U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE PACHECO and U.S. POSTAL SERVICE,
INSPECTION SERVICE, Hartford, CT

*Docket No. 03-720; Submitted on the Record;*
*Issued May 20, 2004*

DECISION and ORDER

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

The issue is whether appellant has established that he developed an emotional condition due to factors of his federal employment.

Appellant, a 45-year-old postal inspector, filed a notice of occupational disease on September 17, 1992 alleging that he developed an emotional condition and high blood pressure due to harassment, discrimination and persecution at the employing establishment. The Office of Workers' Compensation Programs denied appellant's claim by decision dated October 19, 1992, finding that he failed to substantiate a compensable factor of employment.

Appellant requested an oral hearing on November 13, 1992. Appellant's attending physician, Dr. Geraldo Sanz Ortega, a psychiatrist, testified at the oral hearing and attributed appellant's emotional condition to his job duties, including making arrests and undercover work. By decision dated October 25, 1993, the hearing representative found that appellant had established compensable work factors and remanded the claim to the Office for additional development of the statement of accepted facts and the medical evidence to be followed by a *de novo* decision.

On remand, the Office referred appellant, a statement of accepted facts and a list of questions to Dr. Jose Alonso, a psychiatrist, for a second opinion evaluation. Dr. Alonso completed a report on December 9, 1993. By decision dated January 27, 1994, the Office found that the medical evidence did not support appellant's claim for an emotional condition due to his accepted employment duties and denied his claim.

Appellant, through his attorney, requested reconsideration on October 4, 1994. By decision dated December 30, 1994, the Office denied modification of the January 27, 1994 decision.[1] Appellant requested reconsideration on December 28, 1995. By decision dated

[1] Appellant requested review of this decision by the Board, but then requested that the Board dismiss his appeal to pursue the reconsideration process. Docket No. 95-2170 (issued September 25, 1995).

April 1, 1996, the Office denied reopening appellant's claim for reconsideration of the merits. Appellant again requested reconsideration on June 10, 1996.[2] By decision dated March 12, 2002, the Office reviewed appellant's claim on the merits and denied modification of its prior decisions. Appellant requested reconsideration on August 5, 2002. By decision dated November 27, 2002, the Office again denied modification of its prior merit decisions.

The Board finds that this case not in posture for decision.

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 to 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 or to hold a particular position.[3]

Appellant attributed his emotional condition to actions of his supervisors, Kenneth J. Kievet, regional chief inspector, P.F. Wade, inspector-in-charge and Marge Crespo, acting inspector-in-charge. Appellant stated that Mr. Kievet and Mr. Wade groomed him for advancement and that he could not refuse to take the steps they suggested because he feared the consequences. Appellant also stated that he feared losing his position in 1988 as Mr. Wade changed his standards from number of arrests to man hours per arrest. The Board has held that the fear of losing one's job or job insecurity is not sufficient to constitute a personal injury in the performance of duty.[4]

Appellant alleged that a coworker informed him that Ms. Crespo intended to "cut some heads" and that appellant was the first one. Appellant has not submitted any evidence to establish that this remark was made. Appellant requested a lateral transfer to Miami on October 3, 1989. In a letter addressed to Ms. Crespo, dated December 14, 1989, appellant stated that she had informed him that he should reconsider his decision as Hispanics were second class citizens in Miami, that the office belonged to the Americans and they could do as they wanted, that appellant would experience what a "spick" was in Miami and that appellant was a good inspector and she did not want to lose him. Appellant alleged that Mr. Kievet informed him that if he went to Miami he would "get his nose cut there." Appellant felt that this was a threat. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Federal Employees' Compensation Act. Appellant has not substantiated that these remarks

[2] Appellant again requested review by the Board on June 15, 1997. In an order dated May 12, 1999, the Board dismissed the appeal request finding that the case was in an interlocutory situation. (Docket No. 97-2238).

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

[4] *Pervis Nettles*, 45 ECAB 623, 628 (1993).

were made as alleged and further has not shown how these comments would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[5]

By letter dated April 3, 1989, appellant requested that his name be removed from the Postal Candidates Executive Service (PCES) list. Appellant determined that he would like to remain in San Juan, Puerto Rico rather than transfer to Miami if he was reinstated on the PCES list. He requested that he be returned to the PCES list on November 8, 1989. Appellant stated that he felt pressure to remove his name from the request to transfer list and that on October 21, 1989 the employing establishment changed its transfer policy to adversely impact him. On October 21, 1989 the employing establishment eliminated the option of a level 24 inspector to transfer to any level 24 assignment under the Career Path program. Appellant requested that his name be removed from the transfer list on December 18, 1989. Mr. Wade declined to recommend appellant for the PCES as he felt that appellant's judgment was questionable due to the conflicting career decisions that appellant was making. The Board has 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 no 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]

In 1989 Mr. Kievet attributed problems at appellant's duty station in San Juan to difficulties appellant instigated with a coworker, postal inspector Edwin Rios, and chastised appellant. Appellant requested a meeting with Mr. Kievet for the next day, Mr. Kievet agreed, but left without conducting the meeting. In response to appellant's inquiries, Mr. Wade did not provide appellant with an explanation of Mr. Kievet's position regarding Mr. Rios and stated that when appellant was promoted, he would be promoted to New York to insure that his decisions were reviewed by another inspector-in-charge. Appellant considered this proposal to be punishment through promotion. Appellant also attributed his emotional condition to a "very good evaluation" he received on December 1, 1989.

Appellant stated that Ms. Crespo informed the inspectors at a meeting held on December 4, 1989 that he would be leaving. In February 1991 appellant had to return to Puerto Rico from his detail to Hartford to testify in a criminal trial. He stated that Ms. Crespo improperly treated him as a visiting inspector, asking him to report to her office first thing in the morning and to provide daily itineraries. Ms. Crespo then placed appellant under the supervision of Eric Cordero, a visiting postal inspector from Miami. However, appellant noted that he was still the external crimes team leader in Puerto Rico and was only on a temporary detail to Hartford and that Mr. Cordero was a regular working level inspector rather than appellant's team leader or working supervisor status. He also asserted that Mr. Kievet instructed him to stay away from the San Juan office. Appellant also attributed his condition to the fact that he supervised fewer subordinates after his transfer to Hartford and to the employing establishment's denial of his request for 240 hours of advanced sick leave.

[5] *See, e.g., Alfred Arts*, 45 ECAB 530 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction).

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

Appellant returned to Puerto Rico to testify on March 21, 1991. His supervisor at that time, Fred Gray, an inspector-in-charge, requested that appellant provide a copy of the court's summons. Appellant alleged that Mr. Gray failed to provide him with an outstanding performance appraisal despite his statement that appellant had an outstanding year. Appellant noted that others in the office received outstanding evaluations and that he felt that he was also entitled.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly addressed leave, unreasonably monitored his activities at work and improperly assigned work duties, 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 Act.[7] 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] In this case, appellant has submitted no evidence that employing establishment personnel acted unreasonably in the above-mentioned actions.

On December 27, 1989 Mr. Kievet assigned appellant to study the external crimes section in Hartford, Connecticut. Appellant noted that he was required to work from the New Haven domicile. Appellant felt that this assignment was to isolate him from other team leaders at division headquarters. Appellant reported to duty on January 8, 1990 and felt that this assignment was a punishment. At his duty station in Hartford, appellant alleged that he was assigned an office in the storage room, which he had to share with visiting inspectors. He stated that he remained in this position for six months rather than the initially proposed three months. The Board has previously held that a claimant's dissatisfaction with his or her physical surroundings is not compensable as it relates to frustration from not being permitted to work in a particular environment or to hold a particular position, which is not covered under the Act.[9] Appellant has submitted insufficient evidence in support of his contention that the employing establishment committed error or abuse in appellant's temporary detail to the New Haven domicile.

An incident between appellant and Ms. Crespo resulted in two articles in a local newspaper casting the postal inspection service in a bad light. The employing establishment interviewed appellant to determine if he was the informant for the news articles. Appellant alleged that this investigation and the employing establishment's refusal to provide him with the final report caused or contributed to his emotional condition. The employing establishment

[7] 5 U.S.C. §§ 8101-8193; *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, 1266-657 (1988).

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

[9] *Sherry L. McFall*, 51 ECAB 436, 439 (2000).

retains the right to conduct investigations if wrongdoing is suspected. Generally, investigations are related to the performance of an administrative function of the employer and are not compensable factors of employment unless there is affirmative evidence that the employer either erred or acted abusively in the administration of the matter.[10] Appellant alleged that the employing establishment erred by refusing to provide him with a copy of the report regarding this investigation. However, the Board finds that there is no evidence that the employing establishment erred in either the method of conducting the investigation or in withholding the report from appellant.

Appellant also attributed his emotional condition to a reaction to his civil suit against the employing establishment. Regarding appellant's allegations that he had to pursue his rights under the legal system, the Board has held that stress or frustration resulting from failure to obtain appropriate redress or corrective actions from other venues with, which complaints are filed against the employing establishment are not covered by the Act.[11] The actions of another body in reviewing and investigating the charges and rendering a decision thereon do not have any relationship to the employee's assigned duties and are, therefore, not compensable.[12]

Appellant attributed his condition to a fitness-for-duty evaluation required by Ms. Crespo in a letter dated November 28, 1989. Appellant's appointment was scheduled on December 7, 1989 and required that he work all day on December 6, 1989 and fly to Boston at night. Appellant noted that the Employee and Labor Relations Manual acknowledged that management could order a fitness-for-duty examination at any time to safeguard the employee or coworkers, but that the specific reasons for the fitness-for-duty referral should be stated by the referring officials. Appellant alleged that he was not provided with the reasons for the examination. He stated that Ms. Crespo failed to respond to repeated requests for the reasons of the referral. Appellant also attributed his emotional condition to a second fitness-for-duty examination and the resultant letter of proposed removal.

The Board has held that fitness-for-duty examinations are administrative and personnel requirements.[13] Appellant must establish error or abuse on the part of the employing establishment. The initial letter from Ms. Crespo directing that appellant attend the fitness-for-duty examination did not provide a reason for the referral. Dr. James Ryan, an employing establishment physician, completed a report on December 15, 1989 finding that appellant demonstrated no evidence of substance abuse and no medical nor psychological problems. Dr. Ryan found appellant fit for full duty. Appellant requested that Ms. Crespo provide an explanation for his referral for examination in a letter dated December 20, 1989. In a letter dated December 22, 1989, Ms. Crespo responded to appellant's request stating that appellant's work performance was unsatisfactory and that she believed that he had a problem with alcohol. Appellant has not established that the referral was in error on the part of the employing establishment. Appellant has submitted no evidence that it was unreasonable for Ms. Crespo to

[10] *Sandra F.* Powell, 45 ECAB 877, 888 (1994); *Merriett J. Kauffman*, 45 ECAB 696, 701-02 (1994).

[11] *Eileen P. Corigliano*, 45 ECAB 581, 585 (1994).

[12] *Id.*

[13] *Lillie M. Hood*, 48 ECAB 157, 160 (1996); *Alice M. Washington*, 46 ECAB 382, 390 (1994).

attribute his physical symptoms to alcohol abuse and has noted that the employing establishment could request a fitness-for-duty examination at any time to safeguard an employee or coworkers. Appellant failed to provide any evidence that the employing establishment erred in directing him to attend additional examinations in 1992, after his physician found him totally disabled for work due to psychological impairments. Due to the nature of appellant's work and his interaction with the public and other law enforcement officers, clearly the employing establishment had an interest in insuring that he was not under the influence of alcohol while on duty and that he was neither a danger to himself or others while experiencing and emotional condition. Therefore, appellant has not established that the fitness-for-duty examinations were error or abuse on the part of the employing establishment and these examinations are not compensable factors of employment.

Mr. Kievet transferred appellant to the external crimes team leader position in Hartford from his external crimes team leader position in San Juan in June 1990. Appellant filed a second Equal Employment Opportunity (EEO) Commission complaint alleging that this transfer was an illegal disciplinary action and made as a reprisal for appellant's initial EEO complaint. Appellant alleged that lateral transfers were voluntary at the employing establishment and that he was the only employee who was laterally transferred without his prior consent. In response to an interrogatory, the employing establishment indicated that out of 82 postal inspectors within the Northeast region, appellant was the only one transferred within the last three years from one division to another without his prior consent. Mr. Kievet stated that he moved appellant to Hartford to meet the needs of the employing establishment. In a draft letter dated May 29, 1990, Mr. Kievet transferred appellant to the external crimes section in Hartford effective August 11, 1990. He stated:

> "Although your performance as an External Crimes Inspector in San Juan in recent years has been acceptable, your conduct toward other employees has not. A serious morale problem developed in the San Juan Division as a result of internal tension you created among Inspector and Support employees. You caused an atmosphere of distrust and unnecessary internal conflict among many of the senior employees and disrupted the proper development of several newer Inspectors who were dependent on more experienced employees for guidance and training. You actions have seriously damaged the respect needed to perform effectively in the San Juan Division."

In the final version of the letter received by appellant, Mr. Kievet removed the above paragraph and merely advised appellant that he was laterally transferring him to Hartford due to his investigative skills and his knowledge of the Hartford Division.

Regarding appellant's assertion that his transfer was the result of an abusive administrative action, specifically that he was transferred as a disciplinary action and that such a disciplinary action was not authorized at the employing establishment, the Board finds that appellant has not submitted sufficient evidence to establish error or abuse on the part of the employing establishment in his transfer.[14] Although appellant has submitted evidence that he

[14] *Helen P. Allen*, 47 ECAB 141, 146 (1995); *Alfred Arts, supra* note 5 at 530.

was transferred without his prior consent, he has not submitted any evidence that Mr. Kievet's decision to transfer him was against policy or exceeded his authority at the employing establishment. The record establishes that Mr. Kievet revised his initial letter informing appellant of the reasons for his transfer, however, this does not establish that the transfer was a disciplinary measure but suggests that appellant could better serve the employing establishment in a different environment as he could no longer perform effectively in San Juan. Mr. Kievet stated that he felt that appellant's transfer was in the best interest of the employing establishment and both letters reflect this assertion. Therefore, appellant has not established error or abuse in his transfer.

Appellant also alleged that the separation from his family contributed to his emotional condition. To the extent that appellant attributed his emotional condition to the separation from his family, a result of the transfer by the employing establishment, the Board has found that an employee's emotional condition arising from dissatisfaction with a transfer and frustration in not being permitted to hold a former position does not arise within the performance of duty.[15]

In March 1990 while appellant was in San Juan for a court appearance, Ms. Crespo assigned appellant duties, which the district attorney had directed the technical equipment specialist, Angel Rosado, to perform. The District attorney reversed this mandate, again requiring Mr. Rosado to do the work. Ms. Crespo then appeared at the courthouse and ordered appellant to return to Hartford against the directive of the court. Ms. Crespo admitted to this action and stated that she was unfamiliar with the requirement of the Puerto Rican judicial system that required all witnesses to be present during jury selection. Therefore, appellant has established error in this order by his supervisor.

Appellant alleged harassment and discrimination in the above-mentioned actions of the employing establishment. 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. 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 or her allegations with probative and reliable evidence.[16] The Board finds that appellant has not submitted sufficient factual evidence to establish his allegations of harassment or discrimination.

Appellant also attributed his emotional condition to specific assignments and duties of his various positions. Appellant was assigned as the acting inspector-in-charge in 1985, he was assigned a sensitive detail following a stressful interview in 1987, he studied for the PCES examination in October 1988, he was detailed to the New York office in September 1988 and also in 1988 was closely monitored in the detail at the National Headquarters. Appellant worked in a joint taskforce in 1982, two police officers on the taskforce were killed in the investigation and appellant became aware of the everyday dangers of his job. The employing establishment has not disagreed that these were appellant's assigned duties and that appellant's position has

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

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

inherent dangers, therefore, these work assignments constitute compensable factors of employment.

At the oral hearing, appellant's attending physician, Dr. Ortega, a psychiatrist, attributed appellant's condition to making arrests and performing undercover work and undertaking investigations in the performance of duty. The hearing representative accepted that the specific duties in appellant's position description were compensable.

In the present case, appellant has identified compensable employment factors including his regular and specially assigned duties, which include carrying firearms, undertaking investigations, making arrests and doing undercover work as well as that he receive an erroneous order from his supervisor Ms. Crespo in March 1990. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factors.[17]

In a report dated September 15, 1992, appellant's attending physician, Dr. Ortega, a psychiatrist, diagnosed generalized anxiety disorder and obsessive compulsive personality due to harassment and discrimination. Dr. Ortega testified at the oral hearing on April 19, 1993 that appellant's emotional condition was due to the stressful nature of his law enforcement position. He stated that due to appellant's perfectionist tendencies, appellant preferred to attribute his condition to actions of his supervisors rather than to accept that it was his daily job duties, which caused his stress and anxiety.

On remand from the hearing representative the Office referred appellant and a statement of accepted facts to Dr. Jose Alonso, a psychiatrist. The statement of accepted facts listed appellant's compensable employment factors as carrying firearms, performing investigations of a sensitive nature, making arrests and working undercover. The Office did not address Ms. Crespo's erroneous order in March 1990.

In a report dated December 9, 1993, Dr. Alonso diagnosed rule out major depression with psychotic features, rule out personality disorder with paranoid features and problems in his work. Dr. Alonso provided a history of injury including the fitness-for-duty examination for alcohol abuse, problems while testifying in court, persecution and discrimination. He stated: "I consider, based on the events, all his symptoms are related to the following factors: accusation of drinking, change of workplace and incidents with his supervisor, not selected for a position."

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[18] In this case, the Office referred appellant for a second opinion examination with Dr. Alonzo and provided him with a statement of accepted facts. Dr. Alonzo opined that appellant's emotional condition was due to problems with his supervisor and noted that appellant had problems while testifying in court

[17] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[18] *Walter A. Fundinger, Jr.*,37 ECAB 200, 204 (1985).

when summoned as a witness, along other nonaccepted employment events. The Board has accepted an additional factor, that Ms. Crespo directed appellant to leave San Juan against a court order, while he was present on the island as a witness. Therefore, it appears that Dr. Alonzo's report suggests that appellant's emotional condition was due in part to the newly accepted factor. The Board finds that the case requires further development of the medical evidence. On remand, the Office should refer appellant and a detailed statement of accepted facts including all accepted employment factors to an appropriate physician, to determine the causal relationship if any between appellant's accepted employment duties and factors and the development of his emotional condition. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

The November 27 and March 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and remanded for further development consistent with this decision of the Board.

Dated, Washington, DC
May 20, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member