U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REUBEN A. DUCKWORTH and DEPARTMENT OF THE ARMY, U.S. ARMY MEDICAL SERVICES COMMAND, Fort Irwin, CA

Docket No. 03-1959; Submitted on the Record;
Issued October 16, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a).

On October 29, 2002 appellant, then a 60-year-old food service worker, filed a claim for occupational disease alleging that he sustained a stress-related condition when his supervisor denied his request to change his work schedule. Appellant stopped work on October 25, 2002 and returned on October 28, 2002.

In support of his claim, appellant submitted medical records from October 25 to November 13, 2002 which noted that he was treated for increased blood pressure, tingling in the extremities and pain in the right hamstring and was diagnosed with anxiety reaction from stress. An emergency room note dated November 7, 2002 indicated that appellant was treated for high blood pressure and diagnosed with anxiety reaction. Appellant reported that his work environment was unfriendly and he experienced increased stress when his supervisor refused to change his work schedule from 6:00 a.m. to 2:00 p.m. to 7:00 a.m. to 3:00 p.m.; work was killing him and someone was out to get him. On November 13, 2002 appellant was again treated in the emergency room for a fainting spell and was diagnosed with atypical chest pains and hypertension.

Appellant submitted a report dated November 12, 2002, in which Dr. Brian Lindsay Connell, a family practitioner, noted treating him for uncontrolled hypertension, which appellant attributed to his supervisor denying his request for a schedule change which would permit him to utilize government transportation. Dr. Connell diagnosed severe hypertension and noted that appellant's employer should provide reasonable concessions in his schedule, as the failure to do so was endangering appellant's health. In an attending physician's report dated December 17, 2002, Dr. Connell diagnosed malignant hypertension secondary to work stress and noted with a check mark "yes" that appellant's condition was caused or aggravated by his employment

activity. He opined that appellant should undergo vocational rehabilitation and return to employment unrelated to his present employer.

On January 8, 2003 Susan Jordan, Chief of the Nutrition Care Division, noted that, during appellant's initial processing at the employing establishment on August 13 and 16, 2002, his blood pressure was elevated and the medical examiner advised him to seek evaluation for this condition by his private physician. Ms. Jordan noted that on October 24, 2002 appellant requested a schedule change from 6:00 a.m. to 7:00 a.m. because he had moved to the neighboring town Victorville and would need to rely on transportation to get to work, which would arrive at the employing establishment at 6:45 a.m. She stated that she denied appellant's request for a schedule change because it would jeopardize the mission of the nutrition care center to feed patients and would cause an unequal workload between the other two food service workers. Ms. Jordan advised that on November 7, 2002 she presented appellant with a new schedule which addressed his transportation needs while still maintaining an equitable workload distribution among his coworkers. Appellant found the proposal to be unacceptable. Ms. Jordan indicated that between November 7 and November 13, 2002 appellant reported to work late or called in sick.

In a statement dated February 10, 2003, appellant noted that he stopped working on November 7, 2002 due to high blood pressure and was treated in the emergency room for this condition. He advised that he was totally disabled from his job and was seeking compensation from October 24, 2002.

By decision dated May 20, 2003, the Office denied appellant's claim finding that he failed to establish a compensable factor of employment.

In a letter dated June 2, 2003, appellant requested reconsideration. He indicated that he relocated from Germany and was forced to accept the current position in August 2002. He contended that he worked in a hostile environment and that the failure of management to adjust his work schedule was the cause of his illness. By decision dated June 18, 2003, the Office denied appellant's reconsideration request on the grounds that he failed to raise a substantial question or submit relevant evidence not previously considered.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an emotional condition 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] *Fred Faber*, 52 ECAB 107 (2000).

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 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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.[4] When an employee experiences emotional stress in carrying out his employment 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 an 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] 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 under the Act. 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 Act. 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.[6]

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 alleged that he sustained an emotional condition when his supervisor denied his request to change his work schedule.

The Board finds that appellant's allegation relates to administrative or personnel matters, not to his regular or specially assigned work duties and do not fall within the coverage of the

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *James E. Norris*, 52 ECAB 93 (2000).

[5] *Lillian Cutler, supra* note 2.

[6] *See James E. Norris, supra* note 4.

[7] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[8] *Id.*

Act.[9] The Board has long held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[10] Coverage under the Act would attach, however, if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.[11]

The Board finds that the employing establishment acted reasonably in that Ms. Jordan considered appellant's request for a schedule change and denied it because it would jeopardize the mission of the nutrition care center to feed patients and cause an unequal workload with the other two food service workers. She further advised that she offered appellant an alternative schedule, but that he found the revised schedule unacceptable. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, is outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[12] Moreover, the Board has held that an employee's dissatisfaction with working in an environment and frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable under the Act.[13] Appellant has presented insufficient evidence to support that the employing establishment erred or acted abusively. Thus he has not established administrative error or abuse in this regard.

Appellant also generally alleged that he was harassed by Ms. Jordan, when she refused to alter his work schedule. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[14] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[15] Ms. Jordan denied appellant's request to change his schedule because it would jeopardize the mission of the nutrition care center to feed patients and it would cause an unequal workload between the other two food service workers. She further indicated that on November 7, 2002 she tried to

[9] *See Matilda R. Wyatt*, 52 ECAB 421 (2001).

[10] *James E. Norris, supra* note 4.

[11] *Id.*

[12] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

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

[14] *Margaret J. Toland, supra* note 12.

[15] *Dennis J. Balogh, supra* note 7.

accommodate appellant's request for a schedule change and presented him with a new schedule which addressed his transportation needs while still maintaining an equitable workload distribution among appellant's coworkers; however, appellant rejected the proposal. Unsubstantiated allegations of harassment are not determinative of whether such harassment occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[16] In this case appellant has not submitted sufficient evidence to establish that he was harassed by his supervisor. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.[17] The Board concludes that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.[18]

The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.[19]

Under section 8128(a) of the Act,[20] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by the Office; or
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."[21]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[22]

The Office denied appellant's reconsideration request on the grounds that that his letter neither raised substantive legal questions nor included new and relevant evidence and was thus

[16] *James E. Norris, supra* note 4.

[17] *Id.*

[18] As appellant has 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).

[19] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b).

[22] 20 C.F.R. § 10.608(b).

insufficient to warrant merit review. In support of his reconsideration request, appellant submitted a narrative statement which advised that he had relocated from Germany and was forced to accept the current position in August 2002. He alleged that he worked in a hostile environment and that the failure of management to adjust his work schedule was the cause of his industrial illness. However, appellant did not submit new and relevant evidence with his reconsideration request but merely reiterated his allegations. Appellant's June 2, 2003 letter does not show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office.[23] The Board finds that the Office properly determined that this evidence did not constitute a basis for reopening the case for further merit review. For these reasons, the Office properly denied appellant's reconsideration request without conducting a merit review of the record.

The decisions of the Office of Workers' Compensation Programs dated June 18 and May 20, 2003 are affirmed.

Dated, Washington, DC
October 16, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[23] 20 C.F.R. § 10.606(b).