U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. KREUSH and U.S. POSTAL SERVICE, NEW YORK INTERNATIONAL & BULK MAIL CENTER, Jersey City, N.J.

Docket No. 97-46; Submitted on the Record;
Issued August 5, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On September 10, 1995 appellant, then a 46-year-old supervisor of distribution operations, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his stress-induced dysfunction was due to his long work hours and harassment by his supervisor and the Tour III bulk manager. On the reverse side of the form his supervisor, Ms. Pauline Morrison, disagreed with appellant's allegation of harassment and noted that he had been absent on administrative leave since July 28, 1995 pending a removal action. She stated that appellant had been on a different tour for the past four and one-half months.

In a letter of warning dated December 29, 1994 and received by appellant on December 31, 1994, the employing establishment advised appellant that the letter was issued based on charges of disrespect to a postal supervisor, insubordination and failure to discharge his duties conscientiously and effectively. Appellant was also advised that if he failed to correct his work deficiencies, further disciplinary action, including removal from the employing establishment, might result.

In a statement dated September 25, 1995, Frank C. Woods, Manager, Distribution Operations, Bulk Tour III, stated that he never threatened appellant nor denied his request for time off except during mandatory staffing during the holidays. Mr. Woods noted that on July 28, 1995 he issued a proposed action of removal to appellant.

In an undated statement received on September 13, 1995, appellant detailed his allegations of harassment and stress from his employment. Appellant stated that his depression worsened during December 1994 and that he was out for six days in October 1994 due to stress.

Appellant alleged that he was treated without dignity, forced to work a number of hours, treated differently than other supervisors on the tour, forced to work when advanced leave and forced to work religious holidays, such as Christmas. Appellant then detailed that he started working Tour III on July 24, 1993 and the stress he endured from that point. He mentioned that his wife called the employing establishment hotline in December 1993 to complain about his working Christmas day and the hotline was closed. He noted that he was late for work on January 18 and 19, 1994 due to bad weather conditions. Appellant alleged that on May 11, 1994 his supervisor told him "get off your fat white ass and check the mail." Appellant also alleged that his supervisor called him "a slick ass white boy" on August 23 and December 20, 1994. Appellant requested leave for December 24 and 25, 1994, but it was denied. Appellant noted that the letter of warning added to his stress. Appellant also stated that he requested not to be required to work overtime on March 18, 1995 and was refused.

In a report dated September 25, 1995, Dr. Michael Prezioso, a psychologist, indicated that the "most recent precipitant" of appellant's stress was his fear of losing his job due to an investigation into his behavior when a subordinate he was supervising was "involved in a personal injury incident while on the job." Dr. Prezioso noted that appellant stated that he was subject to harassment and unfair treatment from his supervisor which contributed significantly to his stress. Dr. Prezioso noted that appellant was also experiencing serious financial and marital problems.

In a memorandum dated September 30, 1995, Ms. Morrison denied that she ever used racially discriminatory language or swore at appellant. She also denied that appellant received disparate treatment as to his leave requests. Regarding appellant's allegation that he was out due to stress for the period June 2 to 4, 1994 and October 12 to 15, 1994, Ms. Morrison noted, and submitted supporting documentation, that appellant called in for 24 hours of sick leave due to conjunctivitis for the first period and called in for 32 hours of sick leave for a URI for the second period alleged. Ms. Morrison noted that appellant's leave request for December 24 and 25, 1994 was disapproved due to "EAS draft in effect, services needed." Ms. Morrison issued a letter of warning on December 30, 1994 because he failed to follow her specific instructions regarding "his employees leaving the work area prior to official step-offs." Ms. Morrison also indicated that on December 6 and 9, 1994, she held discussions with appellant regarding his unsatisfactory work performance.

By letter dated October 30, 1995, the Office requested appellant to submit additional information to support his claim.

In a report dated November 20, 1995, Dr. Prezioso indicated that he had treated appellant since his referral by the employing establishment on June 14, 1995. Dr. Prezioso noted that appellant stated that "his depression and stress level have steadily increased due to ongoing conflicts with his immediate supervisor on the night shift." Dr. Prezioso indicated that there were other sources of appellant's stress besides work at this time, but opined that appellant's work was the most severe source of his stress.

In a December 6, 1995 letter, appellant further addressed his leave request for December 24 and 25, 1994. Appellant reiterated his belief that he had been harassed by his supervisor.

In a January 22, 1996 report, Dr. Herbert Lessow, a Board-certified psychiatrist, opined that appellant had undergone "a major depression with suicidal ideation and alcohol abuse during the better part of the year prior to June 1995 when he was found unfit for duty and received a letter of removal." Dr. Lessow noted appellant's statement regarding the events which led up to his letter of removal on July 28, 1995. Dr. Lessow also noted that appellant believed his supervisor was prejudiced against him, was critical of him and harassed him.

In a report dated March 1, 1996, Greg Benson, appellant's treating therapist, noted that appellant started therapy with him on January 2, 1996. Mr. Benson noted that appellant had previously been treated by Dr. Prezioso for stress-related issues caused by an "untenable work situation." Mr. Benson attributed appellant's high anxiety and depression to conflicts with his previous supervisor and working conditions which "precipitated a job transfer and title demotion which adversely affects" appellant's financial stability.

By decision dated March 26, 1996, the Office found the evidence insufficient to establish that an injury occurred in the performance of duty. The Office addressed appellant's alleged employment factors and found that the allegations against his supervisor were unsubstantiated, and thus, not compensable. The Office found that the other alleged employment factors were proper administrative actions, and not compensable.

By letter dated and postmarked April 26, 1996, appellant requested an oral hearing before an Office hearing representative.

By letter dated June 21, 1996, the Branch of Hearings and Review denied his hearing request finding that it was untimely and that he could request reconsideration of his case in writing with the submission of additional information.

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty causally related to factors of his federal employment.

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) evidence identifying specific employment factors or incidents alleged to have caused or contributed to his condition, supported by reliable factual evidence; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; 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. Such an opinion of the physician 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 appellant.[2]

[1] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[2] *See Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell*, *supra* note 1.

Workers' compensation law is not applicable 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. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular- or specially-assigned work 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 compensable where it results from such factors as an employee's fear of a reduction-in-force, his frustration from not being permitted to work in a particular environment or to hold a particular position, or his failure to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[3] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[4] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[5]

When working conditions are alleged as factors in causing 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.[6] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with reliable, probative and substantial evidence.[7] When the matter asserted is a compensable factor of employment, and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.

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

[4] *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

[5] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[6] *See Barbara Bush*, 38 ECAB 710 (1987).

[7] *Ruthie M. Evans*, 41 ECAB 416 (1990).

Appellant alleged that he sustained stress due to harassment and discrimination on the part of his supervisor, Ms. Morrison. Appellant claims that Ms. Morrison called him "a slick ass white boy" and told him to "get off your fat white ass and check the mail." Appellant also alleged that his was treated differently than other supervisors on the tour, forced to work when advanced leave was not given, and forced to work religious holidays such as Christmas.

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.[8] However, 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.[9] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted evidence sufficient to establish that he was harassed or discriminated against as alleged.[10] Appellant claimed that his supervisor made statements and committed acts which believed constituted harassment and discrimination, but he provided no evidence, such as witness statements, to establish that the statements were made or the actions occurred.[11] The Board notes that in the absence of a showing of harassment and discrimination, appellant's reaction to such claimed conditions and incidents at work must be considered self-generated in that it appears to have resulted from his frustration at not being permitted to work in a particular environment.[12] Appellant has not established a compensable factor under the Act with respect to his allegations of harassment and discrimination.

Appellant alleged that his requests for leave during the holiday season were denied, which he considered further evidence of harassment by Ms. Morrison. Appellant was also given an oral reprimand from his supervisor regarding his performance and his supervisor refused his request to not be required to work overtime on March 18, 1995. The Board has held that actions of the employing establishment in matters involving the use of leave are generally not considered factors of employment because they related to administrative or personnel matters.[13] As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act.[14] But error or abuse by the employing establishment in what would otherwise be a personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.[15] Although

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

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[10] *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).

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

[12] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[13] *Martha L. Watson*, *supra* note 2; *Abe E. Scott*, 45 ECAB 164 (1993).

[14] *E.g. Norman A. Harris*, 42 ECAB 923 (1991).

[15] *Thomas D. McEuen*, *supra* note 5.

appellant has made allegations that the employment establishment erred and acted abusively in these administrative and personnel matters, the evidence of record does not establish that these actions were in error or were abusive or unreasonable in nature. The Board has held that where the evidence demonstrates that the employing establishment has neither erred nor acted abusively, coverage under the Act will not be afforded.[16] As appellant failed to present evidence of error or abuse, these allegations are consequently not compensable factors of employment.

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 his claim that he sustained an emotional condition in the performance of duty.[17]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing before an Office hearing representative.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[18]

The regulations implementing the Act further provide that any claimant not satisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or for review of the written record. A hearing must be requested in writing within 30 days of the date of issuance of the decision. A claimant is not entitled to a review if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[19]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that the Office must exercise its discretionary authority in deciding whether to grant a hearing.[20] The Board has specifically held that the Office has the discretion to grant or deny a hearing request when the request is made after the 30-day period for requesting a hearing.[21] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[22]

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[16] *Michael Thomas Plante*, 44 ECAB 510 (1993); *Effie O. Morris*, 44 ECAB 470 (1993).

[17] 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).

[18] 5 U.S.C. § 8124 (b)(1).

[19] 20 C.F.R. § 10.131(a)-(b).

[20] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[21] *Herbert C. Holley*, 33 ECAB 140 (1981).

[22] *Rudolph Bermann*, 26 ECAB 354 (1975); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1993).

The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely, are a proper interpretation of the Act and Board precedent.[23]

The record shows that the Office rendered its final decision on March 26, 1996 and that appellant's request for a hearing was dated April 26, 1996. Because he did not request a hearing within 30 days of the Office's final decision, appellant is not entitled to a hearing on his case as a matter of right under the Act. In its June 21, 1996 decision, the Branch of Hearings and Review considered the matter in relation to the issue involved, and it exercised its discretion by denying appellant's request on the grounds that appellant could adequately address the issue involved by submitting medical evidence in conjunction with a request for reconsideration. As appellant may indeed pursue his claim and address the issue in this case by submitting to the Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office properly exercised is discretionary authority in denying appellant's request for a hearing.[24]

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 21 and March 26, 1996 are hereby affirmed

Dated, Washington, D.C.
August 5, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[23] *See Henry Moreno*, 39 ECAB 475 (1988); *Shirley A. Jackson*, 39 ECAB 540 (1988).

[24] The Board has previously held that the denial of an oral hearing on this ground is a proper exercise of the Office's discretionary authority; *see Robert Lombardo*, 40 ECAB 1038 (1989); *Jeff Micono*, 39 ECAB 617 (1988).