U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMMY JONES, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

Docket No. 03-642; Submitted on the Record;
Issued June 9, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition in the performance of his federal duties and (2) whether the Office of Workers' Compensation Programs properly determined that appellant abandoned his hearing request.

On July 6, 2001 appellant, then a 48-year-old postal worker, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained job stress from a verbal and physical confrontation with his supervisor. In an August 15, 2001 letter, the Office requested more information from appellant.

In a September 13, 2001 letter, appellant wrote that he had been involved in whistle-blower activity concerning himself and other minorities in the employing establishment for the last nine years. On May 11, 2001 he attended a meeting with postal and other officials to discuss a "racial flyer" found on postal property. Appellant's group voiced dissatisfaction of the employing establishment's progress of an investigation to find the author of the flyer. He alleges that, as a result of that meeting on May 14, 2001, Postal Inspector J.S. Girardot screamed at him "I know you met with the District Manager yesterday!"

Appellant also submitted several documents related to grievances, Equal Employment Opportunity (EEO) and National Labor Relations Board (NLRB) complaints that he was involved with as a union steward, but not directly related to him. He also submitted witness statements from Roger Barnes and Gary Mahons, who both wrote that "On August 9, 1997 at 2:20 p.m., Sam Jones was interrupted by Janet Beasley (supervisor) during his lunch hour." Appellant also submitted a copy of a partial EEO decision dated March 21, 2001 that found that during 1993 and 1994 he was subjected to a hostile environment due to his race. Finally, appellant submitted newspaper articles covering the racist flyer and the subsequent investigation.

In a June 21, 2001 report, Robert Bruch, a social worker, wrote that appellant had been treated for job-related stress since May 22, 2001 and that he complains of headaches and other stress-related symptoms. In an October 23, 2001 report, Dr. Paul Stein, a psychiatrist, diagnosed

appellant with depressive disorder and anxiety. He opined that appellant's condition was "triggered" by an incident in the employing establishment when he asked a postmaster inspector to handle what he thought was a threat to Black employees. Dr. Stein indicated that appellant has been seeing a psychotherapist for work-related stress since 1999 and has seen a social worker for therapy since May 22, 2001. He concluded that appellant "should not return to work at the employing establishment for it is "too stressful for him to handle."

In a January 23, 2002 decision, the Office denied appellant's claim finding that he had not established that his emotional condition was causally related to an employment factor. The Office did find that appellant alleged one factor arising from the performance of his federal duties -- the March 21, 2001 EEO determination that appellant had been exposed to a hostile environment due to his race. The Office found that the medical evidence did not support that the hostile environment, which occurred in 1993 and 1994, was causally related to his current emotional condition. Therefore, appellant failed to establish that his emotional condition arose from a compensable employment factor.

In a February 18, 2002 letter, with a return address of 2904 N 45th St., Milwaukee, WI, 53210, appellant requested an oral hearing. In a September 17, 2002 letter, sent to that same address in Milwaukee, the Office notified appellant of the October 2002 hearing. Appellant did not appear for the hearing. In an October 29, 2002 decision, the Office determined that appellant had abandoned the hearing.

The Board finds that appellant has not established 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

[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).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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.[5] 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.[6]

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether appellant's alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that his condition resulted from activities he encountered in his capacity as a union steward. The Board adheres to the general principle that union activities are personal in nature and are not considered to be within an employee's course of employment or performance of duty.[7]

Appellant has also alleged his condition resulted from a verbal and physical confrontation with a postal inspector, Mr. Girardot. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[8] In the present case appellant has not submitted corroborating evidence such as witness statements that establish the confrontation occurred or the alleged words were spoken.

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *See Larry D. Passalacqua*, 32 ECAB 1859, 1862 (1981).

[8] *See Leroy Thomas, III,* 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

Appellant has alleged and submitted supporting witness statements that his supervisor, Janet Beasley, interrupted his lunch hour. These statements are vague and it is not clear what "interrupted" means in this context, nor has appellant shown how an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[9]

Appellant has also alleged that he was not satisfied with the employing establishment's progress in investigating the production of a "racial flyer."

The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regular or specially assigned employment duties are not considered to be employment factors.[10] 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.[11] Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation, appellant has not provided sufficient evidence to support such a claim. Thus, he has not established a compensable employment factor under the Act in this respect.

Appellant has established one employment factor: He was subjected to a hostile work environment based on his race in 1993 and 1994. However, his burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. 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 factor.[12]

The medical evidence of record does not causally link appellant's emotional condition to the 1993 and 1994 incidents cited in the EEO decision. The only medical evidence of record is the October 23, 2001 report from Dr. Stein, identified the May 14, 2001 verbal confrontation with a postal inspector as the triggering event. As discussed above that incident did not occur in the performance of his federal duties and, therefore, is not a compensable factor.

For the foregoing reasons, appellant has not established that his emotional condition arose from any compensable employment factor under the Act.

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[9] *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). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

[10] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

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

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

The Board further finds the Office properly determined that appellant abandoned his request for a hearing before an Office hearing representative. Section 10.137 of Title 20 of the Code of Federal Regulations, revised April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[13]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999 the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[14] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [d]istrict Office. In cases involving prerecoupment hearings, [hearings and review] will also issue a final decision on the

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[13] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[14] 20 C.F.R. § 10.622(b) (1999).

> overpayment, based on the available evidence, before returning the case to the [district office].
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [hearings and review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
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> "This course of action is correct even if [hearings and review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[15]

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on October 22, 2002. The record shows that the Office mailed appropriate notice to appellant at 2904 N 45th St, Milwaukee, WI. 53210, his last known address. Although appellant alleges that he did not receive the notice, there is no indication in the record that he advised the Office of a change of address. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[16]

The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.[17]

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[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[16] *Clara T. Norga,* 46 ECAB 473, 465 (1991).

[17] *See also Claudia J. Whitten*, 52 ECAB ___ (Docket No. 99-2128; issued August 22, 2001).

The decisions of the Office of Workers' Compensation Programs dated October 29 and January 23, 2002 are affirmed.[18]

Dated, Washington, DC
June 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] The Board notes the appellant submitted new evidence subsequent to the Office's October 29, 2002 decision. However, the Board cannot consider that evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).