U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENITO F. DAVILA and DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Fort Worth, Tex.

Docket No. 97-1214; Submitted on the Record;
Issued June 8, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

On November 21, 1995 appellant's then a 35-year-old bookbinder, filed an occupational disease claim alleging that he sustained an emotional condition, which he contributed to factors of his employment. He attributed his emotional condition to: believing that his supervisors, Frank Jones and Robert Compton, were trying to get rid of him; having his application for a new job denied because he was a Mexican-American; being discriminated against because he filed a complaint with the Equal Employment Opportunity Commission[1] (EEOC) and also because he testified in the EEO complaint of another worker; being harassed by his supervisors because of his race and his union activities; having his machine sabotaged by a coworker to slow down his work production; being criticized by supervisors in front of other employees; receiving a letter of suspension and a notice of removal from the employing establishment; receiving a low performance evaluation; being denied leave and being asked to provide medical documentation for his use of sick leave; being denied overtime after he returned to work following an employment injury; having his work closely monitored by his supervisors; and being denied breaks granted to other employees. Regarding his allegation that he received a poor evaluation, he stated that this was because his production had not been calculated correctly and he provided copies of production records with his handwritten notes in the margins. Regarding his allegation of being denied overtime, he testified at the oral hearing held in this case that the employing establishment would not allow him to work overtime until he provided a note from his physician indicating that he was not taking medication and was able to perform overtime work with no adverse effects to his health.

The record contains a notice of proposed removal issued to appellant on June 12, 1995 for improper conduct including: telling other employees to slow down their production; slowing

[1] At the oral hearing held in this case, appellant indicated that resolution of his Equal Employment Opportunity (EEO) complaint was still pending.

down his own machine's production; pretending that his machine was malfunctioning; turning his machine off early and stating that he had met his quota; taking extended breaks from work; and starting work late and leaving early.

In a report dated November 10, 1995, Dr. M.S. McCullagh, a family practitioner, related that appellant had been under his care for treatment of acute anxiety and depression and was also a recovering alcoholic. He stated that appellant's job was stressful and had aggravated his anxiety and depression and also caused a relapse in his alcoholism.

By decision dated January 8, 1996, the Office of Workers' Compensation Programs denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that he had sustained a medical condition causally related to factors of his employment.

By letter dated February 5, 1996, appellant requested an oral hearing before an Office hearing representative.

On September 24, 1996 a hearing was held before an Office hearing representative at which time appellant testified.

In a letter dated October 19, 1995, to an EEO counselor, appellant stated that he wished to file charges against his supervisors for racial discrimination and harassment. He stated that on October 10, 1995 he provided supervisor Jones with a doctor's certificate explaining a recent absence and that he shook his head and stated to another supervisor, "I will never hire another one of them again" and appellant interpreted this to mean that he would never again hire a Mexican-American or a veteran. Appellant stated that on October 7, 1991 he attended a meeting addressing employees' EEO concerns and he asked why the employing establishment had not hired any Hispanics for supervisory positions and that Mr. Jones approached him and asked in a stern voice, "When are you going to be satisfied?" He stated that in 1992 he applied for a new position but that employees less experienced than he were selected. Appellant also alleged that a Mr. Luis Fritter had been prying into his personal life and he believed that his supervisors had asked Mr. Fritter to do this. He alleged that on January 5, 1995 he was looking at some jewelry catalogues in the parking lot during his break and the next day he was accused of leaving his job early. Appellant alleged that his supervisors discouraged his use of leave and tried to deny his request for leave to attend his parents' 50th wedding anniversary celebration. He alleged discrimination due to the fact that no apprentice bookbinders were assigned to him for training. Appellant also alleged that he was improperly denied overtime.

In a report dated January 4, 1996, Dr. Martin B. Fisher, a Board-certified psychiatrist and neurologist, related that appellant was hospitalized on November 30, 1995 with a diagnosis of major depression and alcoholic dependence in remission. He related that appellant was experiencing work-related stressors and was considered to be totally disabled until February 1996.

In a report dated April 19, 1996, Dr. Richard S. Citrin, a psychologist, related that appellant had entered therapy with a diagnosis of work-related depression and had complaints about how he had been treated at the employing establishment as well as complaints concerning injuries he sustained while serving in the military. He indicated that appellant was disabled.

In a letter dated April 23, 1996, an employing establishment representative related that appellant had filed an EEO discrimination complaint alleging that his request for administrative leave on January 6, 1996 was denied because of his race and/or reprisal for filing an EEO complaint.[2]

In a statement dated October 22, 1996, Mr. Charlie White, the head union steward, related that when appellant asked during a meeting why there were not more Hispanic employees at the employing establishment, appellant's supervisors, Mr. Jones and Mr. Compton, later stated, "What does he want, we already hired a bunch of Mexicans, does he want them to take over the plant?" He related that on one occasion Mr. Jones said to him "I made a mistake in hiring him, I will never hire another one of them." Mr. White asked Mr. Jones what he meant by that remark and was told that he had already said too much and was not going to get into trouble. He related that Mr. Jones and Mr. Compton often complained when appellant went to the health unit but did not complain about other employees. Mr. White related that Mr. Jones attempted to deny appellant's request for leave to attend his parents 50th anniversary party although he had requested leave two months in advance and that no other employee was treated this way.

By decision dated November 15, 1996, the Office hearing representative affirmed the Office's January 8, 1996 decision on the grounds that appellant had failed to establish that he sustained an emotional condition causally related to a compensable factor of employment.[3]

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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.[4] 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.[5]

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.[6] This burden includes the submission of a detailed

[2] As noted above, the record does not contain evidence as to the final outcome of the EEO complaint.

[3] The Board notes that the case record contains evidence which was submitted subsequent to the Office's November 15, 1996 decision. As this evidence was not considered by the Office when it rendered its decision, the Board has no jurisdiction to review it on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *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.[7]

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.[8] 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.[9]

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 these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations of receiving a letter of suspension and a notice of removal for misconduct, receiving a low performance evaluation, being denied leave and being asked to provide medical documentation for his use of sick leave, being denied overtime after he returned to work following an employment injury, and having his work closely monitored by his supervisors, the Board finds that these allegations relate 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.[10] Although such matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] 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.[12]

Regarding the disciplinary actions taken by the employing establishment such as the notice of removal, the employing establishment indicated that these actions were taken because of appellant's misconduct which included telling other employees to slow down their production, slowing down his own machine's production, pretending that his machine was malfunctioning, turning his machine off early and stating that he had met his quota, taking extended breaks and

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

[8] *See Margaret Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[9] *Id.*

[10] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[11] *Id.*

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

starting work late and leaving early. There is insufficient evidence or error or abuse on the part of the employing establishment in taking disciplinary action against appellant and, therefore, this factor is not deemed a compensable factor of employment. Regarding the allegation that appellant was unfairly denied overtime, he testified at the oral hearing held in this case that the employing establishment would not allow appellant to work overtime until he provided a note from his physician indicating that he was not taking medication and was able to perform overtime work with no adverse effects to his health. It appears, then, that the reason for the employing establishment denying overtime until medical documentation was provided was its concern for appellant's health. There is insufficient evidence of error or abuse on the part of the employing establishment concerning this allegation and it is not deemed a compensable factor in this case. There is also insufficient evidence that the employing establishment erred or acted abusively regarding appellant's performance evaluation, the handling of matters relating to leave usage and the close monitoring of his work by his supervisors. Therefore, these allegations regarding administrative or personnel matters are not deemed compensable factors of employment.

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. 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.[13] 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.[14]

Regarding appellant's allegations that his machine was sabotaged, that he was criticized by his supervisors in front of other employees, that he was denied breaks granted to other employees, that a Mr. Fritter was prying into his personal life at the request of his supervisors, that no apprentice workers were assigned to him, that his supervisors were trying to get rid of him, that he was discriminated against for filing complaints against his supervisors, that he was harassed because of his union activities, and that he was discriminated against because he was a veteran, there is insufficient evidence of record that these incidents occurred and, therefore, they cannot be deemed compensable factors of employment.

Regarding appellant's allegation that his application for a new job was denied because he was a Mexican-American and that he was harassed by his supervisors because of his race, appellant submitted a statement dated October 22, 1996, in which Mr. White, the head union steward, related that when appellant asked during a meeting why there were not more Hispanic employees at the employing establishment appellant's supervisors, Mr. Jones and Mr. Compton stated, "What does he want, we already hired a bunch of Mexicans, does he want them to take over the plant?" He related that on one occasion Mr. Jones said to him "I made a mistake in hiring him, I will never hire another one of them." Mr. White asked Mr. Jones what he meant by that remark and was told that he had already said too much and was not going to get into trouble.

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

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

He related that Mr. Jones and Mr. Compton often complained when appellant went to the health unit but did not complain about other employees. Mr. White related that Mr. Jones attempted to deny appellant's request for leave to attend his parents 50th anniversary party although he had requested leave two months in advance and that no other employee was treated this way. Regarding the supervisors' complaints when appellant went to the health unit and the supervisors' attempts to deny appellant's request for leave to attend his parents anniversary party, there is insufficient evidence of discrimination or harassment on the part of the employing establishment. There is no evidence that the supervisors denied appellant's requests to go to the health unit and, even if it were true that the supervisors attempted to deny appellant's leave request to attend his parents' anniversary party, it appears that the leave was granted. Regarding the supervisors' comments about Mexican-Americans as reported by Mr. White, if true, these comments might be interpreted as showing some ethnic bias on the part of the supervisors. However, there is insufficient evidence of record that appellant's supervisors committed any specific acts of discrimination or harassment against appellant. Thus, appellant has not established a compensable employment factor under the Act in this respect.

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 that he sustained an emotional condition in the performance of duty.[15]

The decision of the Office of Workers' Compensation Programs dated November 15, 1996 is affirmed.

Dated, Washington, D.C.
June 8, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[15] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, supra note 8.