U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH W. JOHNSTON and U.S. POSTAL SERVICE,
BULK MAIL FACILITY, Philadelphia, PA

Docket No. 02-2092; Submitted on the Record;
Issued January 22, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On December 4, 2000 appellant, then a 41-year-old mailhandler, filed an occupational disease claim, alleging that factors of employment caused stress. He noted that he had been taken off work on November 17, 2000 for nonperformance of duties and had not returned to work. In an accompanying statement, appellant indicated that he had a difficult relationship with his supervisor, Kevin Riley, after he had returned to light duty following time off for an employment-related hernia and lumbar strain. He related that Mr. Riley singled him out and was hostile and treated him with animosity, speaking in a demeaning, patronizing manner, trying to provoke appellant. He stated that he was taken off the clock unfairly on November 17, 2000 after he informed management that the chair he was using was too high and hurt his back. He noted that efforts were made to secure a proper chair but that this took approximately an hour, during which time he had to stand. Later that day he was taken off the clock by Mr. Riley. Appellant also submitted a statement in response to a seven-day suspension, in which he further characterized his relationship with Mr. Riley.

Appellant submitted medical reports dated November 17 and 29, 2000, in which Dr. Myron Sewell, a Board-certified internist, diagnosed anxiety and depression caused or aggravated by employment and advised that appellant could not work due to stress. In a December 21, 2000 report, Victor L. Schermer, M.A., diagnosed adjustment disorder with anxiety and depression.

In a December 7, 2000 statement, Mr. Riley noted that, following appellant's return to work on October 24, 2000, appellant had a tendency to be off assignment with low productivity. He had discussions with appellant on November 2 and 3, 2000 and issued a suspension letter on November 9, 2000. Mr. Riley noted that on November 17, 2000 appellant was observed with his eyes closed, headset on and not working. Mr. Riley stated that he questioned appellant, who did not respond and informed appellant of the consequences of his actions. Mr. Riley stated that at

1:05 on November 17, 2000 he again observed this type of behavior and removed appellant from the clock.

In a statement dated December 7, 2000, Leo W. Havel, a supervisor, advised that appellant had been issued corrective action repeatedly over the course of his career for "similar and other infractions" by Mr. Havel and others, concluding that it was appellant's nonperformance and refusal to respond to Mr. Riley's questions that precipitated the November 17, 2000 episode.

The employing establishment also submitted a notice of seven-day, no time off suspension for incidents of November 2, 3 and 8, 2000.

In a February 28, 2001 statement, Joseph Zelenenki, a union steward, advised that a meeting was held on November 10, 2000 with appellant, Mr. Riley and J. Baker. He related that, while he did not recall what was specifically stated, Mr. Riley said "something to [appellant] ... in a very abrupt and sarcastic manner."

The record further contains evidence that grievances were filed regarding the suspension and three hours' lost pay. In a prearbitration settlement dated June 1, 2001, without prejudice to either party, the suspension issued on November 10, 2000 was expunged and three hours' pay was restored.

By decision dated August 3, 2001, the Office found that appellant failed to establish that he sustained an injury in the performance of duty.

On June 21, 2002 appellant, through counsel, requested reconsideration, arguing that he was forced to work beyond his physical limitations on November 17, 2000 when a proper chair was not promptly supplied.

In a decision dated July 19, 2002, the Office denied modification of the prior decision, finding that the period of time it took the employing establishment to obtain an acceptable chair did not rise to the level of demonstrating evidence of its failure to accommodate a work restriction. The instant appeal follows.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

[1] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5]

In the instant case, regarding appellant's allegations that he was unfairly given a seven-day suspension on November 10, 2000 and unfairly taken off the clock on November 17, 2000, the Board has long held that, while the handling of disciplinary actions is generally related to employment, such action is an administrative function of the employer and not the duty of the employee, absent error or abuse on the part of the employing establishment.[6] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[7] Furthermore, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[8] In the instant case, while the record indicates that in a prearbitration settlement dated June 1, 2001, the suspension issued on November 10, 2000 was expunged and three hours pay was restored, this was without prejudice to either party. Thus, appellant did not establish a compensable employment factor under the Act with respect to these disciplinary matters.

Appellant has also alleged that harassment and discrimination on the part of his supervisor, Mr. Riley. 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

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *See supra* note 2.

[6] *See Janet I. Jones*, 47 ECAB 345 (1996).

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

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

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

perceptions of harassment or discrimination are not compensable under the Act.[10] In the present case, the only evidence submitted by appellant was the February 28, 2001 statement, in which Mr. Zelenenki advised that on November 10, 2000 Mr. Riley said "something" to appellant in a sarcastic manner. The Board finds that this statement to be general in nature and does not rise to the level to establish harassment.[11] A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent objective evidence that the interaction was, in fact, abusive. This principle recognizes that a supervisor or management in general must be allowed to perform their duties and that, in performing their duties, employees will at times dislike actions taken but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent error or abuse.[12] A claim based on verbal altercations or a difficult relationship with a supervisor must be supported by the record,[13] and a claimant's burden of proof is not discharged by the fact that the employee has identified some employment factors. Therefore, in the absence of evidence substantiating his claim regarding Mr. Riley, appellant did not establish that harassment or discrimination occurred.

Finally, the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[14] The record in the instant case, however, indicates that as soon as appellant brought his problems with the chair to the employing establishment's attention, efforts were immediately made to accommodate his needs and a chair was found about an hour later. The Board, therefore, finds that this does not rise to the level of the employing establishment not accommodating an employee's physical limitations.

The Board, therefore, finds that as appellant has not established a compensable employment factor, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.[15]

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

[11] *Id.*

[12] *Daniel B. Arroyo*, 48 ECAB 204 (1996).

[13] *See Diane C. Bernard*, 45 ECAB 223 (1993).

[14] *Id*.

[15] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

The July 19, 2002 and August 3, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 22, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member