U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. RUSSO and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Norwalk, CT

Docket No. 99-2101; Oral Argument Held January 24, 2001; Issued March 9, 2001

Appearances: *James L. Russo, pro se*; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an emotional condition causally related to compensable factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration without merit review of the claim.

On December 9, 1996 appellant, then a 47 year-old internal revenue agent, filed a claim alleging that he sustained an emotional condition causally related to his federal employment. By decision dated April 10, 1997, the Office determined that appellant had not established an injury in the performance of duty. In a decision dated June 25, 1998, an Office hearing representative affirmed the prior decision. By decision dated November 23, 1998, the Office determined that appellant's August 25, 1998 request for reconsideration was insufficient to warrant merit review of the claim.

The Board finds that appellant has not established that he sustained an emotional condition causally related to compensable work factors.

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.[1] 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

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

(3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2]

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. 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 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 Federal Employees' Compensation Act.[3]

In the present case, appellant's primary allegation is that he sustained an emotional condition causally related to a disciplinary action of the employing establishment. On November 15, 1996 the employing establishment issued a proposed 14-day suspension for unauthorized disclosure of tax information in April 1996. In a letter dated June 27, 1997, the employing establishment advised appellant he would be suspended for three days commencing July 2, 1997 for the unauthorized disclosure in April 1996. It is well established that disciplinary matters are administrative actions of the employing establishment.[4] Although, generally related to employment, these are primarily administrative functions of the employer rather than duties of the employee.[5] The Board has also found, however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.[6]

Appellant alleges that the disciplinary action was erroneous; he argues that he was singled out, that mitigating factors should have been considered and that the disclosure was inadvertent. The record, however, does not contain any probative evidence of error or abuse. There is no admission or acknowledgment of error by the employing establishment and the mere fact that an administrative action is later modified does not, in and of itself, establish error or abuse.[7] The June 27, 1997 letter acknowledges that the disclosure was not a willful disclosure and also indicates that relevant factors were considered in determining the penalty. The Board

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

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

[4] *See, e.g., Joe E. Hendricks*, 43 ECAB 850 (1992).

[5] *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

[6] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[7] *See Michael Thomas Plante*, *supra* note 6; *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment).

finds no probative evidence of error or abuse in the disciplinary actions taken with respect to the April 1996 employment incidents.[8]

Appellant has also referred to prior disciplinary actions by the employing establishment.

In a December 14, 1996 letter, for example, appellant indicated that he had been disciplined following a 1985 holiday party; had received a proposed 15-day suspension in November 1992 and a notice of proposed removal in 1994. Again, the record does not contain any probative evidence of error or abuse in these administrative actions. With respect to the proposed removal, the record contains a settlement agreement dated October 12, 1994. The agreement specifically states that it does not constitute an admission of error by the employing establishment.

The Board notes that appellant has characterized the above disciplinary matters, as well as other administrative actions by the employing establishment, as discrimination. With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers, which the employee characterizes as discrimination may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[9] An employee's allegation that he or she was harassed or discriminated against is not determinative of whether discrimination occurred.[10]

In a March 3, 1998 letter, an Equal Employment Opportunity (EEO) specialist indicated that appellant had filed six EEO complaints, four of which had been dismissed. The complaints that were pending included a complaint of discrimination in issuing the June 27, 1997 suspension and a February 15, 1998 complaint for discrimination primarily for denials of leave requests. The record indicates that a settlement agreement was signed on May 7, 1998 that addressed appellant's complaints regarding leave and request to return to work. The settlement agreement stated that it did not constitute an admission of any violation of any law or internal employing establishment regulation. The Board finds no indication that a finding of discrimination has been made by an independent agency, nor is there any other probative evidence that is sufficient to establish a claim based on discrimination.

Accordingly, the Board finds that appellant has not alleged and substantiated a compensable work factor as contributing to an emotional condition. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.[11]

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

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[8] Appellant also referred to false arrests by the local police department, but he did not provide a detailed description or evidence with respect to specific job duties.

[9] *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[10] *Helen P. Allen*, 47 ECAB 141 (1995).

[11] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[13] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[14]

In this case, appellant submitted an August 25, 1998 letter, indicating that he was filing a claim in Federal Court with respect to actions of the employing establishment. He did not submit additional evidence. In the August 25, 1998 letter, appellant also argued that the 1998 settlement agreement did disclose error by the employing establishment, since it retroactively restored appellant to pay status as of December 1, 1997. The Board notes that settlement agreements often modify prior personnel actions. It is well established that agreements explicitly denying an admission of any violation of law or regulation by the employing establishment do not constitute evidence of error solely because a prior personnel action is modified in appellant's favor.[15] Appellant did not show that the Office erroneously applied a point of law, advance a new and relevant point of law or fact, or submit new and relevant evidence. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

[12] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[13] 20 C.F.R. § 10.138(b)(1).

[14] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[15] *See Mary L. Brooks*, 46 ECAB 266 (1994) (an EEO settlement agreement modified appellant's performance rating from "unsatisfactory" to "good"; no error or abuse was established).

The decisions of the Office of Workers' Compensation Programs dated November 23 and June 25, 1998 are hereby affirmed.

Dated, Washington, DC
March 9, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member