U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD J. WALCK and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Mechanicsburg, PA

Docket No. 01-2041; Oral Argument Held February 13, 2003; Issued April 28, 2003

Appearances: *Mario R. Bordogna, Esq.*, for appellant; *Thomas G. Giblin, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request to issue subpoenas; and (2) whether appellant has established that he sustained an emotional condition in the performance of duty.

On March 13, 2000 appellant, then a 47-year-old document automation specialist, filed an occupational disease claim alleging that on March 31, 1998 he first realized that his major depressive disorder was caused by factors of his federal employment. He stated that his supervisors caused stressful conditions necessitating his depression. Appellant alleged that the head of the production department at that time admitted to sabotaging a project he was working on and stated that he was out "to get me." He stated that this betrayal and upper management's failure to respond destroyed him mentally and led to his incapacity.[1]

Appellant submitted the November 10, 1999 report of Dr. Frank J. Munoz, a Board-certified psychiatrist, who opined that his major depressive episode resulted directly from job-related stress, which overwhelmed his adaptive capacity. He further opined that in view of the intensity and chronicity of his major depressive episode and its impact on his overall mental functioning, he did not believe that appellant would ever be able to return to his previous position at the employing establishment.

Appellant submitted a November 17, 1999 report of Dr. Lawrence McCloskey, a clinical neurophysiologist, who opined that his emotional condition was caused by his work duties. He stated that, in managing a high profile project, appellant had reason to believe that he and a long-time close associate were being undercut and sabotaged in a personal attack motivated by office

[1] The record indicates that appellant retired from the employing establishment in October 1998.

politics and jealousies. Dr. McCloskey further stated that appellant's coworkers incriminated themselves in a meeting, but on the next day, appellant's supervisor disputed his interpretation of the situation and refused to punish them. He noted that appellant reacted by breaking down into tears and leaving the premises. Dr. McCloskey further noted the difficulty in predicting who will become emotionally devastated by situations and described how individuals react differently to the same situation. He speculated that appellant's perceived betrayal was an affront to his deeply held need for competence, honesty, loyalty and rectitude in himself and others. Dr. McCloskey stated that, after what happened at work, appellant could not trust his coworkers or the system and he could not imagine himself functioning there. He concluded that appellant would never be able to return to his previous position at the employing establishment.

In a March 13, 2000 narrative statement, appellant indicated that he was appointed Defense Automated Printing Service (DAPS) coordinator of the Electronic Data Access (EDA) project. He stated that management removed one of two highly competent individuals assigned to the project, Raymond Mosten and replaced him with Rhonda Kern. Appellant objected to this action and became stressed over losing Mr. Mosten because he was an individual whom he held in high regard and proved his dedication to duty and the success of the project on a daily basis. He stated that problems ensued because Ms. Kern experienced difficulty in learning the work, which may have jeopardized the project. Appellant further stated that Sammy Childs, supervisor of the production department, and Charles Witmer, Jr., head of the production department, rejected his concerns about Ms. Kern. He noted that his stress level increased during the ensuing weeks because he received telephone calls as to why the project started to encounter problems, which were not previously at issue and Ms. Kerns' inability to perform her job. Appellant further noted that Mr. Mosten told him about a conversation he had with Mr. Childs and Mr. Witmer. Mr. Mosten related that Mr. Witmer stated he was out to get appellant and that he was the sacrificial lamb because appellant could not dictate who could work in the EDA room and he would have to work with whomever he was given. Appellant stated that he was stunned by this conversation. He relayed this conversation to the union vice president, Larry Corr, who arranged a meeting with himself, appellant, Lindsey Grable, acting director of DAPS, Mr. Witmer, Mr. Childs and Mr. Mosten. Mr. Witmer and Mr. Childs denied making the statements about appellant and Mr. Grable stated he did not believe that two of his supervisors would make such a remark or pursue such an avenue of vengeance against appellant. Appellant noted that, later in the meeting, Mr. Witmer admitted to making the statement, but stated that Mr. Mosten misconstrued it. He stated that Mr. Grable still did not believe that Mr. Witmer and Mr. Childs made the statements. In a subsequent meeting, appellant indicated that Mr. Grable still did not believe the supervisors made the statements, but he later recanted and admitted that they did make the statements. Appellant stated that Mr. Grable thought he was overreacting to the situation and in response he went back to his desk and broke down. He asked Mr. Grable to place him on workers' compensation, but Mr. Grable stated that workers' compensation did not cover mental injuries. Appellant responded that he wanted to be placed on whatever type of leave so that he could leave. He concluded by noting his subsequent depressive mood, medical treatment and loss of cognitive function.

Mr. Grable submitted an undated statement in response to appellant's allegations. He described the EDA project and appellant's responsibility to train Ms. Kern. Mr. Grable denied appellant's allegation that the removal of Mr. Mosten would result in the failure of the EDA project. He stated that Ms. Kern performed an excellent job in the EDA department, noting that

she was well suited for the job and that there were a few setbacks through this transition, which had little impact on the EDA customer community. Mr. Grable noted that Mr. Mosten did not want to relinquish his position and that it was questionable whether the communication need for a seamless transition was not what it should have been. From management's perspective, there was clearly a united effort between appellant and Mr. Mosten to push Ms. Kern out of the EDA program and this was considered when appellant confronted management about Ms. Kern's ineptitude. He stated that Mr. Witmer met with appellant prior to their meeting with Mr. Mosten and made it very clear that appellant's responsibility was to coordinate not to supervise the EDA program. Mr. Grable then described a meeting between Mr. Witmer, Mr. Childs and Mr. Mosten attempting to explain management's decision to temporarily remove Mr. Mosten from the EDA program and to bolster Mr. Mosten's confidence because he felt the removal was his fault. Mr. Grable stated that, since appellant was not present at the meeting where Mr. Witmer and Mr. Childs allegedly made the statement about him and Mr. Witmer and Mr. Childs maintained a different conclusion than Mr. Mosten, he could only base his conclusions on his knowledge of the individuals. Mr. Grable could not see any motive or purpose they had in wanting to make the EDA project fail or to get appellant. He was not aware of any avenue of vengeance against appellant, rather, he was very respected by all parties involved. Mr. Grable stated that Mr. Witmer never admitted making the alleged statements and in his frustration Mr. Witmer sarcastically asked appellant if he had said those things, then what would he like his punishment to be. He denied making the statement that workers' compensation did not cover mental stress injuries. Mr. Grable stated that appellant exhibited signs of isolation and suspicious behavior long before this incident. He further stated that the actual cause of this incident was appellant's inability or unwillingness to trust or confide in management. Mr. Grable concluded that everyone including, managers and coworkers treated appellant with utmost respect.

In a July 7, 2000 letter, appellant's counsel provided the names, addresses and telephone numbers of individuals who could corroborate appellant's allegations. He stated that appellant had not previously filed any complaints or grievances associated with his claim, he did not experience any stress outside his federal employment or a previous emotional condition, he did not have any regular hobbies except occasional yard work, he had not been treated for an emotional condition and that he was able to complete his tasks, but with difficulty until the time he stopped working at the employing establishment. Appellant's counsel submitted Dr. Munoz's August 18, 1998 report revealing that appellant experienced the onset of a major depressive episode, which led to his admission to an adult partial hospitalization program from April 8 through May 4, 1998. Dr. Munoz noted his treatment of appellant and diagnosed severe major depressive disorder from a single episode. He stated that appellant also had underlying obsessive-compulsive personality or its traits. Dr. Munoz opined that appellant's condition had not yet stabilized as indicated by his ongoing symptoms and that he would most likely be disabled by his condition for at least a year from its onset in March 1998. Appellant's counsel resubmitted the November 10 and 17, 1999 reports of Drs. Munoz and McCloskey and appellant's March 13, 2000 narrative statement.

In a June 18, 2000 report, Dr. Munoz indicated that appellant's condition had improved, but despite working as a part-time laborer at a shipyard, he was unable to handle the duties of a managerial position.

By decision dated October 30, 2000, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a November 21, 2000 letter, appellant, through his counsel, requested an oral hearing before an Office hearing representative.

In an October 17, 2000 report, Dr. Munoz noted appellant's current medications, complaints and his findings on mental and objective examination. He diagnosed obsessive-compulsive disorder.

In a January 18, 2001 letter, appellant's counsel requested subpoenas for Cindy Walck, appellant's wife, to testify about the disabling nature of appellant's mental condition; Mr. Mosten to testify that appellant's superiors stated that they were deliberately attempting to get appellant by sabotaging his project; and Mr. Corr to testify about how management's continued harassment of appellant and failure to redress the situation contributed to his emotional condition.

By letter dated February 12, 2001, the Office hearing representative stated:

> "Under the applicable regulations at 20 C.F.R. [§] 10.619, subpoenas are issued for witnesses only where oral testimony is the best way to ascertain the facts. A person requesting a subpoena must explain why the testimony is directly relevant to the issues at hand and a subpoena is the best method or opportunity to obtain such evidence because there are no other means by which the testimony could be obtained.
>
> "I am denying your request for issuance of a subpoena to compel the attendance and testimony of Cindy Walck, Larry Corr and Raymond Mosten. Testimony by Mrs. Walck concerning her husband's mental condition would not be relevant to the issue of whether his mental condition was causally related to factors of his federal employment. As for Larry Corr and Raymond Mosten, you have not established that there are no other means by which their testimony could be obtained, such as their voluntary attendance and testimony at the hearing or their submission of written statements."

The Office received Dr. Munoz's treatment notes covering the period July 13 through November 2, 2000 and his October 3 and 17, 2000 reports regarding appellant's emotional condition.

In response to the Office's February 12, 2001 letter, appellant's counsel submitted a February 15, 2001 letter requesting that the Office reconsider its denial of his request for the issuance of subpoenas. He explained that Mr. Mosten and Mr. Corr would not voluntarily testify at the hearing or prepare written statements without a subpoena because they still worked at the employing establishment and it was his "understanding that they will not offer testimony or prepare written statements for my client voluntarily without the compulsion of a formal subpoena." Appellant's counsel further stated that he imagined they feared potential adverse action if they offered evidence favorable to him and detrimental to the employing establishment. He indicated that he was "fairly certain that, without the compulsion from a formal subpoena,

neither witness will appear to testify or prepare a written statement." Appellant's counsel apologized for not mentioning this in his January 18, 2001 letter because he felt that this was understood.

In a February 22, 2001 letter, the Office hearing representative advised that counsel did not indicate that Mr. Mosten and Mr. Corr had refused to provide written statements or voluntary oral testimony at the scheduled hearing. The hearing representative again denied the request for subpoenas.

By letter dated March 9, 2001, the hearing representative advised the employing establishment to have Mr. Mosten and Mr. Witmer review appellant's March 13, 2000 statement and to submit a written statement addressing the accuracy of his allegations.

At the hearing on March 6, 2001 appellant testified, among other things, that he saw Mr. Mosten on December 22, 2000 at a local mall and that Mr. Mosten told him that he was advised by his attorney not to appear at the hearing unless he received a subpoena so that the employing establishment could not take action against him for testifying on his behalf.

At the hearing, appellant submitted Dr. McCloskey's February 23, 2001 report finding that his severe chronic major depression was directly caused by his duties as a manager dealing with projects and personnel issues. He opined that appellant never recovered from his depression.

Upon review of the hearing transcript, Mr. Grable submitted an April 5, 2001 statement explaining appellant's role on the EDA project, Mr. Mosten's discontentment with being replaced by Ms. Kern and his decision not to reprimand Mr. Witmer and Mr. Childs based on their awareness of how the failure of the project would reflect on everyone and not just appellant. Mr. Witmer's March 22, 2001 accompanying statement described the EDA project and noted that Mr. Mosten was asked to cross train Ms. Kern. He stated that he, as well as, Ms. Kern's supervisor, Mr. Childs, decided to keep her on the project despite appellant's request to have her removed due to her demonstration of superior self-motivating abilities over the course of her career. Mr. Witmer denied appellant's allegation that he was intentionally trying to sabotage the project and that he was after him. He stated that appellant misunderstood the intent to cross train another employee. In an April 3, 2001 letter, Mr. Mosten stated: "[m]y recollection is not clear concerning the events of four years ago."

By letter dated May 2, 2001, appellant's counsel responded to Mr. Grable's and Mr. Witmer's statements, contending that they made inaccurate and inconsistent statements and thus, their credibility was questionable.

Appellant submitted a sworn affidavit that, following the hearing, Mr. Mosten informed him that he was afraid to voluntarily testify in his case because he feared retaliation by the employing establishment and that he would only testify if compelled by a subpoena. Mr. Mosten also told appellant that he talked to Marilyn Stewart-Fridey, Mr. Grable's supervisor and northeast area director, about details of the case including, conversations he had with appellant and meeting and conversations with Mr. Witmer, Mr. Childs and Mr. Corr during an internal

investigation into his case after he left the employing establishment. Mr. Mosten stated that Ms. Stewart-Fridey was supposed to advise him about the investigation, but she never did so.

By decision dated May 14, 2001, the hearing representative found that appellant failed to establish that he sustained an emotional condition in the performance of duty. The hearing representative also found that appellant was not deprived of his right to due process because his request for the issuance of subpoenas was denied.

The Board finds that the Office properly denied appellant's request to issue subpoenas.

Section 8126[2] of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[3]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence, because there is no other means by which the testimony could have been obtained."[4] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[5]

On January 18, 2001 appellant requested the issuance of subpoenas for: his wife, to testify about his emotional condition; Mr. Mosten to testify that Mr. Witmer and Mr. Childs stated that they were deliberately attempting to get him by sabotaging his project; and Mr. Corr to testify about how management's continued harassment and failure to redress the situation contributed to his emotional condition. However, appellant did not show why information from these individuals could not be obtained other than through the subpoena process. Upon receiving appellant's request for subpoenas, the Office specifically advised him about the circumstances under which subpoenas are issued pursuant to section 10.619. The Office noted that appellant had not established that there were no other means by which Mr. Mosten's and Mr. Corr's testimony could be obtained, such as their voluntary attendance and testimony at the hearing or their submission of a written statement. In response to the Office's denial, appellant's counsel merely stated that it was his "understanding" that Mr. Mosten and Mr. Corr would not voluntarily testify or prepare a statement and that he was "fairly certain" that they would not

[2] 5 U.S.C. § 8126.

[3] 20 C.F.R. § 10.619.

[4] *Id.*

[5] *Dorothy Bernard*, 37 ECAB 124 (1985).

voluntarily comply. He did not submit any evidence such as, a statement from either Mr. Mosten or Mr. Corr to support his contention that they would not voluntarily cooperate. Similarly, appellant did not submit any evidence supporting his hearing testimony and affidavit that Mr. Mosten told him that he would not testify at the hearing without a subpoena due to fear of retaliation from the employing establishment.

Moreover, Mrs. Walck's testimony about the disabling nature of appellant's emotional condition is irrelevant to the issue of whether the condition was caused by factors of his federal employment. Thus, the Board finds that the Office hearing representative acted within his discretion in not issuing subpoenas as requested by appellant.

The Board further finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

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. To establish that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual 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.[6]

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[7]

The initial question presented is whether appellant has substantiated compensable factors of employment as contributing to his emotional condition;[8] if appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.[9]

Appellant has alleged that he sustained an emotional condition as a result of harassment by his supervisors. He stated that management sabotaged his work on the EDA project by

[6] *Vaile F. Walders*, 46 ECAB 822 (1995).

[7] *Mary Boylan*, 45 ECAB 338 (1994); 5 U.S.C. §§ 8101-8193.

[8] *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

[9] *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

replacing Mr. Mosten, a highly competent employee, with Ms. Kern, a less competent employee. Appellant also stated that his supervisors, Mr. Witmer and Mr. Childs, ignored his concerns about Ms. Kern's work performance and that he became stressed when he received telephone calls regarding her performance and problems with the project. Further, appellant stated that Mr. Mosten told him that he heard Mr. Witmer and Mr. Childs state that they were out to "get" him.

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.[10] 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.[11]

The replacement of Mr. Mosten by Ms. Kern and the employing establishment's refusal to remove Ms. Kern from the EDA project involve administrative or personnel matters. The Board has 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.[12]

Although appellant has made allegations that the employing establishment acted abusively in handling the above administrative matters; he has not provided sufficient evidence to support such a claim. Mr. Witmer explained why Ms. Kern replaced Mr. Mosten and indicated that she was a competent employee. Appellant provided no evidence, such as witness statements to establish that his supervisors' actions were unreasonable.[13] Thus, he has not established a compensable employment factor under the Act in this respect.

Appellant has failed to submit any evidence to support his allegation that Mr. Witmer and Mr. Childs stated that they were out to "get" him. Although appellant stated that Mr. Mosten informed him that he heard Mr. Witmer and Mr. Childs make the comment, he stated in his April 3, 2001 letter that, "[m]y recollection is not clear concerning the events of four years ago." Mr. Witmer denied any attempt to intentionally sabotage the project and to "get" appellant. Mr. Grable inquired about the statements allegedly made by Mr. Witmer and Mr. Childs and determined that they were unfounded. In the absence of sufficient evidence, such as witness statements or other forms of support for appellant's version of the events to establish that they took place, the Board finds his allegations are not established as factual.[14] Thus, appellant has

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

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

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

[13] *See Larry J. Thomas*, 44 ECAB 291, 300 (1992).

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

failed to establish a compensable factor under the Act. Since no compensable factors of employment have been established, the Board will not address the medical evidence.[15]

The May 14, 2001 and October 30, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 28, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[15] *Margaret S. Krzycki*, *supra* note 9.