U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. STROVINK and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

Docket No. 02-1675; Submitted on the Record;
Issued January 22, 2003

DECISION and ORDER

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

The issue is whether appellant sustained an emotional condition causally related to factors of his employment.

On May 24, 2001 appellant, then a 29-year-old letter carrier, filed a claim for an emotional condition. He alleged that on May 18, 2001 his supervisor followed him while he worked, insulted him regarding his workload, and put his hands on appellant. Union Steward Christopher Arnone stated that appellant was visibly shaking as he completed a leave slip while in the supervisor's office. Mr. Arnone stated that appellant told him that he was being followed and bothered by his supervisor.

In a statement dated May 18, 2001, Kevin Montano, appellant's supervisor, noted that on that day he approached appellant to assign him an undertime "bump" (an additional assignment) because of his low mail volume. He and appellant discussed the status of appellant's unfinished tasks. Later Mr. Montano saw appellant talking to another worker and told him he needed to get back to work. Shortly thereafter appellant took a break. Later that day Mr. Montano saw appellant away from his delivery route and told him that he needed to get back to his route. He later saw appellant talking to another worker and told the worker that he should let appellant get back to work. Appellant then began shouting that Mr. Montano was following and harassing him. He told appellant that he was not harassing him and that he needed to get back to work. Appellant threatened to leave work and Mr. Montano told him not to raise his voice. Appellant stated that he was going home sick. He told Mr. Montano, "I will get you. You will pay for this. I will be the one to bring you down." Appellant requested the union steward and Steward Arnone went to the supervisor's office with appellant and Mr. Montano. Appellant stated that he had been told that he needed documentation that he could not work and he held out his arms and began shaking them, stating that he was too stressed to work. He told Mr. Montano that he did not know if he could get an appointment with his doctor and Mr. Montano offered to take him for treatment. Mr. Arnone told appellant that he had the right to see his own physician but the employing establishment had the right to request documentation for sick leave. Appellant then left work.

In a disability certificate dated May 30, 2001, Janet Callahan, a nurse, indicated that appellant was unable to work.

In a letter dated May 31, 2001, an employing establishment injury compensation specialist indicated that appellant's supervisor was simply managing appellant's work, not harassing him.

By decision dated June 14, 2001, the Office denied appellant's claim on the grounds that appellant had failed to establish that his emotional condition was causally related to any compensable factors of employment.

On June 20, 2001 appellant requested reconsideration and submitted additional evidence. He alleged that on May 18, 2002 Mr. Montano harassed him by following him around the building as he performed his tasks and by assigning him a 45-minute part of another route to complete along with his own route.

On January 25, 2001 appellant stated that he was "counted" by management on December 15 and 16, 2000 and explained that a "count' was a six-day study of any deficiencies of a carrier. He stated that he was not given prior notice of the count or the reason for it. Appellant alleged that on December 16, 2000 Mr. Montano twice put his hands on him. He alleged that Mr. Montano pulled him by the elbow to tell him what he wanted him to do that day. Appellant stated that later that day Mr. Montano grabbed him by the back of the elbow and pulled him back to his case when he went to return an item that did not belong to him.

On January 25, 2001 Mr. Arnone indicated that on one morning[1] Mr. Montano told appellant that he needed to perform a vehicle inspection and grabbed appellant's elbow with his hand. Later that day appellant was returning an item that did not belong to him and Mr. Montano grabbed him and pulled him back into his case and told him he could not leave the case without permission. Mr. Arnone stated his opinion that appellant was being singled out for harassment.

In a decision letter dated February 12, 2001, received by the Office on June 21, 2001, the employing establishment and the union indicated that appellant's grievance regarding being touched by his supervisor in December 2000 had been resolved at Step B by the Dispute Resolution Team. The decision letter stated that the Step B Team agreed that an atmosphere of mutual respect should be maintained and all one-day counts should be conducted in accordance with the handbook.

In a letter dated June 26, 2001, an employing establishment manager, Wendy Stevens, stated that appellant's claim that Mr. Montano touched him on December 16, 2000 was investigated on January 26, 2001 as a result of an EEOC (Equal Employment Opportunity Commission) complaint filed by appellant. Mr. Montano stated that he touched appellant's elbow to get his attention when appellant did not respond after twice being called by name. Appellant did not act offended or mention being touched on his elbow at the time of the incident. Mr. Montano denied that he grabbed appellant by the elbow later that day and only gave him a

[1] Although the date is not specified, based on appellant's January 25, 2001 statement, it apparently was December 16, 2000.

verbal instruction to return to his case. A registry clerk who witnessed the incident confirmed that Mr. Montano did not touch appellant and only instructed him to return to his case. Following the EEOC investigation, Mr. Montano was advised not to touch any employee, even if it was just to get an employee's attention. Ms. Stevens stated that appellant was asked on May 18, 2002 to take an additional workload, a bump, because his volume of mail was low but appellant started wasting time in the office to try and demonstrate that he did not have any extra time. She noted that appellant had refused to make additional deliveries in the past and had threatened to file a complaint against any supervisor who tried to make him take a bump. Ms. Stevens listed the names of 26 employees who were also asked to take bumps on May 18, 2001 to bring their day up to an eight-hour workday.

By decision dated September 7, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and not sufficient to warrant further merit review.[2]

The Board finds that appellant failed to establish that he sustained an emotional condition causally related to factors of his employment.

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]

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.[5] 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.[6]

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[2] The record contains additional evidence that was not before the Office at the time it issued its September 7 and June 14, 2001 decisions. (Document in docket file dated November 7, 2001) The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997). Although the Office indicated that its September 7, 2001 decision was a nonmerit denial of appellant's request for reconsideration, the Office appeared to conduct a merit review of the evidence submitted by appellant in his request for reconsideration.

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

[6] *See Effie O. Morris*, 44 ECAB 470, 473 (1993).

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.[7] 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.[8]

Appellant has alleged that harassment and discrimination on the part of his supervisor, Mr. Montano, contributed to his claimed stress-related condition. 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.[9] 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.[10] In this 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 supervisor.[11]

Although appellant alleged that on May 18, 2001 Mr. Montano harassed him by following him, insulting him regarding his workload, assigning him a portion of another route to complete along with his own (a "bump") and touching him, the evidence does not support appellant's version and thus there is insufficient evidence of record to establish that appellant was harassed by Mr. Montano on May 18, 2001. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant also alleged that he harassed when he was "counted" by management on December 15 and 16, 2000 and was not given prior notice of the count or the reason for it and that on December 16, 2000, Mr. Montano twice put his hand on him. However, there is no finding in the February 12, 2001 decision by the employing establishment on the grievance that appellant was harassed by the employing establishment regarding the count on December 15 and 16 2000 or that Mr. Montano acted abusively in touching appellant on December 16, 2000.

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

[8] *Id.*

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

[10] *See Donna J. DiBernardo*, 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[11] *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).

Regarding appellant's claim that Mr. Montano touched him on December 16, 2000, this was investigated on January 26, 2001 as a result of an EEOC complaint filed by appellant, but there was no finding that Mr. Montano acted abusively on December 16, 2000.

Regarding the allegation that Mr. Montano grabbed appellant's elbow with his hand on December 16, 2000 is contradicted by another witness and by Mr. Montano. Therefore, there is insufficient evidence that appellant was harassed by the employing establishment on December 16, 2000 when a count was conducted or when Mr. Montano touched him in order to get his attention.

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 while in the performance of duty.[12]

The decisions of the Office of Workers' Compensation Programs dated September 7 and June 14, 2001 are affirmed.

Dated, Washington, DC
January 22, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[12] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Garry M. Carlo*, 47 ECAB 299, 305 (1996).