U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWIN C. PORTER, JR. and DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Denver, CO

Docket No. 01-2277; Submitted on the Record;
Issued November 22, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

On February 14, 2000 appellant, then a 46-year-old industrial hygienist, filed a traumatic injury claim alleging that his stress was due to his employment duties. Specifically, he attributed it to a heavy workload, injustices in the workplace and "the burden of 'shouldering' my team (sic) rotation grievance." On the back of the form, the employing establishment disagreed with appellant's facts and stated that he had "no definitive change in [appellant's] workload" on February 14, 2000.

Appellant submitted a copy of a September 30, 1999 memorandum from Bob Glover, noting a change in team assignments effective October 1, 1999 and the members of the response team and the strategic team. Mr. Glover also submitted copies of a Team Rotation Plan for DAO and the Regional Rollout Guide Team Selection Criteria Chapter, which included a statement that members could volunteer to change teams and that the union/management pair would use consensus to select members of their team.

On October 21, 1999 appellant filed a grievance alleging that the employing establishment transferred him to the strategic planning team without following appropriate procedures in rotating staff. The employing establishment denied his grievance in both at step one. The employing establishment stated that the guide "was a guidance developed for initial team selection only" and that it was outdated. Appellant also submitted a copy of the step two grievance denial.

Responding to the Office's February 22, 2000 letter requesting additional information, appellant alleged that his stress was directly related to events on February 14, 2000. Appellant stated:

> "[I] became extremely overwhelmed with the workload, which was sitting on my desk. This workload included case files, pending assignments, mine and a fellow employee's team rotation grievances, mine and a fellow employee's 'formal' EEO [Equal Employment Opportunity] complaints, my most recent annual cash performance award and all of the other injustices and 'deals' (too numerous to list) that exist in my workplace. Looking at all of the above items, I would say that I was most overwhelmed by the number of 'open' case files, the number of pending assignments stacking-up on my desk and the stress related to anticipating that additional assignment(s) may show up on my desk at any moment."

In a March 31, 2000 decision, the Office denied appellant's claim on the basis that he had failed to establish fact of injury and the record was devoid of medical evidence.

Appellant requested reconsideration by letter dated April 20, 2000 and submitted reports dated April 7 and 15, 2000 by Dr. Marilyn J. Meyers, a licensed clinical psychologist.

In an April 7, 2000 report, Dr. Meyers diagnosed depression and anxiety due to work factors, attributing appellant's stress to his workload on the rapid response team, which involved a lot of work as well as his transfer from the strategic intervention team and the grievance filed over the transfer. Dr. Meyers also submitted her treatment notes for appellant, who "felt increasing pressure from his work. [He] explained to me, on the Strategic Intervention Team, the evaluation can schedule appointments and basically plan their work. Once one evaluation is completed, then the evaluator begins the next project. On the Rapid Response Team, the evaluator must respond to complaints, accidents and fatalities. The evaluator must respond in 5 days for a complaint and 24 hours for a death." Dr. Meyers noted "[appellant] stated [that] he was unable to complete the work he had been doing on the Strategic Response Team and then had to respond immediately to the new team needs. [Appellant] found himself opening up cases but was unable to complete cases. [He] stated [that] he had a number of cases that were not completed and progressively felt overwhelmed by the caseload."

In a letter dated April 15, 2000, Dr. Meyers opined that appellant's symptoms were related to his job.

On June 13, 2000 the Office denied modification of the March 31, 2000 decision.

By letter dated July 10, 2000, appellant requested reconsideration, contending that the Office erred in failing to find this a compensable factor as "all of my work that went into researching, preparing, writing and meetings for mine and Mr. Lorenzo's grievances was in the 'performance of duty.'"

On October 10, 2000 the Office denied appellant's request for reconsideration.

In letters dated January 5 and February 26, 2001, appellant's counsel requested reconsideration, presented legal arguments and submitted evidence in support of his request.

The evidence included treatment notes for the period February 17 through September 29, 2000, an August 10, 1998 e-mail from Mr. Glover regarding Team Leader Rotation, affidavits from coworkers, Mr. Lorenzo, Pete Dailey and Michael J. Smith, appellant's analysis of his workload and a narrative by him. Mr. Dailey, Mr. Lorenzo and Mr. Smith all stated that management's moving appellant to the Rapid Response Team was in clear violation of the written office procedure for handling moves between the Strategic Intervention Team and the Rapid Response Team. Mr. Dailey also noted that appellant, when working on the Strategic Response Team had no more than four open inspections at a time. He noted that appellant "became flooded with assignments and inspections" in late 1999 and that appellant was given "new assignments every week up to that team he left in February 2000." Mr. Dailey recounted appellant showing him the "stacks of inspections on his desk" and he could "understand how someone with [appellant's] inspection workload at that time (to include the EEO and grievance) would be under enormous levels of stress." Mr. Smith also stated that appellant's workload was less when he was on the Strategic Response Team and that on the Rapid Response Team he "was getting a new inspection every week until he left the workplace around the middle of February 2000." He also recalls seeing the "stack of open inspection case files and his stack of inspection assignments" which involved about 10 different companies. Mr. Smith also stated that appellant's workload had increased since his involuntary transfer to the Rapid Response Team. Lastly, Mr. Smith indicated "With the large number of inspections on his desk, the increasing number of assignments for him to open and the grievances and EEO work, it is no wonder that he experienced an enormous level of stress." Lastly, Mr. Lorenzo detailed that appellant "was flooded with assignments and inspections" upon return from his leave in 1999. Mr. Lorenzo noted "[]it seemed like he was getting some new assignment every week until he left in the middle of February 2000. [Appellant's] workload was never that large on the Strategic Intervention [t]eam" and that he can understand why appellant had an enormous amount of stress due to "the mounts inspections, mounting assignments and the grievances and EEO work." Moreover, appellant was responsible for reaching and writing the EEO and grievance documents for Mr. Lorenzo and appellant. Mr. Glover, in his August 10, 1998 e-mail, asked for volunteers for team leader for both teams and that "Selection will be made as soon as the UM pair can meet after this date."

In a July 10, 2000 report, Dr. Meyers stated: "what made this difficult, for him, was he could not complete work before he was given another assignment with a time deadline. Progressively, he began to get further and further behind. Quality of work is very important to [appellant] and he felt he was unable to do the quality of work or the quantity of work."

On June 6, 2001 the Office denied appellant's request for modification.

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

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 factors of his federal employment.[1] To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual

[1] *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641, 644 (1997).

evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) 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]

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.[3] 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.[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]

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated March 30 and June 13, 2000 and June 6, 2001, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that his emotional condition was caused by his case assignments and overwork following his transfer to the Rapid Response Team. The Board has held that where a evidence establishes a overwork as part of an employee's job requirements, reactions

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[2] *Judy L. Kahn*, 53 ECAB ___ (Docket No. 00-457, issued February 1, 2002); *Ray E. Shotwell, Jr.*, 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 5 U.S.C. §§ 8101-8193.

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

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

[6] *Id.*

from such regular or specially assigned duties are compensable.[7] As with all allegations, overwork must be established on a factual basis to be a compensable employment factor.[8] In the case at hand, appellant has submitted evidence pertaining to his workload, to establish a compensable factor of employment. The affidavits from his coworkers, Mr. Dailey, Mr. Smith and Mr. Lorenzo, an analysis of appellant's workload and his narrative statement support appellant's contentions that he encountered difficulty in his case assignments and inspection requirements. Thus, appellant has established a compensable factor of employment.

Appellant alleged that his emotional condition was also due to "injustices in the workplace" including his transfer to the Rapid Response Team. An employee's frustration and depression resulting from a transfer are not compensable.[9] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[10] In support of this contention, appellant provided an August 10, 1998 e-mail from Mr. Glover, the Team Rotation Plan for DAO and the Regional Rollout Guide Team Selection Criteria Chapter. This evidence, however, does not establish that the employing establishment acted unreasonably with regard to his transfer. Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged that he sustained an emotional condition resulting from his duties as a union representative, *i.e.*, his researching, writing and preparing the group rotation grievance. The Board has held that union activities are personal in nature and are not considered to be with the course of employment.[11] The Board has recognized an exception to the general rule in that employees performing representational functions, which entitle them to official time are in the performance of duty and are entitled to the benefits of the Act if injured while in the performance of those functions.[12] The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employer.[13] Allegations of an emotional reaction while performing official representational functions, such as filing a grievance on behalf of members of his team, could constitute compensable factors if the incidents are substantiated by the record. In the instant case, however, the record is devoid of any evidence showing that appellant was on official time as a union representative and thus entitled to coverage under the Act. While Mr. Lorenzo noted that appellant was responsible for the work involved in the filing of their grievances, there is no

[7] *Robert Bartlett*, 51 ECAB 664 (2000); *Sherry L. McFall*, 51 ECAB 436 (2000); *Sherman Howard*, 51 ECAB 387 (2000).

[8] *Sherry L. McFall*, *supra* note 7.

[9] *Andrew J. Sheppard*, 53 ECAB ___ (Docket No. 00-1228, issued October 15, 2001).

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

[11] *Jimmy E. Norred*, 36 ECAB 726 (1985).

[12] *Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[13] *See A. Larson*, *The Law of Workers' Compensation* § 27.03(3)(c) (1990).

evidence that appellant performed this work as the union representative of record. Thus, appellant has not established a compensable factor of employment.

In the present case, appellant has identified a compensable employment factor with respect to overwork. As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[14] After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

The June 6, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
November 22, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

[14] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).