United States Department of Labor
Employees' Compensation Appeals Board

STEPHEN N. ZANOWIC, Appellant	)	
and	)	**Docket No. 04-10**
	)	**Issued: February 13, 2004**
U.S. MARSHALS SERVICE, Miami, FL, Employer	)	

Appearances:
Alan E. Wolin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 26, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 9, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

This issue is whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

FACTUAL HISTORY

On October 22, 2002 appellant, then a 48-year-old marshal, filed a notice of recurrence of disability alleging that he had sustained a recurrence of his March 11, 1997 employment injury. Appellant returned to work on October 22, 2001 and stopped work on October 15, 2002. He stated that he experienced a steady increase of hostile workplace activity since October 22, 2001, as well as retaliation against him for filing his current Equal Employment Opportunity complaints due to discriminatory and racist acts by the employing establishment.

In a letter dated January 21, 2003, the Office requested additional factual and medical evidence regarding appellant's alleged recurrence of disability. Appellant submitted a narrative statement listing the employment events that he felt caused or contributed to his current emotional condition. In a letter dated February 7, 2003, the Office found that appellant's claim should be developed as a new occupational disease claim, as he alleged that additional employment exposures following his return to work contributed to his condition. The Office requested that appellant's supervisor comment on appellant's alleged employment factors. The employing establishment responded on March 10 and May 16, 2003 denying that appellant was treated differently.

By decision dated July 9, 2003, the Office denied appellant's claim finding that he failed to substantiate a compensable factor of employment and that, therefore, he had not met his burden of proof in establishing an emotional condition as a result of his federal employment.

LEGAL PRECEDENT

To establish appellant's occupational disease claim that he has 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] Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[2]

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 concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned-work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.[3]

[1] *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[2] *Id.*

[3] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

ANALYSIS

Although appellant filed a claim for a recurrence of disability causally related to his March 11, 1997 work-related emotional condition, the Office properly found that appellant alleged additional employment exposures to the work environment, which caused or contributed to his current emotional condition. Therefore, the Office properly developed appellant's claim as a new occupational disease claim rather than a recurrence of disability.[4]

Appellant attributed his emotional condition to denials of training, the failure of the employing establishment to provide him with proper instructions to perform his job duties and the failure to the employing establishment to restore his sick and annual leave following his return to duty in October 2001. Regarding appellant's allegation that the employing establishment improperly denied training,[5] improperly denied leave[6] and improperly assigned work duties,[7] the Board finds that these allegations related 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 Federal Employees' Compensation Act. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[8]

Appellant stated that his pay was docked when he used leave. The employing establishment responded to this allegation and noted that appellant had not submitted a leave buy-back request to recoup leave used due to his March 11, 1997 employment injury. The employing establishment further provided the notifications to appellant that he had no more advance annual leave available as of October 9, 2002 and that his sick leave balance was a negative 148 hours. The employing establishment granted appellant leave without pay. Appellant has submitted no evidence to substantiate his allegation that the employing establishment acted improperly in denying sick and annual leave usage or in granting leave without pay.

Appellant alleged that the employing establishment constantly placed him in work assignments without proper instructions or with "people who were told one thing and myself

[4] The Office's regulations define a recurrence of disability as: "[A]n inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness." 20 C.F.R. § 10.5(x).

[5] *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[6] *Elizabeth Pinero*, 46 ECAB 123, 130 (1994).

[7] 5 U.S.C. §§ 8101-8193; *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gates*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*,39 ECAB 1260, 1266-657 (1988).

[8] *Martha L. Watson*, 46 ECAB 407 (1995).

something else." The employing establishment addressed three situations, in which appellant stated that he was not correctly informed that inmates were "separatees" and should not be transported together.[9] On August 2, 2002 the specific inmates mentioned were not classified as separatees and could have been transported together according to the employing establishment. On August 5 and 6, 2003 two inmates were not classified as separatees as the employing establishment was not aware that one would be testifying against the other. The employing establishment stated that when the information was received an additional officer was assigned. On August 15, 2003 the employing establishment stated that the two inmate separatees were allotted two officers each and that appellant's supervisor did not recall a request for additional help by appellant. Appellant has submitted no evidence of error or abuse by the employing establishment in assigning his work duties.

Appellant asserted that he was denied requested training. The employing establishment stated that appellant attended advanced Deputy U.S. Marshal training in January 2002. The employing establishment further stated that appellant's request for airport training was to be considered prior to his rotation to the Miami office warrants squad, but that appellant utilized leave without pay prior to this rotation. The employing establishment concluded that at the time appellant requested this training it was not pertinent to his duties and responsibilities. Finally, the employing establishment stated that it was unaware of a training program for terrorist ID/Bomb recognition as requested by appellant. In his narrative statement to the Office, appellant did not identify training denials and did not substantiate error or abuse by the employing establishment in denial of training.

Appellant further attributed his emotional condition to his assigned work location. Appellant stated that when he agreed to work he was assigned to the Florida Keys office. He stated that the employing establishment breached his return-to-work agreement by placing him in the Miami, Florida office instead. The employing establishment stated that upon a finding that appellant was fit to return to duty, the employing establishment offered him various openings and appellant chose the Southern District of Florida without indicating a specific interest in the Key West sub-office. The employing establishment assigned appellant to Key West on August 13, 2001, however, due to the events of September 11, 2001, the judicial work of Key West was significantly reduced and due to this reduction of work, the employing establishment reassigned appellant to the Miami office as of October 21, 2001. The employing establishment noted, "At that time, [appellant] had not relocated physically to the Key West sub-office and/or made any financial commitments to that location…. Contrary to [appellant's] assertions. There was never an 'agreement' to keep him in the Key West sub-office." An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.[10]

Appellant alleged harassment, retaliation and discrimination through the above actions, through the failure of the employing establishment to allow him time to work on his current federal court case, through the placement of "Bigots with Badges" in his personnel file and through the failure of the Court Security Officers to notify him of a visitor and the fact that he

[9] The specific allegations made by appellant, as addressed by the employing establishment, are not included elsewhere in the record before the Board.

[10] *Judy L. Kahn*, 53 ECAB ___ (Docket No. 00-457, issued February 1, 2002); *see Lillian Cutler, supra* note 3.

did not receive telephone messages from that visitor and his wife in contrast to his coworkers. Appellant also attributed his emotional condition to discrimination, retaliation and harassment, due to his testimony regarding acts of discrimination, retaliation and abusive force against minorities. For harassment, retaliation or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment, retaliation or discrimination did, in fact, occur. Mere perceptions of harassment, retaliation or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.[11]

The employing establishment stated that after investigation it appeared that appellant's friend's visit coincided with the anniversary of September 11, 2001 and that the contracted Court Security Officers were extremely busy on this date due to heightened security concerns. The employing establishment further stated that appellant's friend asked for him at a security check point rather than the employing establishment public entrance and that it was likely that the Court Security Officers were not familiar with appellant as he worked in a different court function. The employing establishment further noted that as an entity it was not aware that appellant had a visitor until notified by appellant. Finally, the employing establishment stated that, as a matter of practice, the administrative assistant forwarded employees' calls to a personal voice mail. However, appellant had never set up his voice mail system.

In regard to appellant's allegation that he was not allowed time to work on his federal court case, the employing establishment stated that this allegation was unfounded. The employing establishment stated that appellant used advanced annual leave from April 3 to 11 and April 15 to 19, 2002. The employing establishment stated that appellant asserted that, from April 3 through 19, 2002, he was working on his federal court case. Appellant did not submit any specific time period, during which the employing establishment did not allow him to work on his court case and did not indicate whether he felt that he was entitled to time during working hours to pursue this case. As there is no evidence substantiating appellant's claim that he was denied appropriate time to pursue his federal claim and as the employing establishment denied such an action, appellant has not established harassment, discrimination or retaliation through such a denial.

Appellant alleged that the employing establishment attempted to harass and intimidate him through unspecified threats and the placement of evidence of a "Bigots with Badges" website in his personnel folder. The employing establishment denied that such information was placed in his personnel folder. As appellant has not submitted any evidence substantiating that the information was in his personnel folder as alleged, he has failed to substantiate that this event occurred and that it constituted, harassment, retaliation, discrimination or intimidation, on the part of the employing establishment.[12]

[11] *Alice M. Washington*, 46 ECAB 382 (1994).

[12] 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).

CONCLUSION

The Board finds that appellant has not submitted the necessary factual evidence to establish that he sustained an emotional condition as a result of compensable factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member