U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW K. JOHNSON and DEPARTMENT OF THE NAVY, TRIDENT REFIT FACILITY, BANGOR SUBASE, Silverdale, Wash.

Docket No. 96-1800; Submitted on the Record;
Issued June 7, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

The Board has duly reviewed the case record in this appeal and finds that the case is not in posture for decision.

On December 29, 1995 appellant, then a painter/sandblaster, filed a claim for an occupational disease (Form CA-2) assigned number A14-302687 alleging that he first became aware that his emotional condition was caused by his employment on December 11, 1994.[1]

By decision dated November 17, 1995, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition caused by factors of his federal employment. In a December 3, 1995 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

By letter dated December 28, 1995, the Office advised the employing establishment to review appellant's request for reconsideration and to answer specific questions regarding appellant's employment. In a January 22, 1996 response, the employing establishment stated that it agreed with the Office's decision and that appellant was working full time on a limited-duty basis. The employing establishment's response was accompanied by medical evidence and employment records.

[1] Previously, appellant filed a traumatic injury claim (Form CA-1) assigned number A14-0300764 for back and right shoulder conditions. The Office of Workers' Compensation Programs accepted appellant's claim for lumbosacral strain and right shoulder strain.

By decision dated January 24, 1996, the Office denied appellant's request for modification based on a merit review of the claim. In letters dated February 5 and 16, 1996, appellant requested reconsideration of the Office's decision accompanied by factual evidence.

By decision dated March 5, 1996, the Office denied appellant's request for reconsideration without a merit review of the claim. In a March 10, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by factual and medical evidence.

By decision dated March 18, 1996, the Office denied appellant's request for reconsideration without a review of the merits of the claim.

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 coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[2]

Perceptions and feelings alone are not compensable. 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 factors of his federal employment.[3] To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) 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.[4]

In this case, appellant has alleged that he sustained an emotional condition due to various conditions and incidents at work. Appellant's primary allegation is that he was harassed and discriminated against by the employing establishment for disclosing unsafe working conditions and that he feared reprisals for such disclosure and refusing job assignments. Appellant has also alleged that he was verbally abused by the employing establishment. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment and discrimination may constitute factors of employment giving rise to coverage under the Act.[5]

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

[3] *Pamela R. Rice*, 38 ECAB 838 (1987).

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

[5] *Donna Faye Cardwell*, *supra* note 4; *Pamela R. Rice*, *supra* note 3.

Mere perceptions alone of harassment are not compensable under the Act.[6] To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.[7] Appellant has failed to provide any such probative and reliable evidence in this case.

In a January 9, 1995 narrative statement, Michael Jones, appellant's supervisor, stated that since he had been a supervisor, he had openly encouraged the submission of unsafe/unhealthful working condition reports. Mr. Jones noted that this report was used when either he or the employee was unsuccessful in correcting the problem. He stated that he had helped employees fill out the report when he could not resolve the issue to their satisfaction. Mr. Jones further stated that appellant's accusation of reprisals were unfounded and untrue based on appellant's work assignments and performance ratings. He noted that appellant's performance ratings had gone up the last two years because of his training work. Mr. Jones stated that problems had occurred and tagouts had been violated, but that only two such incidents could be considered life threatening; however, no injury was sustained or reported in either incident. The record reveals the employing establishment's instructions regarding the reporting of unsafe/unhealthful working conditions. These instructions indicated that employees "shall be encouraged" to report unsafe or unhealthful working conditions. Thus, the Board finds that appellant has not established a compensable employment factor.

Appellant has also alleged that he had a fear of termination and experienced feelings of inadequacy and loss of morale due to the employing establishment's proposed termination and suspension. Additionally, appellant alleged that he had feelings of being discredited by his peers. Disabling conditions caused by an employee's fear of termination and suspension, difficulty in dealing with loss of credibility and feelings of inadequacy, and feelings of being discredited by peers are not compensable factors under the Act. In such cases, the employee's feelings are self-generated and are not related to assigned duties.[8]

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[9] The Board has held, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[10] Absent evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

---

[6] *Wanda G. Bailey*, 45 ECAB 835 (1994); *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[7] *Ruthie M. Evans*, *supra* note 6.

[8] *Barbara E. Hamm*, 45 ECAB 843 (1994).

[9] *Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[10] *Richard J. Dube*, 42 ECAB 916 (1991).

Appellant's allegations that fall within this category of administrative or personnel matters include: the employing establishment's notice to suspend appellant for his refusal to obey a direct order to remain at the worksite after a December 11, 1994 verbal altercation with Dennis Litch, appellant's coworker, regarding Mr. Litch's allegation that appellant hit him with a light,[11] the employing establishment's proposal to terminate appellant's employment due to his medical condition,[12] the employing establishment's decision to suspend appellant for 10 days for absence without leave after the December 11, 1994 incident,[13] the employing establishment's refusal to allow appellant to see a union representative,[14] lowered performance appraisals,[15] monitoring of work activities,[16] the denial of a request for a transfer,[17] appellant's filing of grievances concerning the proposed suspension and termination,[18] the employing establishment's requirement that appellant use sick leave,[19] the employing establishment's refusal to extend appellant's assignment as a safety instructor beyond March 10, 1994[20] and denial of a promotion in October 1994.[21]

Appellant has failed to establish that the employing establishment committed error or abuse in handling these matters. Therefore, they do not constitute compensable employment factors. Regarding the suspension of appellant, Mr. Jones indicated in his January 9, 1995 narrative statement that appellant left without permission to do so on December 11, 1994 after his verbal altercation with Mr. Litch. Mr. Jones further indicated that during the days immediately following, he had several calm discussions with appellant about the pending disciplinary action and that appellant agreed with the need for disciplinary action. Mr. Jones then indicated that appellant expressed his desire to teach a class on the code of ethics to the entire shop rather than face any formal disciplinary actions. Mr. Jones stated that he told appellant that this was not possible. Regarding the denial of appellant's request for a transfer, Mr. Jones stated in his January 9, 1995 statement that he denied appellant's request for a transfer to a different shop because the department was very busy and he believed that appellant was going to use unsupervised time to prepare a grievance rather than perform his job duties.

[11] *Barbara E. Hamm*, *supra* note 8; *Frederick D. Richardson*, 45 ECAB 454 (1994); *Joe E. Hendricks*, 43 ECAB 850 (1992).

[12] *Id.*

[13] *Id.*

[14] *Wanda G. Bailey*, *supra* note 6.

[15] *James E. Woods*, 45 ECAB 556 (1994).

[16] *Jimmy Gilbreath*, 44 ECAB 555 (1993).

[17] *Goldie K. Behymer*, 45 ECAB 508, 511 (1994); *Thomas D. McEuen*, *supra* note 9.

[18] *Diane C. Bernard*, 45 ECAB 223, 228 (1993).

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

[20] *Purvis Nettles*, 44 ECAB 623 (1993).

[21] *Donna Faye Cardwell*, *supra* note 4.

Concerning appellant's filing of a grievance regarding the employing establishment's proposed termination, the employing establishment canceled its proposal to terminate appellant's employment. Appellant's other grievances were denied by the employing establishment. While such personnel actions may be upheld, reversed, or modified through various procedures such as arbitration or the grievance process, the settlement of labor management disputes through such processes does not, in itself, establish that the employing establishment's actions were either erroneous or unreasonable.[22] Nor does the resolution of a particular dispute in appellant's favor demonstrate that the subject matter of the grievance was an employment factor.[23] Thus, the filing and resolution of appellant's grievances are insufficient to establish either a compensable work factor or erroneous or abusive actions by the employing establishment.[24] Inasmuch as appellant has failed to establish error or abuse by the employing establishment in the handling of the above administrative or personnel matters, the Board finds that appellant has failed to establish a compensable employment factor.

Appellant has alleged that the employing establishment did not respond to his questions regarding unsafe working conditions which he reported during the period October through December 1994. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative reliable evidence.[25] Appellant has failed to submit evidence to support his contention. In a January 9, 1995 narrative statement, Mr. Jones stated that all unsafe conditions reported to him were corrected or forwarded to the appropriate shop or safety for correction. Mr. Jones further stated that the unsafe staging mentioned by appellant was reinspected by the shipwright work leader and found to be safe. Mr. Jones also stated that the work leader made adjustments to the staging to ensure safety. The record reveals the employing establishment's responses to appellant's unsafe/unhealthful working condition reports regarding two employees sandblasting out of the same manlift which exceeded the weight limitation of the manlift, the breathing air system and the failure of a breathing air compressor.

In addition, the record reveals statements from appellant's coworkers indicating that the employing establishment responded to safety concerns. In an undated narrative statement, Chuck Carter, appellant's coworker, stated that on December 9, 1995 appellant, Mr. Litch and George Harless, appellant's coworker, were working to set up sandblasting of "MBT 2b/2A" tanks. Mr. Carter stated that since Mr. Litch had to finish hazmat work prior to working on the tanks, he checked on the progress made by appellant and Mr. Harless. He further stated that appellant and Mr. Harless had not gotten too far on the job and that appellant felt that the staging was unsafe. Mr. Carter then stated that he had crawled the tank earlier and crawled the tank again with appellant. He explained that he told appellant that the staging was adequate for blasting and that appellant disagreed with him. Mr. Carter further explained that the changes requested by appellant would make conditions unsafe. He then explained that the only change

[22] *Barbara J. Nicholson*, 45 ECAB 803, 810 (1994).

[23] *Paul Trotman-Hall*, 45 ECAB 229, 238 (1993).

[24] *Diane C. Bernard*, *supra* note 18.

[25] *Ruthie M. Evans*, *supra* note 6.

made was a support that was added by shop 64. Mr. Carter stated that other than that change, shop 64 believed that the staging was as safe as could be in a "MBT." He concluded that a general consensus of work leaders from shop 71A and 64A felt that the tank was staged as close as they could remember to past "MBT" blast jobs. The March 12, 1996 statement of David L. Nunez, appellant's coworker, revealed that on December 9, 1994 he was approached by appellant regarding the staging. Mr. Nunez further stated that he and appellant climbed into and about the staging in "MBT 2B." In response to the question of whether he agreed that the staging had serious flaws which needed to be corrected, Mr. Nunez stated that the staging was not ergonomic and that the ladder in the tank did not have a landing at the bottom which could cause someone to fall to the bottom of the "MBT." However, Mr. Nunez stated that on December 12, 1994 the blasters stopped blasting and shop 64A was required to modify the staging so that it could be placed in a safe working condition.

Appellant has also failed to submit evidence to substantiate his allegation that on December 14, 1994, an employing establishment watch stander, who knew him, did not ask for his badge when he boarded a submarine twice to clean the topside area. Appellant further alleged that his preoccupation with safety and harassment problems could have resulted in fatal consequences because deadly force was authorized for security breaches. Additionally, appellant has not established a factual basis for his contention that the employing establishment required him to keep an eye on sailors to make sure that they did not make mistakes and this work duty did not fall within his physical restrictions.

Appellant has alleged that uncompensated time spent on researching and defending his position has caused his emotional condition. However, appellant's allegation does not relate to his regular or specifically assigned duties. Thus, the Board finds that appellant has failed to establish a compensable employment factor.

The Office properly found that the following employment incidents and injury constituted compensable employment factors which arose in the performance of appellant's employment duties: (1) on October 31, 1994 appellant was sandblasting in a tank when his respirator shut off and he panicked as his face mask filled up with a bluish soapy substance while he adjusted the valve on his respirator; (2) on December 13, 1994 appellant had an emotional reaction when he witnessed the respirators of his coworkers fill up with water; (3) on December 11, 1994 appellant engaged in a verbal altercation with Mr. Litch based on Mr. Litch's accusation that appellant purposely hit him with a light; and (4) on December 22, 1994 appellant became partially buried while sandblasting in a tank, and panicked by kicking, twisting and flailing in freeing himself sustaining a back injury. In addition, all of these events are established as having occurred by evidence present in the case record, and by their nature, they arise out of and in the course of appellant's assigned duties, thus, as properly found by the Office, are compensable factors of his employment.

Appellant's burden of proof, however, is not discharged by the fact that he has established employment factors 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.[26]

In a November 3, 1995 medical report, Dr. Geoffrey, a psychiatrist, opined that the work-related incidents listed in the Office's statement of accepted facts, which included, the October 31, December 11 and 13, 1994 employment incidents, and appellant's December 22, 1994 employment injury, significantly contributed to appellant's post-traumatic stress disorder. Dr. Geoffrey stated:

> "A worsening mood episode, even major depression such as [appellant] was diagnosed as having, is not unusual in connection with post-traumatic stress disorder, and because there was a worsening of his mood symptoms temporally linked with the work events which he experienced as traumatic in late 1994, it seems reasonable to attribute the mood diagnosis to work-related incidents as well.
>
> "My understanding of the nature of [appellant's] work is that it does indeed have the potential for dangerousness, and if this is the case, a simple statement such as 'he detected water in his sand blast hood' would grossly understate this context of dangerousness. As my consultation report indicates,[27] [appellant] experienced the October 31, 1994 episode as water flooding into the cell in which he was sandblasting in a dark confined place, feeling trapped and unable to breathe, and having to strain to extricate himself from the situation. This latter contextualized situation certainly meets Criteria A for post-traumatic stress disorder in which a person is confronted with an event involving the threat of death or serious injury, or a threat to the physical integrity of self. In addition, he responded with intense fear and helplessness and the other post-traumatic stress disorder sequelae described in my August 17, 1995 report. It should be noted that a change from DSM-IIIR to DSM-IV places additional emphasis on a person's response to a potentially serious event or events, and no longer requires experiencing 'an event that is outside the range of usual human experience that would be markedly distressing to almost anyone.' New prevalence rates of post-traumatic stress disorder in research studies have shown that post-traumatic stress disorder are more common than previously thought, with prevalence rates ranging from 1 [to] 14 percent and trauma therefore is no longer felt to be outside the range of usual human experience.

[26] *William P. George, supra* note 6.

[27] The record contains Dr. Geoffrey's August 17, 1995 medical report indicating a diagnosis of post-traumatic stress disorder and a single episode of major depression. Dr. Geoffrey's report further indicated that appellant's emotional condition was aggravated by interactions with coworkers which appellant felt were due to being labeled a whistleblower, appellant's demotion as a paint shop instructor despite outstanding performance ratings, the failure of the employing establishment to respond to appellant's report of unsafe working conditions and being accused of not performing a good job. Dr. Geoffrey concluded that appellant's symptoms of anxiety and depression appeared to be aggravated through interactions with certain coworkers and apparently to system inaction as well.

> "The other events mentioned on the 'statement of accepted facts' dated October 19, 1995 were also events referred to by [appellant] and experienced as traumatic. I had not known that on December 22, 1994 he had twisted his back attempting to quickly extricate himself from the sand, but would suggest that such an action in an experienced painter/sandblaster like [appellant] would provide additional evidence of his intense fear and significant distress."

Regarding the question of whether appellant continued to have any residuals of his condition, Dr. Geoffrey stated that appellant continued to experience work-related stress symptoms, but that he had reported gradual lessening of his initial post-traumatic stress disorder symptoms, and thus, appellant's prognosis appeared to be excellent. Dr. Geoffrey noted that "it is not unusual in such cases for post-traumatic stress disorder to normally have resolved, in a supportive employment environment, within a few months of the stress, but instead may become prolonged as a result of work-related claims or conflictual relationships arising out of the claim which may prolong the patient's recovery." Regarding appellant's work restrictions, Dr. Geoffrey indicated that it would be appropriate for appellant to continue his current course of gradually reexposing himself to the work environment and desensitizing himself to the situations that caused fright and panic in the past. Dr. Geoffrey concluded that he would allow appellant to determine the rate at which he could return to various work-related situations.

The Board finds that the medical report of Dr. Geoffrey, while not sufficient to establish appellant's claim, is sufficient to require further development of the medical evidence.[28] On remand, the Office should prepare a statement of accepted facts and refer appellant to an appropriate medical specialist for a diagnosis of any emotional condition and rationalized opinion on whether any accepted factors of employment caused or contributed to his emotional condition.

[28] *See Josephine A. Genecko*, 9 ECAB 332, 334 (1957).

The March 18 and 5 and January 24, 1996, and November 17, 1995 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
June 7, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member