U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES BOLDEN and UNITED STATES NAVY,
BUREAU OF MEDICINE & SURGERY, Washington, DC

Docket No. 03-1079; Submitted on the Record;
Issued July 21, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition in the performance of his federal duties and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On an April 24, 2001 appellant, then 43-year-old accountant, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that his supervisor, Robert Anderson, inflicted anguish, pain, suffering, stress, tension, headaches, back pain, nervousness and blurry vision through undue and unwarranted acts of discrimination and reprisal. In a July 10, 2002 letter, appellant listed a series of medical conditions he suffers from, including, anguish, stress, pain and suffering caused by his employer's undue harassing and traumatic discrimination.

In an August 15, 2002 letter, the Office requested more information from appellant. In a September 18, 2002 letter, appellant wrote that the employing establishment intentionally delayed the forwarding on his CA-1 claim and that he was "subjected to extreme discrimination and harassment by the employing establishment's personnel commencing March 11, 2002, which climaxed on March 28, 2002 and resulted in traumatic injuries...."

In a September 24, 2002 decision, the Office denied appellant's claim, finding that he had not established that he had sustained the alleged condition or that his condition resulted from a compensable employment factor. In an October 2, 2002 letter, appellant requested reconsideration and submitted a copy of a complaint filed with the Equal Employment Opportunity (EEO) Commission, wherein he alleges that he was denied a promotion to GS-12 while two coworkers, Jenny Carlos and Jane Cunningham were promoted. He also wrote that his complaint is based on race, sex and handicap discrimination and bias, double standards, undue harassment and anguish inflicted upon him.

The record contains an email dated May 6, 2002 and received by the Office on October 10, 2002, sent by appellant to Mr. Anderson and at least one other of appellant's supervisors, in which he wrote:

> "[Mr. Anderson's] failed attempt to distort my excellent work performance in Med-14 through Steven Sninsky goes without merit and purely a **Worker's Compensation and EEO Reprisal.** (Emphasis in the original.) This was clearly anguish, pain, suffering, stress, headaches, memory lost, sleepless nights, tension, anxiety, nervous, spasms, back pain and blurry vision oversight caused by the defendants oppressive and undue acts of discrimination inflicted upon me. The performance issue comments below 'inattention to detail and lack of understanding' regarding the LOA is ludicrous. This is based on the simple fact: I have effortlessly prepared this document on other previous occasions over the last years and have an excellent performance rating...."

In a December 23, 2002 decision, the Office denied reconsideration finding that appellant had not submitted substantial and probative evidence to warrant a review of the decision of record.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of his federal duties.

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]

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[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).

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 September 24, 2002, 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 improperly failed to promote him and issued an unfair performance evaluation, 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.[5] 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.[6] Likewise, although the handling of evaluations is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[7] 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.[8] However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. In support of these allegations, appellant submitted copies of EEO complaints he had filed following the denial of his promotion and following his unfavorable performance evaluation. These complaints however only contain reiterations of appellant's own perceptions of racial and sexual discrimination. These complaints contain no witness statements or other evidence to collaborate appellant's statements. He has not submitted any evidence that the employing establishment violated any rule or regulation in the promotion of performance evaluation process. Thus, appellant has not established a compensable employment factor under the Act, with respect to these personnel matters.

Appellant has also alleged that harassment and discrimination on the part of his supervisors 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

[5] *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).

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

[7] *Id.*

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

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

did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[10] In the present case appellant has not submitted any evidence to establish that he was harassed or discriminated against by his supervisor.[11] He provided no corroborating evidence, such as witness statements to establish that he was harassed or discriminated against.[12] Thus, appellant has not established a compensable employment factor under the Federal Employees' Compensation Act, with respect to the claimed harassment and discrimination.

Regarding appellant's allegations that the employing establishment mishandled his compensation claims, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.[13] Again, the handling of a compensation claim is an administrative duty of the employer, not a duty of the employee. Absent error or abuse by the employing establishment, administrative functions of the employer do not constitute compensable factors of employment.

In this case, appellant has alleged that 113 days elapsed between the time he filed his CA-1 form and the date he received correspondence regarding his claim from the Office. The employing establishment has explained in a statement dated June 24, 2002, from Steven G. Sninsky, that a delay occurred in forwarding appellant's CA-1 form to the Office because appellant's emotional condition claim was an occupational illness claim, rather than a claim for traumatic injury. He stated that he attempted to provide advice and assistance to appellant, that the CA-2 form should be filed instead of a CA-1 form, because there was no indication that he had sustained a traumatic injury. The allegations appellant has made in support of his emotional condition claim do not substantiate a traumatic injury, but rather are in the nature of an occupational injury claim.[14] As the delay in forwarding the claim form occurred because the employer was attempting to assist appellant in the completion of the correct claim form, appellant has not established any error or abuse by the employing establishment in this regard.

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.[15]

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[10] *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).

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

[13] *See George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

[14] 20 C.F.R. § 10.5(q) defines occupational disease or illness as "a condition produced by the work environment over a period longer than a single workday or shift."

[15] 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).

The Board also finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provide that a claimant must (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[19]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[20] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[21] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[22]

In the present case, appellant has not established that the Office abused its discretion, in its decision, by denying his request for a review on the merits of its September 24, 2002 decision under section 8128(a) of the Act, because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

The critical issue on reconsideration was whether appellant had established any compensable factors of employment. He submitted no new probative evidence on that issue. Appellant reiterated allegations made previously, but submitted no corroborating evidence to establish discrimination or abuse.

[16] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[17] 20 C.F.R. §§ 10.606(b)(2).

[18] 20 C.F.R. § 10.607(a).

[19] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[20] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[21] *Edward Matthew Diekemper*, 31 ECAB 224, 25 (1979).

[22] *John F. Critz*, 44 ECAB 788, 794 (1993).

The decisions of the Office of Workers' Compensation Programs dated December 23 and September 24, 2002 are affirmed.

Dated, Washington, DC
July 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member