U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BASHARAT A. JAMIL and DEPARTMENT OF DEFENSE, DEFENSE MAPPING AGENCY, Washington, D.C.

Docket No. 96-2685; Submitted on the Record;
Issued March 6, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's claim on the grounds that he did not sustain an injury in the performance of duty.

In the present case, appellant, a computer systems analyst, filed a claim on October 17, 1985 alleging that he had sustained an emotional condition as a result of his federal employment. Appellant alleged that he sustained an emotional condition due to supervisory actions, including denial of requests for training which would have advanced his career in computer science project management, denial of requests for promotion, denial of travel leave, reassignment of projects, improper salary offset, high level conspiracy to deprive him of employment, ethnic rivalry and retaliation due to his criticism of his supervisors. Appellant alleged that after a technical evaluation of projects at the employing establishment, he noted incompetence and mismanagement on behalf of the technical director and "his cronies" and that they harassed him and conspired against him. Appellant was terminated from employment on October 18, 1985 for failure to have a security clearance.

Based on the factors of employment alleged, the Office accepted appellant's claim on September 18, 1986 for "anxious depression." At the time of its acceptance, the Office had before it evidence consisting of sworn statements of two fellow employees of appellant, Seham Elaraby and William F. Whelan. In Mr. Elaraby's statement dated October 25, 1985, he stated that he overheard a conversation between Judy Davenport, appellant's supervisor, and Dr. Kevin Daugherty, Ms. Davenport's supervisor, wherein Ms. Davenport was saying (quoting from Mr. Elaraby's sworn statement): "She was also saying that we must teach him a lesson and get rid of him [appellant] quick. And Ms. Davenport said the best way to fire him is through security. Dr. Daugherty promised he would look into that and some other means he also told Ms. Davenport that he would tell the personnel officer not to hire any more South Asians they are too much to handle.... I did not know who [appellant] was. But when [appellant] was given

a desk in the same room where I used to be in March 1985 I recalled the whole conversation and got stunned to find out what was going on."

In a second sworn affidavit dated October 25, 1985, Mr. William F. Whelan stated he had been a colleague of appellant's from the first day he started working in November 1978. He said:

> "Everybody was impressed by his expertise and advice in systems analysis, DBMS, ADP project management, computer and mathematics applications. Because of his systems analysis background, it did not take him long to find out how far behind the DMAATC was in automation. He developed and implemented data bases in a very short period of time and surprised everybody. [appellant] is an open critic of Dr. Daugherty (the Technical Director) and holds him responsible for the failure of all the technical projects at the Center as well as the waste of millions of taxpayers dollars. Dr. Daugherty being aware of [appellant's] views was hostile to him. This is the main reason he tried his best to impede his promotion by using the security clearance against him and at the same time he kept on promoting one of his cronies, Ms. Judy Davenport for the positions in which [appellant] was much more qualified."
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> "Dr. Daugherty not only used [appellant's] security clearance status as an excuse to stop his promotion, he also used Judy Davenport to discriminate against him and to force him to quit. The way she treated [appellant] after she was appointed to be his Division Chief by Dr. Daugherty is clear evidence to this fact, and indicates that [appellant] has been a victim of systematic discrimination.
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> "I was not fully aware of what had been going on against [appellant] until I overheard a conversation between Dr. Daugherty and Judy Davenport. I did not tell about this to [appellant] throughout my stay at the DMAHTC since I did not want to get involved in the high level politics. Now since I am retired, and [appellant] has asked me to be a witness, I feel it is my moral duty to tell it all.
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> "It was in the afternoon in November 1983 when I went to Judy's office to check about a project I was working on. When I entered her office I overheard Dr. Daugherty talking to Judy behind the office partition. I stopped to wait for my turn. But their conversation was of the nature that I did not like to embarrass them by letting them know that I had heard them. Dr. Daugherty was saying that the Indian Ph.D. (Dr. Kumar) thinks himself a big shot and Pakistani Ph.D. [appellant] is too critical of our management and technical expertise. Judy was saying that [appellant's] case is even worst.[sic] She was insisting that we must get rid of him first because she could not stand him any more. Dr. Daugherty said thank God we did not send his TS and SCI clearance case to the DIA, otherwise he would have been a GS-13 and it would be impossible to get rid of him. Dr. Daugherty suggested to give him a bad performance appraisal. Judy said nobody would believe that since [appellant] has a too good of recognition in the private sector. She suggested it would be easier and safe to get him on security clearance. Meanwhile, she would give him menial jobs in order to force him to

> quit. Dr. Daugherty said he would look into that and if he did not quit he would get rid of him through other means. These are not the exact words of Dr. Daugherty and Judy Davenport, however, it is the best possible way I can describe their conversation [that] happened almost two years ago. But the idea was clear that they wanted to get rid of [appellant]."

With these affidavits in the record, as well as appellant's statements and other evidence of harassment, the Office accepted the claim on September 18, 1986 for "anxious depression" based on a medical opinion furnished by Dr. Lawrence Brain, an impartial medical specialist.

Thereafter, the Office, on November 4, 1986, advised the employing establishment that the claim had been accepted according to Office requirements and a determination would be made as to continuing benefits. At the same time, the Office requested statements from Kenneth Daugherty and Judith Davenport, and furnished them with the statements of appellant and William F. Whelan. Dr. Daugherty, in a February 20, 1987 statement, denied that any conversation took place as described by Mr. Whelan, stating: "the type of discussion that he indicates is uncharacteristic of myself or Mrs. Davenport." He did not address other statements made by Mr. Whelan. Ms. Davenport in her February 19, 1987 statement makes no reference to or denial of Mr. Whelan's statements as to what he overheard in her conversation with Dr. Daugherty. Neither Dr. Daugherty or Ms. Davenport referenced or denied the conversation testified to by Mr. Elaraby.

After receiving these statements the Office, on June 10, 1987, put appellant on the periodic rolls. Subsequently compensation was suspended for failure to see a referral physician but was reinstated February 7, 1988, when the Office advised appellant: "[The Office] has accepted the condition identified above (anxious depression) as resulting from your employment injury…. You have been placed on the periodic rolls…."

In a statement of accepted facts dated April 23, 1990, the Office noted that appellant relied on a high level conspiracy against him, coupled with many confrontations with Dr. Daugherty and Ms. Davenport, for his emotional condition. On November 5, 1991 the Office sent appellant to a rehabilitation counselor.

On October 22, 1992 appellant was informed by an Office claims examiner that his accepted condition was "anxious depression" and that he would need a report from his treating psychiatrist in order to evaluate the claim for continued compensation.

On February 2, 1993 appellant was given a notice of proposed termination, wherein an Office, examiner recounted some 15 factors, which he said would not be considered for purposes of compensation claims including the harassment charges brought by appellant, and subscribed to by two witnesses.

On March 12, 1993 the Office issued a decision terminating appellant's compensation on the basis that "the condition (emotional condition) is not linked to accepted factors plus the appellant's medical evidence was insufficient to support continued disability." The Office held that the evidence established that appellant's disability resulting from the injury of October 11, 1985 ceased no later than March 7, 1993.

On September 8, 1993 after a review of the written record without a hearing, an Office hearing representative set aside and vacated the March 12, 1993 termination decision finding that the Office had failed to meet its burden of proof in terminating compensation. The hearing representative found, generally, that the four psychiatrists who had examined appellant on behalf of the Office, were misinformed as to the facts; that the three statements of accepted facts prepared by the Office in 1986, 1987 and 1990 were faulty, but noted all the psychiatrists who had examined appellant, namely Drs. Smoller, Brain, Barger and Haller, had found his emotional condition due to work factors; and that his treating physician, Dr. Ahmad, had consistently supported disability. He noted the "*Office has procured no medical evidence to the contrary*." (Emphasis added.)

The hearing representative further noted:

> "The Office has secured no new evidence which would prove that the claimant's disability, previously accepted as employment related, has ceased, lessened, or is no longer related to the employment. Further, readjudication of precisely the same evidence upon which the claim was accepted over seven years previously, now finding that the medical condition, previously accepted as employment related, is not and was not so employment related, does not discharge the burden of proof upon the Office to justify termination of entitlement."

In remanding the case, the hearing representative ordered a new statement of accepted facts and referral to a Board-certified psychiatrist.

On February 12, 1994 the Office vacated its acceptance decision of June 10, 1987, finding that the claimed incidents did not occur in the performance of duty. On May 23, 1994 a hearing was held on the issue of whether the February 12, 1994 decision rescinding acceptance of appellant's claim should be affirmed.

On June 6, 1994 the Office informed the claimant that it had accepted his condition of anxious depression as resulting from his employment, and that it would pay compensation through February 12, 1994.

On September 6, 1995 a second hearing representative, reviewing the identical facts that existed in 1986 and 1987, found the rescission was proper.

The Board finds that the Office did not meet its burden of proof to rescind its acceptance of appellant's claim for an emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act, and where supported by the evidence, set aside or modify a prior decision and issued a new decision.[1] The Board has noted, however, that the power to annul an award is not an arbitrary one, and that an award for compensation can only be set aside in the manner provided by the compensation

[1] *Larry J. Lilton*, 44 ECAB 243 (1992).

statute.[2] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence, or through new legal argument and/or rationale.[4]

In the present case, the Office, in its February 12, 1994 decision, proffered a new legal argument in justification of rescission by explaining that it erred when it initially accepted appellant's claim because none of the factual findings regarding appellant's claim were compensable and therefore the medical evidence was irrelevant.

The Board has held since its *Lillian Cutler*[5] decision that 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 or her regular or specifically 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position. In *Cutler* and its progeny, the Board has repeatedly found that incidents which are generally related to employment, but which involve administrative functions of the employer, not duties of the employee, are not considered to be within the performance of duty and are not compensable pursuant to the Act, unless the employing establishment has acted unreasonably.[6]

Appellant's allegations that his requests for travel leave, training and promotion were denied, that his projects were reassigned, and that his employment was improperly terminated relate to administrative actions taken by the employing establishment rather than appellant's performance of his employment duties and as such do not fall within the coverage of the Act, absent a showing of error or abuse by the employing establishment.[7] Appellant has not submitted the necessary corroborating evidence to establish that the employing establishment's administrative actions regarding his requests for travel leave, training, promotion and project assignments were in fact error or abuse. However, there is evidence of record that would substantiate retaliation due to appellant's criticism of the programs of the employing establishment.

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[2] *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[3] *Thomas Meyers*, 35 ECAB 381 (1983).

[4] *Anthony A. Zarcone*, 44 ECAB 751 (1993).

[5] 28 ECAB 125 (1976).

[6] *See Thomas D. McEuen*, 42 ECAB 566 (1991); *see also George C. Kaplan*, 32 ECAB 634 (1981).

[7] *See Barbara J. Nicholson*, 45 ECAB 803 (1994).

Appellant was ultimately terminated for failure to have a security clearance. The evidence does not establish the employing establishment's termination was in error. The record indicates that the Merit Systems Protection Board (MSPB) affirmed the employing establishment's decision to terminate appellant's employment after finding that it had no authority to review the employing establishment's reasons for the security clearance determination. Appellant's appeal from the MSPB determination to the United States Court of Appeals was dismissed on December 14, 1990. Appellant's claim of unlawful retaliation and whistleblowing was dismissed by the U.S. District Court for the District of Maryland on June 1, 1989. The U.S. Fourth Circuit Court of Appeals affirmed the District Court's summary judgment on August 3, 1990 and appellant's application for extension of time to file a *Writ of Certiori* was denied by the U.S. Supreme Court on August 18, 1992.

Appellant alleged that harassment and retaliation on the part of his supervisors contributed to his stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that such did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[8] In the present case, the employing establishment partially denied that appellant was subjected to harassment or discrimination. Appellant, however, submitted sworn witness statements to the record in support of his allegations.

Appellant submitted statements from two co-employees, Mr. Whelan and Mr. Elaraby, to establish harassment and retaliation to get rid of him. Mr. Whelan stated that appellant was an open critic of the technical director, Dr. Daugherty, and held him responsible for waste of millions of taxpayers dollars; that Dr. Daugherty was aware that appellant was hostile to him and that was the main reason that Dr. Daugherty "tried his best to impede his promotion by using the security clearance against him and at the same time kept on promoting one of his cronies, Ms. Davenport, for a position in which [appellant] was much more qualified." Mr. Whelan also related that he had overheard a private conversation between Dr. Daugherty and Ms. Davenport in November 1983 during which Dr. Daugherty stated that appellant was too critical of management and that Ms. Davenport responded that she could not stand appellant anymore and that they should get rid of him. Mr. Whelan indicated that Dr. Daugherty then suggested that appellant be given a bad performance appraisal, while Ms. Davenport stated that nobody would believe that and that it would be easier to deal with the security clearance issue. Appellant also submitted an affidavit from Mr. Elaraby who stated that sometime in June 1984 he overheard a conversation between Ms. Davenport and Dr. Daugherty regarding appellant, during which Ms. Davenport stated that appellant should be taught a lesson, that he should be fired and that the best way to accomplish his firing would be through the security clearance issue.

As pointed out, previously, Dr. Daugherty and Ms. Davenport made no reference to the conversation Mr. Elaraby testified to in June 1984 and Ms. Davenport did not deny the conversation Mr. Whelan testified he overheard in 1983.

[8] *Goldie K. Behymer*, 45 ECAB 508 (1994).

There is further evidence of disparate treatment by the establishment in that up to 10 employees were in default on student loans, yet did not lose their security clearance or employment. This was alleged as harassment and retaliation. The Office's initial and subsequent decisions would support such a finding. After reviewing all the statements, and reviewing all the evidence the Office accepted the claim. The hearing representative in his September 8, 1993 decision, found the medical evidence submitted by four Office appointed psychiatrists and appellant's treating physician, confirmed his emotional condition was related to these work factors.

The Board finds that the evidence of record supports a finding of harassment and retaliation on the part of management at the employing establishment in an effort to terminate appellant's status as an employee. The witness statements of Mr. Elaraby and Mr. Whelan support such a finding. Harassment is a covered factor and the medical evidence of record attributes, at least in part, that harassment contributed to his emotional condition. There is further evidence in this case that the employing establishment continued to withhold appellant's pay, after notification from the Department of Education that he had an appeal pending before it, with respect to the status of his student loan. This constitutes error, in an administrative matter, and is a covered factor.

The facts in this case have not changed. As in the case of *Daniel E. Phillips*,[9] a second deciding official has adjudicated identical facts and come to an opposite conclusion. Under the Board's case law dealing with rescission, this is not sufficient.[10]

In summary, the Office accepted the claim on adequate factual and medical evidence. While the Board accepts that a portion of the Office's legal argument in support of rescission pertains to work factors that would not afford coverage to the appellant, there is evidence of record to establish factors that would afford coverage -- harassment and error -- and the medical evidence at the time of acceptance attributes the emotional condition partially to these factors.

The Office therefore improperly rescinded the acceptance of appellant's claim for "anxious depression" on the basis that he failed to establish any compensable employment factors under the Act.

[9] 40 ECAB 1111, 1119 (1989); *petition on recon. denied*, 41 ECAB 201 (1989).

[10] *See Alice M. Roberts*, 42 ECAB 747, (1991) and cases cited therein; *James Gray, Jr.*, 44 ECAB 652 (1993).

The decision of the Office of Workers' Compensation Programs dated and finalized on September 6, 1995 is hereby reversed.

Dated, Washington, D.C.
March 6, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member