." Dr. Echavarria referred appellant for a neuropsychiatric evaluation due to appellant's strong psychiatric history and "recent incidents." In a report dated May 20, 1977, he stated that appellant had been diagnosed by "Dr. Fumero" with schizophrenia chronic undifferentiated and acute exacerbation, manifested by disturbance of thinking, mood and behavior with marked affective symptoms and some paranoid traits. He did not recommend appellant for the position of carrier technician.

In a statement dated August 15, 1999, appellant explained that the employing establishment hired him in June 1971 and at that time he received 20 percent compensation representing 10 percent for his back and 10 percent for a nervous condition. He stated that he was hired as a mailhandler and changed to a letter carrier. Appellant stated that in about 1975 he injured his left ankle and management began to harass him for requiring assistance to finish his work. Appellant stated that the constant harassment by management led to his having a nervous breakdown, for which he was hospitalized in December 1973 to March 1, 1974 and when he returned to work his ankle still bothered him. Appellant stated that the employing establishment gave him a fitness-for-duty psychiatric evaluation "in retaliation to get him [out] of the of the postal service" and stated that they did not consider his ankle. He also stated that Dr. Vigoreaux who performed the evaluation recommended a change of jobs and appellant was given a clerk job in the night tour.[1]

Appellant stated that in November 1997, his supervisor, Luis Garcia, discriminated against him on the basis of his physical disability by denying him the opportunity to work December 25, 1997 and January 1, 1998. Appellant stated that he had been working the previous two years on holidays. He stated that he challenged management's action through the union and won the case as he was allowed to work on holidays.

Appellant filed two grievances regarding his being denied the opportunity to work on December 25, 1997 and January 1, 1998, for which on July 6, 1999 he was awarded 16 hours of holiday pay. In the grievance regarding the December 25, 1997 date, under "remedy," the union representative stated that appellant sought compensation for additional hours because management "violated the "pecking order" of not allowing the seniority and volunteering factor of appellant to work the holiday as called for under the LMU-Item #13.1.B. of the union agreement" and that management should comply with Article 11.6 of the union contract. Regarding the grievance for the January 1, 1998 date, the union made the statement that management violated the union contract by not allowing appellant to work on that date.

Without specifying a date, appellant stated that Mr. Garcia requested a limited status report from his treating physician, Dr. Faura Clavell, because Mr. Garcia had no record of appellant's limited duty. Appellant stated that he went to Dr. Clavell on January 15, 1998 and then Mr. Garcia arranged for appellant to be interviewed by Dr. Echavarria who emphasized that appellant's case was closed, that his permanent limited duty no longer existed and appellant was to request light-duty work. Appellant stated that he feared he might lose his job because management would not accommodate an employee on light duty and he would be "out a job." Appellant stated that although he told Mr. Garcia, a Vietnam war veteran, that he was also a Vietnam war veteran and he did not like to talk about Vietnam, Mr. Garcia never stopped talking about Vietnam in his presence.

Appellant stated that in November 1998 his supervisor was changed to Mr. Rodriguez who made notes of everything in his work area and this made him nervous. Appellant stated that during the "past few months" another supervisor, Juan Ortiz, discussed his Vietnam war experiences while appellant was present during lunch time and while Mr. Rodriguez was present.

[1] Appellant alleged certain incidents of harassment occurring on August 16, 1978, February 19, 1992 and July 7, 1994 but these were part of appellant's prior claim which was accepted.

Appellant stated that he had a stressful and nervous reaction and Mr. Rodriguez tried to calm him. Appellant stated that a few days later, Mr. Rodriguez gave him a fitness-for-duty psychiatric evaluation Form OWCP-5, stating that it was "for [his] own good." Appellant stated that it made him think of his first experience when he was a letter carrier and was evaluated by Dr. Vigoreaux and this made him think that Mr. Rodriguez was trying to get him out of the employing establishment. Appellant further stated that Mr. Garcia's informed him after he underwent the examination, that his light duty no longer existed and that this made him fear that he might lose his job.

Appellant also filed a grievance for having to undergo the fitness-for-duty examination and was reimbursed $180.00 on January 6, 1999. Appellant did not specify the date of that fitness-of-duty examination but apparently is referring to the one Dr. Garcia asked him to undergo in 1997 before the holidays.

In a report dated February 24, 1999, appellant's treating physician, Dr. Maria M. Sanchez-Bonilla, considered appellant's symptoms, that appellant felt people at work and some family were against him, "conspiring to hurt him one way or another," performed a physical examination and diagnosed major depression with psychotic features and history of post-traumatic stress syndrome. Dr. Sanchez-Bonilla opined that appellant was permanently, totally disabled and required psychiatric treatment.

By decision dated October 22, 1999, the Office denied appellant's claim, stating that the evidence of record did not establish that he sustained an injury in the performance of duty.

By letter dated November 5, 1999, appellant requested an oral hearing before an Office hearing representative, which was held on March 1, 2000. At the hearing appellant explained that his claim had been accepted for a post-traumatic stress disorder and he returned to work on limited duty due to a herniated disc in September 1994. Appellant stated that he missed lots of work since 1994 because of his emotional condition and in January 1999 he stopped working and filed his claim for a recurrence of disability. Appellant stated that his problems began when the tour superintendent, Leocadio Reyes, approached him and told him that he could not work holidays on limited duty, specifically on December 25, 1997 and January 1, 1998, because it was not permitted. Appellant stated that he had been working holidays the past two years on limited duty. He stated that his immediate supervisor started harassing him and then he did not follow the union procedures. Appellant reiterated that he filed two grievances which he won.

Appellant stated that it confused him when Mr. Garcia asked him for a medical certificate of limited duty because he had been on limited duty. Appellant stated that he obtained the certificate. He reiterated that Mr. Garcia talked about his Vietnam experiences in front of him. He also stated that Mr. Ortiz would come in the lunch area and discuss Vietnam knowing appellant's psychiatric situation and his background. Appellant stated that it upset him and made him "very nervous" that Mr. Rodriguez gave him a Form OWCP-5 which made him feel "they were trying to get [him] out of his work." Appellant stated that he had only about a year left to retire and if management had not put "so much pressure on [him]," he might have been able to finish his 30 years.

Appellant submitted additional evidence. In a statement dated November 5, 1999, three coworkers stated that in 1997 and 1998 they heard Mr. Garcia and Mr. Ortiz speak of their Vietnam experiences in appellant's presence and during one lunch hour, Mr. Rodriguez was also present.

In a work capacity evaluation for a psychiatric and psychological condition dated January 27, 1999, Form OWCP-5a, Dr. Sanchez-Bonilla stated that appellant had multiple crises and exacerbations of his illness and that he was not responding appropriately to pharmacologic interventions causing him to be dysfunctional. He stated that appellant was unable to tolerate his workload and was unable to tolerate slight stressful situations with his peers and supervisors without having exacerbation and medical psychiatric illness.

In a report dated December 18, 1999, Dr. Sanchez-Bonilla considered appellant's medical history, performed a mental status examination and diagnosed major depression with psychotic features and history of post-traumatic stress syndrome. She stated that appellant was permanently totally disabled due to his psychiatric condition. Dr. Sanchez-Bonilla stated that multiple factors contributed to appellant's current condition such as prior physical and psychiatric injuries acquired at work and new insults that could have exacerbated and aggravated his condition while at work.

In an addendum dated March 6, 2000, Dr. Sanchez-Bonilla stated that on December 21, 1998, appellant's supervisor from another work area came to his work area and started talking about events in Vietnam, which made appellant recall his traumatic experience and have post-traumatic stress syndrome manifestations consisting in part of depressed mood, decreased energy and motivations for activities, helplessness, suicidal ideas and hopelessness. She stated that appellant needed to be referred for psychiatric hospitalization and this was triggered by the December 21, 1998 event and the fact that his direct supervisor gave him a fitness-for-duty form that caused appellant to have the post-traumatic stress syndrome manifestations. Dr. Sanchez-Bonilla stated that appellant believed there was a plot at work to fire him from his job and during the interview with his supervisor, he became very agitated and she believed appellant could become assaultive toward people at work.

Appellant also submitted another grievance he filed addressing his being accosted by Mr. Garcia on May 20, 1998 in a "rude and disturbing manner," when Mr. Garcia tried to wake him up by clapping his hands when appellant was not even sleeping and said if he *i.e.*, appellant wanted to sleep, to go do it in the vault.

By decision dated June 14, 2000, the Office hearing representative affirmed the Office's October 22, 1999 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.[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]

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[4] The issue is not whether the claimant has established harassment or discrimination under standards applied by the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[5] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[6]

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[7] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[8]

The November 5, 1999 statement by three of appellant's coworkers corroborate appellant's contention that the supervisors, Mr. Garcia and Mr. Ortiz, discussed their Vietnam war experiences in appellant's presence and that, on one occasion, Mr. Rodriguez was also present. Appellant has not shown, despite his contention, that Mr. Garcia and Mr. Ortiz were aware he was a Vietnam war veteran and they purposely discussed their experiences to harass him. He, therefore, has not shown that their conduct was abusive.[9] Although appellant submitted a grievance alleging that Mr. Garcia was rude to him on May 20, 1998 when he told appellant if he wanted to sleep, he should do it in the vault, appellant has not submitted evidence corroborating that Mr. Garcia made that statement.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[4] *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[5] *See Martha L. Cook*, 47 ECAB 226, 231 (1995).

[6] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

[7] *Clara T. Noga*, *supra* note 3 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

[9] *Id*.

Mr. Rodriguez's taking lots of notes on appellant's work performance was not corroborated but in any event, the conduct of monitoring the employees is an administrative matter and appellant has not shown that Mr. Rodriguez acted abusively.[10]

Regarding appellant's contention that Mr. Garcia refused to let him work on December 25, 1997 and January 1, 1998, because appellant was on limited duty when in the past two years appellant worked those holidays on limited duty, appellant has established a compensable factor of employment. Management's refusal to allow appellant to work on Christmas and New Year's Day may be characterized as a change in work shift. As such it is only compensable, if appellant shows management acted abusively or unreasonably and it was the change that caused appellant's emotional condition, not the nature of the work itself.[11] Appellant won both grievances for his not being allowed to work on December 25, 1997 and January 1, 1998 in that he was awarded holiday pay for those days. The grievances noted that appellant had worked in 1996 and 1997 during holidays on limited duty without any problem and that by refusing to allow him to work on December 25, 1997 and January 1, 1998, management violated the union contract. There is no evidence in the record showing that management had any reasonable basis for refusing to allow appellant to work on those days.

Appellant's related contention that it was unfair for Mr. Garcia to ask him to undergo a fitness-for-duty examination prior to those holiday dates also has merit. Since appellant's work performance on limited duty on holidays had been acceptable for the past two years, it was not reasonable for Mr. Garcia to suddenly require a fitness-for-duty examination. The Board has held that requiring fitness-for-duty examinations is an administrative function of the employer and absent error or abuse, on its part, coverage will not be afforded.[12] The record, however, does not provide any valid reason why Mr. Garcia requested a fitness-for-duty examination at that time especially when appellant had worked on the holidays without any problem in the past two years. Under these circumstances, Mr. Garcia's requiring appellant to undergo a fitness-for-duty examination is unreasonable and constitutes a compensable factor of employment. Moreover, appellant's being awarded $180.00 for having to submit to the fitness-for-duty examination in the grievance he filed is consistent with management's request being unreasonable.

Regarding appellant's contention that Mr. Rodriguez's giving him a fitness-for-duty Form OWCP-5, a few days after the incident where his supervisors discussed Vietnam in his presence causing him to have a nervous and stressful reaction, it does not appear unreasonable that Mr. Rodriguez gave appellant that form because of that incident. Appellant has not shown that Mr. Rodriguez's giving him that form, which is an administrative matter, was unreasonable or abusive. He has not shown that Mr. Rodriguez gave him that form in an effort to drive him out of his job.

Appellant's contention that on January 15, 1998, based on an interview with Dr. Echavarria, he was told his permanent limited duty no longer existed and he would be

[10] *Daryl Davis*, 45 ECAB 907, 911 (1994).

[11] *See Elizabeth Pinero*, 46 ECAB 123, 128-29 (1994).

[12] *Alice M. Washington*, 46 ECAB 382, 390 (1994); *Donald E. Ewals*, 45 ECAB 111, 124 (1993).

required to do light-duty work and that made him afraid he would lose his job, is not corroborated by evidence of record. Further, fear of losing one's job is not compensable.[13]

Because appellant has established two factors of employment, that is, management unreasonably refused to allow him to work on December 25, 1997 and January 1, 1998 and unreasonably required him to undergo a fitness-for-duty examination at that time, the case must be remanded for the Office to develop the claim and to determine whether appellant developed an emotional condition causally related to management's refusal to allow appellant to work on December 25, 1997 and January 1, 1998 and management requiring appellant to undergo a fitness-for-duty examination. Upon such further development as it deems necessary, the Office shall issue a *de novo* decision.

The June 14, 2000 and October 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
October 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[13] *See Clara T. Norga, supra* note 3.