U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHALL A. MULLINS and DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Oakland, CA

Docket No. 98-1770; Submitted on the Record;
Issued August 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On June 23, 1997 appellant, a 39-year-old supervisor -- criminal investigation, filed an occupational disease claim alleging that he sustained job-related stress causing insomnia and stomach problems and other related effects. Appellant stopped work on April 18, 1997 and has not returned.

In various statements, appellant alleged that his emotional and physical conditions were due to several incidents and conditions at work. Appellant advised that he had been a supervisor since 1991 and that he was currently supervised by Rick Perez, Deputy Assistant Regional Inspector, Western Region. He related that his position involves high levels of responsibilities and that nine criminal investigators are under his supervision. Appellant indicated that, on April 14, 1997, Mr. Perez called him about a sensitive, federal grand jury case under his supervision which became heated. Appellant alleged that Mr. Perez told him that "he and I were going to ask for a declination of prosecution on this case from the prosecuting attorney. [Appellant stated that] this assignment was contrary to his considerable experience as an investigator and a manager … [and would] be unethical and illegal (obstruction of justice)." Appellant contacted the prosecuting attorney and was told the case would continue irrespective of Mr. Perez's intentions. Appellant asserted that the resulting conflict in assignments caused him great anxiety and anguish. He also indicated that he contacted the Assistant Chief Inspector (Internal Security) to report the impropriety.

Appellant alleged that Mr. Perez yelled at him and berated him, even after he told him that he was not going to talk to him that way. Appellant further related that Mr. Perez instructed him to fly that evening for a meeting the next day and that he hung up on him. On April 15, 1997 appellant stated that he met with three levels of his supervision, which included Mr. Perez. He indicated that his supervisors knew he had contacted the prosecuting attorney and the

Assistant Chief Inspector regarding the specific case and that they harshly questioned his judgment of contacting them. Appellant asserted that his supervisors continuously berated him and questioned his judgment throughout the meeting. He indicated that he felt extremely abused and intimidated by their onslaught. They also questioned his judgment in contacting the Inspector General's Office. He indicated that the case in question was reassigned and the State of New Mexico, which was part of his territory, was reassigned from his supervision.

Appellant further related that his performance evaluation was discussed and downgraded during the April 15, 1997 meeting. Appellant asserted that his performance has never been an issue in his nineteen years of government service and claimed that Mr. Perez downgraded his performance as a form of retaliation. He indicated that his supervisors, Mr. Perez, Aldwyn "Doc" Hyatt and Kevin Greene, were under investigation by the Treasury Inspector General's office for obstruction of justice and that he was contacted by the lead investigator for the Senate Finance Committee regarding this matter.

Appellant stated that he went on leave and, while on leave, he was constantly harassed by inspection management via mail. He related that one letter suggested that he retire on disability and another letter threatened him with absent without leave if he did not return to work on a designated date although his medical documentation indicated he could not work. Appellant additionally filed an Equal Employment Opportunity (EEO) complaint concerning the retaliatory and harassing actions and privacy violations taken against him by western region management and provided that material.

Appellant submitted medical evidence in support of his claim including a medical report from Dr. Janis J. Saunders, a Board-certified osteopath, which indicated that appellant had emotional and gastroespophageal problems related to stress at work and advised against his return to work. A July 17, 1997 psychological report from Dr. Robert J. Goldsworthy stated that the "precipitating incident involved the patient's perception of being asked to do something illegal (which technically I cannot judge), feeling personally insulted by the supervisor and feeling upset and stressed at the potential of carrying out an illegal order."

By decision dated February 13, 1998, the Office of Worker's Compensation Programs denied appellant's claim on the grounds that the incidents which appellant established did occur were not compensable employment factors.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

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. 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.[1]

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 workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen 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. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[2]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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.[3] Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.[4]

Appellant has alleged that, on April 14, 1997, he had a heated telephone conversation with his supervisor, Mr. Perez, regarding a sensitive, federal grand jury case under his supervision whereby Mr. Perez ordered appellant to the April 15, 1997 meeting and hung up on him. The evidence reflects that Mr. Perez had indicated his displeasure concerning the progress of the case in question and had recapped the progress, or lack thereof, of the last two years of investigating the case in concern. Mr. Perez acknowledged that the conversation was terminated after it became heated. He further indicated that, since appellant was coming to the April 15, 1997 meeting anyway, he had instructed appellant to fly in that evening to further discuss the matter in the morning. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give

[1] *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

[2] *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 2.

[4] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Kryzcki*, *supra* note 3.

rise to coverage under the Act.[5] Appellant has not shown how such a "heated" discussion with Mr. Perez or an instruction to fly in that evening would rise to the level of verbal abuse or administrative error guide as to come within the coverage of the Act.[6]

Appellant has also alleged that, during the April 14, 1997 conversation, he was asked to perform an illegal act, by being instructed to ask for a declination of prosecution. The evidence of record, however, does not establish that appellant was asked to perform an illegal act or whether the act of asking for a declination of prosecution was an illegal act. Mr. Perez indicated that, "based on the path that this case was taking, the missed deadlines, the poor quality of the report, we would probably end up getting a declination from the U.S. Attorney." Appellant indicated that the prosecuting attorney advised there would be no declination. Although appellant perceived a conflict in work assignments, to establish entitlement, appellant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7] As there is no evidence presented to establish a conflict in work assignments or whether appellant was asked to perform an illegal act, such unsubstantiated allegation is not determinative of whether such event occurred. Appellant indicated that he filed complaints with the U.S. Attorney's Office, the Assistant Chief Inspector's Office (Internal Security) and the Treasury General's Office regarding his allegation that asking for a declination of prosecution would amount to an illegal act. Although Mr. Perez acknowledged that inspectors were being interviewed by the Treasury Inspector General's Office regarding appellant's complaint, the record is devoid of any evidence establishing that appellant's supervisors committed an administrative error in this regard. Appellant's disagreement with his supervisors as to the prosecution of the case, or whether it should be prosecuted, has not been established as an administrative abuse.

Appellant alleged that his judgment was questioned and he was berated and harassed during the April 15, 1997 meeting, which was attended by all of his supervisors, because he contacted the U.S. Attorney's Office, the Assistant Chief Inspector's Office (Internal Security) and the Treasury General's Office regarding his allegation that asking for a declination of prosecution would amount to an illegal act. Appellant's attorney asserted that appellant was harassed in retaliation for the complaint he brought against these supervisors under the Whistleblowers Protection Act. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act.[8] Mere perceptions of harassment and discrimination are not compensable under the Act.[9] To discharge his burden of proof, a claimant

[5] *See Mary A. Sisneros*, 46 ECAB 155 (1994); *David W. Shirey*, 42 ECAB 783 (1991); *Alton White*, 42 ECAB 666 (1991).

[6] *See, e.g., Alfred Arts*, 45 ECAB 530 (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 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

[7] *See Mary A. Sisneros, supra* note 5.

[8] *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990); *Pamela R. Rice*, 38 ECAB 838, 843 (1987).

[9] *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB

must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.[10] In this case, appellant has failed to provide sufficient probative and reliable evidence to support his allegations of harassment and discrimination on the part of his supervisors. As previously discussed, there is no evidence of any formal investigation against appellant's supervisors. The record is devoid of any evidence establishing that any of the supervisor's harassed appellant to punish him for contacting the reported agencies regarding his allegation of abuse.

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.[11] However, the Board has held 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.[12] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. Appellant's allegations that the federal grand jury case and the State of New Mexico were removed from his supervision, the downgrading of his performance appraisal and his perceived harassment by management since being on leave fall within the category of administrative or personnel actions. The Board finds that appellant has not shown that the employing establishment committed error or abuse with respect to the administrative function of these actions. The record contains no evidence of error or abuse on the part of the employing establishment with respect to the removal of the federal grand jury case and the State of New Mexico from appellant's supervision.

The April 15, 1997 discussion concerning appellant's job performance and the actions taken by the employing establishment concerning the approval or denial of appellant's leave also contain no error or abuse by the employing establishment. The evidence of file reflect that the April 15, 1997 meeting primarily concerned appellant's job performance. Discussions and meetings regarding job performance are administrative in nature and are not considered factors of performance. In regards to appellant's allegation that his supervisors berated him and questioned his judgment, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[13] There is no evidence that the employing establishment acted unreasonably in the April 15, 1997 meeting discussing appellant's performance. Although appellant has presented evidence which indicated

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416 (1990).

[10] *Ruthie M. Evans*, *supra* note 9.

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

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

[13] *See Michael Thomas Plante*, 44 ECAB 510 (1993).

that his performance has always been good, no evidence was presented which would indicate that the employing establishment erred or abused its supervisory discretion on April 14 and 15, 1997. A discussion of performance and appellant's allegation that he was downgraded in his performance appraisal due to retaliation, without any evidence of error or abuse on the part of the employer, does not constitute a compensable factor of employment with respect to the administrative function of these actions.

Likewise, appellant's allegation that he was harassed by the employing establishment while he was on leave is not supported by the evidence of record. The record contains letters from the employing establishment to appellant discussing procedures for taking leave, requests for medical documentation and appellant's failure to comply with a deadline for producing requested information would result in a leave without pay status. The Board notes that matters involving the use of sick leave and the rules and procedures relating thereto, are administrative or personnel matters unrelated to the employee's regular or specially assigned work duties or requirements.[14] Appellant has submitted no evidence to establish error or abuse by the employing establishment regarding his leave usage.

The February 13, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
August 4, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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