U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY C. CHEESE and DEPARTMENT OF THE NAVY, FACILITIES MAINTENCE, Cherry Point, NC

Docket No. 99-2478; Submitted on the Record;
Issued January 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

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

The Board finds that appellant did not meet 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.[1] 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.[2]

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

---

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *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.[4]

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 of Workers' Compensation Programs, 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.[5] 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.[6]

On December 30, 1996 appellant, then a 48-year-old high voltage electrician, filed a claim alleging that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated September 23, 1997, the Office denied appellant's emotional condition claim on the grounds that there was no rationalized medical evidence establishing that appellant sustained an emotional condition causally related to the only compensable employment factor found. The compensable employment factor related to an administrative matter whereby the employing establishment acknowledged that they acted erroneously in excluding appellant from working overtime on June 23, 1996. Appellant's other allegations were determined to be either unsubstantiated or not in the performance of duty. By decisions dated November 30, 1998 and July 8, 1999, appellant's requests for modification were denied. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that he had an on-the-job injury in August 1995, which resulted in limited duty and shoulder restrictions. On October 6, 1995 Dave White, supervisor, told him to cut grass, which he could not do because of his shoulder condition and the medication he was on, and was told to go home if he could not perform the job. Mr. White acknowledged that appellant had an on-the-job injury and advised that all employees had the option to go home on sick leave if they were too sick to stay at work or to do the job. The Board finds that inasmuch as appellant did not perform the job, this allegation relates to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.[7] Although the handling of leave requests or the option to take leave are generally related to the employment, they are administrative functions of the employer and not duties of

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

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

the employee.[8] 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.[9] Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse in connection with the handling of appellant's refusal to cut the grass by advising him of his option to take leave. Moreover, there is no evidence in the record that the order to cut grass was against appellant's work restrictions. Accordingly, Mr. White's order to cut grass or to go home was not erroneous or abusive or disparate treatment. Appellant further alleges that on October 8, 1995, Mr. White asked him to paint an eight foot door, which he did without complaining although he was not supposed to reach above his shoulder. Although Mr. White advised that appellant was never asked to paint an eight foot door, but rather was asked to stain a floor cabinet, the issue concerns whether the employing establishment violated any of appellant's work restrictions pertaining to his shoulder condition. In this case, the medical evidence in record indicates that on October 2, 1995, the employing establishment physician released appellant for full-time employment without restrictions. Inasmuch as appellant performed the job which was requested of him after he was released from medical care with no restrictions on October 2, 1995 and the record is devoid of any evidence indicating that appellant reinjured or sought medical attention regarding his shoulder condition, the Office properly found that this allegation was unsubstantiated.

Appellant has also alleged that harassment and discrimination on the part of his supervisor 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.[10] 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.[11]

Regarding appellant's allegation that the employing establishment discriminated against him by not allowing him to climb poles, Mr. White stated that on April 23, 1996 he told appellant that he did not have to climb on the training exercise of April 25, 1996 if he did not feel up to it as appellant was recently out of work for a chipped bone in his ankle. Appellant further asserted that during the same conversation on April 23, 1996, Mr. White called him a "boy," told him that he could move to another shop if he wanted to and further told him that the pole was pretty tall. Mr. White, however, specifically denied appellant's allegation of calling him a "boy." The record reveals that on May 28, 1996 appellant visited B.J. Harrison's office and mentioned among other things as to being upset on the account that Mr. White had called

[8] *Id.*

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

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

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

him a "boy." However, B.J. Harrison was not present when the comment was allegedly made and thus is merely repeating what appellant alleged. The record is devoid of any evidence to substantiate appellant's allegation. Mr. White stated that there was never any mention of moving to another shop and that he did not have the authority to move anyone. He further related that he never stated that the poles were tall and that the exercise entailed climbing only eight feet. As the record is devoid of any evidence to substantiate appellant's allegations, the Office properly found those events were not factual. Appellant asserted that he participated in the training exercise of April 25, 1996 and that Mr. White had asked him whether he was scared during the climbing test. Mr. White denied appellant's allegation and stated that he had stated that it would be "scary" to lower a person down a pole after they had been electrocuted. He further added that he had complimented appellant on doing a good job after the exercise. As the record is devoid of any evidence to substantiate appellant's allegation, the Office properly found that this event was not factual. Appellant's allegation that he was told that he could not climb poles on August 7, 1996 is specifically denied by the employing establishment and the record is devoid of any evidence to substantiate this allegation.

Appellant asserted that he was not included in the discussions pertaining to job changes or told of schedule changes. He stated that on a job in November 1995, Mr. White had initially wanted him to hook up lights and pull wires, and when he arrived on the job he was told by the lead mechanic on the job that Mr. White had wanted him to work in the bucket. Appellant stated that Mr. White had discussed the changes with the lead mechanic the day before and that he was not privy to that discussion. Mr. White advised that all jobs were briefed the first thing in the morning before the employees go out to work. He stated that the only change to the job concerned one of the feeds to one of the lights. There is no evidence in the record to confirm appellant's allegation that the job was discussed the day before and is contrary to Mr. White's statement concerning the briefing of jobs. Appellant's discussions with management around the November 1995 time frame provide no specific mention of appellant being left out of discussions pertaining to job changes, but reveal a concern for safety issues. Furthermore, the record is devoid of any evidence to indicate that any actions concerning the November 1995 job were abusive or erroneous. Appellant also asserted that he was never told of scheduling changes during the period July 11 through 13, 1996, when he had to work overtime. The record reveals that Hurricane Bertha was active during the time period. Mr. White stated that before a hurricane, there are constant meetings with management to discuss what is needed in terms of personnel on duty. After a hurricane hits, everyone within his unit stays at work for the duration of the storm or until they are told otherwise. Mr. White stated that all employees were informed as the situation pertaining to the hurricane changed and were also informed of the schedule as it changed. Inasmuch as the record is devoid of any evidence to substantiate appellant's allegation, this allegation was properly not accepted as factual by the Office.

Appellant alleged that he was blocked from being a member of the special electrical committee by Mr. White who had said that he could not "see why he could make a difference on the committee." Appellant felt that this was racially motivated. Mr. White stated that the committee was made up of electrical engineers, housing and budget supervisors, an engineering technician, and a WC-54 supervisor. The committee was used to make recommendations and draft future electrical projects. Mr. White stated that appellant had just started working there and as he did not know the electrical distribution system, he could not see where he could have any

input on the projects. The record is devoid of any evidence to establish that Mr. White's solicited opinion was either erroneous, abusive, or discriminatory. Appellant further alleged that after he was blocked from being on the electrical committee, his coworkers stopped talking to him. He further stated that he was left out of meetings held about jobs. Appellant also asserted that there were communication problems from the supervisor, which he stated created an unsafe environment to work in with no support. The Equal Employment Opportunity (EEO) investigation and agency investigation; however, uncovered allegations of appellant being defensive when approached by coworkers regarding his job. His defensive attitude renders him difficult to work with. The investigation further revealed that appellant made no effort to be involved in any of the informal meetings held in the morning before the crews left the shop for their particular jobs. Accordingly the evidence of record reveals that any implied problems in communication resulted from appellant's voluntary exclusions from the morning meetings and were not a result of discrimination.

Appellant alleged that on February 7, 1996, Mr. White accused him of "reckless unsafe acts" but could not specify the incidents. The record indicates that several meetings took place between appellant and management in which safe working habits and the qualifications or demands of the job was discussed. There is no evidence to indicate that either of those meetings constituted erroneous or abusive behavior on the part of management.

Appellant alleged that on or about July 13 or 14, 1996 someone on the radio announced that he did not know how to do his job. The evidence of record, however, indicates that no one stated that appellant could not do his job. In an undated memorandum, J.B. Parker, Jr., maintenance superintendent, stated that he overheard a radio transmitted conversation whereby Mr. Cole asked Mr. McCabe to tell appellant to put the covers over the bucket of the truck. Mr. McCabe replied, "I can [no]t tell [appellant] anything because he knows his job." Mr. Parker indicated that the tone utilized by Mr. McCabe was sarcastic. Inasmuch as there is no evidence to substantiate appellant's allegation, the Office properly found this allegation to be unsubstantiated.

Appellant alleged that Mr. White accused him of "sabotage" with regards to an April 1996 incident whereby someone tied a wire into a metal bracket causing a short. He asserted that arguments concerning this incident arose on April 22 and May 23, 1996 with Mr. White and himself whereby Mr. White accused appellant of doing this act. The EEO investigation revealed that although Mr. White suspected that appellant had wrapped the wire that shorted out, no action was ever taken against appellant because of the incident. The employing establisment's own investigation revealed that although Mr. White had climbed the pole that day, a comparision between the work done on the faulty pole to the work done on poles where the workers were known, revealed that appellant did not perform the faulty power line installation. There is no evidence of record concerning that any of the alleged arguments took place. Moreover, the record is devoid of any evidence that Mr. White accused appellant of the faulty installation. Instead, the record reveals that Mr. White had an obligation to investigate the incorrectly wrapped power lines. As such, appellant along with his other coworkers had to be interviewed. The record is devoid of any evidence that Mr. White conducted such investigation into the matter in either an abusive or erroneous fashion.

Appellant asserted that Mr. White accused him of turning a breaker in the wrong direction and that he filed a complaint. Mr. White, however, denied that a complaint was ever filed regarding appellant turning a breaker crank backwards. He stated that he watched appellant turn the crank backwards and had to tell him to turn it the other way. As no evidence supports appellant's allegation, the Office properly found this allegation not to be factual.

Appellant asserted that his performance appraisal was lowered due to the investigation into the wire tying incident and his supervisor's discriminatory attitude towards him. However, he has not provided any corroborating evidence, such as witness statements, to support his allegations.[12]

The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[13] Appellant, however, submitted evidence and the Office properly found that appellant was excluded from overtime pay offered on June 23, 1996. Inasmuch as he established a compensable factor of employment, the medical evidence of record will be considered.

In this case, the medical evidence of record is devoid of a causal connection between appellant's medical condition and the one compensable factor of employment concerning the exclusion of overtime pay offered on June 23, 1996. In an undated medical report, Jean Wathen, CCSW suggested that appellant was experiencing a type of acute stress reaction and stated that appellant's stressors were job related to the incidents concerning the tampering of the high voltage wire and interpersonal conflicts with coworkers and the supervisor who implicated appellant in foul play on the job. However, no mention of the denied overtime, the only compensable work factor in this case, was mentioned. In an August 28, 1996 medical report, Dr. Robert Lynn, a psychiatrist, diagnosed appellant with major depression, single episode and related the diagnoses to appellant's disputes within his own department, whereby appellant felt totally unsupported by his supervisor and management. Dr. Lynn related that "there is an episode that is still somewhat unclear in which [appellant] was accused of wiring a high tension wire to a bracket that could have caused a good deal of damage to the area and [appellant] has been exonerated from that accusation." Again, there is no mention of the denied overtime. Medical progress notes dated April 3 and 20, July 17 and September 11, 1998, from Dr. E. Ray Hodges, Jr., a psychiatrist, was also submitted. In the April 3, 1998 note, Dr. Hodges provided a history of injury as appellant being "accused of incorrectly installing high tension electrical wiring in April." He indicated that appellant was diagnosed as having major depressive episode, single episode, May 1996. He opined that appellant had elements of major depressive episode, but did not provide a complete factual and medical background, nor did he explain how and why appellant's current condition was due to the single compensable employment factor. Moreover, Dr. Hodges failed to explain how or causally relate appellant's current emotional condition in 1998 to the single episode of depression which occurred in May 1996. In the April 20, 1998

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

[13] *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).

note, Dr. Hodges states that appellant's diagnosis is more clearly major depressive episode with likely significant secondary anxiety. This condition, however, is not linked to the only compensable factor of employment. In the July 17, 1998 note, Dr. Hodges provides a history of injury concerning appellant being charged with inappropriately connecting high voltage wiring. However, as this event was not found to be a compensable work factor, it has no relevance to this claim. The September 11, 1998 note likewise is deficient in that it fails to attribute appellant's emotional condition to the single compensable factor of employment. In a February 15, 1999 medical report, Dr. Hodges states that "from my notes I clearly am relating [appellant's] psychiatric illness to his work stressors in and around the incident in April of 1996 when he was falsely accused of incorrectly installing the high tension wires." Again this report is deficient as attributes appellant's emotional condition to a noncompensable employment factor.

Accordingly, as none of the medical reports of record relate appellant's emotional condition to the single accepted compensable employment factor in this case which related to the exclusion of overtime pay offered on June 23, 1996, appellant has not meet his burden of proof.

The decisions of the Office of Workers' Compensation Programs dated July 8, 1999 and November 30, 1998 are affirmed.

Dated, Washington, DC
January 2, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member