U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LIONEL NEELY and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL.

Docket No. 01-1878; Submitted on the Record;
Issued September 13, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his request for an oral hearing.

On December 10, 1999 appellant, then a 51-year-old rehabilitation clerk, filed a claim alleging that he sustained an emotional condition while in the performance of his duties. Appellant alleged that he was called a "dumb [ass]" by his supervisor, Barbara Rockwood. A coworker, Sylvan Manson, talked to him "like she was a dictator" and insisted he refer to her as "Ms." and not her first name, as others were allowed to use. The coworker also said that appellant would "have to find another place to work" and told him angrily to "stop" when appellant was pushing a machine, but gave no reason why. He was given 100 letters to mail but not enough money for postage. Appellant was denied a reassignment of his start time so he could attend physical therapy. Appellant was told not to use the telephone, by Frank Readus, a supervisor, while other employees were allowed to do so. He was forced to watch a videotape of a coworker who won a ride to work in a limousine. Appellant was the only male clerk assigned to a training unit. He was denied a one day vacation by his supervisor Ms. Rockwood while she took a longer vacation. Appellant was denied leave by Ms. Rockwood after complaining of chest pains and never informed of his rights under the Family Medical Leave Act. While home recuperating from high blood pressure, appellant's supervisor, Ms. Rockwood, issued him an absent without leave (AWOL) notice even though appellant had given her a leave notice. Ms. Rockwood never explained to him how to properly apply for extended leave. She requested appellant provide medical verification of his illness every two weeks when employing establishment policy is to submit medical documentation every 30 days. Ms. Rockwood found that appellant submitted insufficient evidence to support his medical leave while she accepted it from his union steward. While on leave the content of appellant's office and desk were removed and placed in storeroom and items were stolen. Appellant requested and was denied ergonomic furniture, which other employees were given. He was removed from his computer training

position and placed in mail training position. His request for higher pay for this change was denied. Eddie Hopkins yelled at him to "get back in the machine room and do not come out."

Appellant did not submit any supporting evidence to corroborate his allegations. Appellant filed union grievances and Equal Employment Opportunity claims.

In response to appellant's allegations, Mr. Readus responded that he "categorically refutes" all of appellant's allegations. Mr. Readus stated that "[Appellant] was referred to EAP once and he refused to go. I have also offered to send him to training for Interpersonal Skill and he again refused. [Appellant] disenfranchises himself from most of the PEDC staff."

Mr. Hopkins stated that he never yelled at appellant and that appellant became confrontational. Regarding appellant's request for more pay for new training, Mr. Hopkins stated that he told appellant that he was only handing the trainees materials and updating records and if he felt he should receive more pay he should take it through the proper procedures.

Ms. Manson responded that she never gave appellant a negative job action because he called her by her first name. Ms. Manson wrote that she gave him a letter of warning for physically approaching her in a threatening way. She admitted to angrily telling appellant to "stop there" but did so because he was walking away from her while she was giving him instructions. Ms. Manson denied telling appellant he should find another place to work. Regarding the videotape of the coworker, she indicated, it was the end of a business meeting, the entire video lasted one to two minutes and appellant was not required to watch it.

By decision dated December 13, 2000, the Office denied appellant's claim finding the evidence of record failed to demonstrate that he sustained an injury in the performance of duty. The Office found the following factors factual but not in the performance of duty: that appellant was denied leave for chest pains; that a coworker was granted an extra week of leave; that Ms. Rockwood issued appellant a notice of AWOL and had not instructed him as to the deficiencies of the leave notice he had submitted. The Office found these allegations regarding leave to be administrative issues and not within the performance of duty absent error or abuse which was not established.

The Office further found as factual, but not in the performance of duty: that appellant was told not to use the telephone while another employee was allowed to do so, that a video of a coworker was shown, that while on leave some of his possessions were moved and missing. Appellant was denied a request for an ergonomic chair and that he was denied the opportunity to work overtime. Appellant was refused a higher pay level when he was temporarily moved to a new training position. The Office found these allegations not compensable because frustration at not being able to work in a particular environment and personnel and pay matters are administrative issues, that are not in the performance of duty absent establishing error or abuse.

The Office found the following not accepted as factual: that appellant was called a dumb ass, that John Richardson told appellant he had lost his letter, but later found it but said he could not read it; that Mr. Richardson indicated that appellant needed to take a class on interpersonal relations, that a request from training was denied; that a negative job action letter was written by Ms. Manson because appellant wanted to call her by her first name; that Ms. Manson said

that appellant would have to find another place to work; that Ms. Manson spoke to him in a loud voice; that he was required to watch the video of the coworker in a limousine and that Mr. Hopkins inappropriately yelled at the appellant or denied him additional pay.

In a letter dated January 9, 2001, appellant requested an oral hearing. By letter dated April 23, 2001, he was notified the hearing was scheduled for May 25, 2001. Appellant failed to appear for the hearing.

In a decision dated June 4, 2001, the Office found that appellant abandoned his request for a hearing.

The Board finds that appellant has not met his burden of proof that he sustained an emotional condition while in the performance of duty.

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

[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).

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 decision dated December 13, 2000, 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.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly denied leave and improperly assigned work duties, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[7] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[8] 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 and finds that there is insufficient evidence to establish error or abuse in this case.[9] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[10]

Appellant has also alleged that he was treated differently by his supervisors and coworkers contributed to his claimed stress-related condition suggesting harassment or discrimination. 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

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[6] *Id.*

[7] *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).

[8] *Id.*

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

[10] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

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

harassment or discrimination are not compensable under the Act.[12] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[13] Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[14] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Regarding appellant's allegation of denial of promotions, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[15] Thus, appellant has not established a compensable employment factor under the Act in this respect.

The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.[16]

The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[17]

The Board has held that an employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[18]

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

[13] *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).

[14] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[15] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[16] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[17] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[18] *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[19]

The Board has held that an employing establishment's refusal to give an employee training as requested is an administrative matter, which is not covered under the Act unless the refusal constitutes error or abuse, which has not been established in this case.[20]

The Board has recognized the compensability of verbal altercations or abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[21]

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.[22] Appellant has not shown how the comment made by Ms. Manson would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[23]

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 in the performance of duty.[24]

The Board further finds that the Office properly determined that appellant abandoned his request for a hearing.

The legal authority governing abandonment of hearing 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.

"(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

[19] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

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

[21] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

[23] *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).

[24] 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).

scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

"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 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."[25]

In the present case, by letter dated January 9, 2001 appellant requested a hearing before an Office representative in connection with the Office's December 13, 2000 decision. By notice dated April 23, 2001, the Office advised appellant of the time and place of a hearing scheduled for May 25, 2000. Appellant did not request within 10 days after the scheduled date of the hearing that another hearing be scheduled. Appellant's failure to make such request, together with his failure to appear at the scheduled hearing, constitutes abandonment of his request for a hearing and the Board finds that the Office properly so determined.

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

The June 4, 2001 and December 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 13, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member