U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID M. NAGEL and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Empire, MI

Docket No. 03-1223; Submitted on the Record;
Issued November 24, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
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 26, 2001 appellant, then a 56-year-old maintenance worker supervisor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained stress, anxiety and depression due to various incidents and conditions at work.

In an August 17, 2001 letter, the Office of Workers' Compensation Programs advised appellant of the additional evidence needed to establish his claim and requested that he submit such.

By letter dated October 1, 2001, appellant indicated that he was serving in a supervisory capacity but, he received insufficient training with respect to certain aspects of his position and that he was responsible for and dependent upon unreliable employees, including one who had a history of substance abuse. He indicated that he could not complete assigned tasks under the conditions and with the resources he had assigned to him. Appellant cited as examples: that his supervisor lied to him and did not give him any support on the island; that he could not order materials and supplies due to a lack of working telephones, poor mail service and an unreliable boat operator and that he was unable to hire the best employees because they did not want to be on a five-day eight-hour shift as opposed to a four-day ten-hour shift. Additionally, he added that he was unable to set tours of duty, work schedules or leave and he could not perform his duties, on a timely basis, due to unacceptable working conditions. Appellant stated further that the shift change implemented by the employing establishment caused him undue stress.

In support of his claim, appellant submitted numerous documents including witness statements, chronological notes and a June 11, 2001 report from Jay Paulsen, Board-certified in public health and general preventive medicine.

In a November 5, 2001 statement, the employing establishment controverted the claim. The employing establishment indicated that appellant could not be accommodated regarding his request to have his duty station changed to the mainland as he was a supervisory employee, of which 60 percent of his duties were "supervisory" and which could not be performed on the mainland. The employing establishment responded to allegations concerning appellant's schedule and explained that the shifts initially were for four, ten-hour shifts per week, however, a policy change caused the shifts to be five, eight-hour shifts in response to productivity and safety purposes. Regarding transportation costs, the employing establishment indicated that the employees would report to the boat dock at nine a.m. and they were considered to be on pay status at that time as it was appropriate for those serving on the island. They also indicated that appellant was responsible for several tasks and employees as per his position description and that he had direct control over the employees assigned to him. Further, the employing establishment indicated that appellant had consistently not used all of his available funds for his areas of responsibility and he was able to complete work for which he was responsible. The employing establishment denied that appellant received inadequate training and referred to numerous training programs such as computer training, one on one training and user manuals. Further, it indicated that the telephone system was installed in May 2000 and although, it was initially unreliable, back up cellular telephones were provided.

In a January 8, 2002 decision, the Office found that the evidence was insufficient to establish that appellant sustained an injury in the performance of duty.

On February 6, 2002 appellant requested a hearing which was held on November 7, 2002.[1] Additional evidence followed his request.

In a May 13, 2002 letter, the employing establishment indicated that appellant was not required to stay on the island all week, as he was free to come and go. The employing establishment indicated that appellant was not eligible for *per diem* while working on the islands, as housing was provided to him in lieu of *per diem.* With respect to mileage, the employing establishment advised that there were certain trips that were covered such as the first trip, last trip and one round trip per calendar year, however, all other personal trips were at the employees own expense.

On November 20, 2002 the Office received comments from appellant.

[1] During the hearing, appellant testified that he did not receive proper training to perform his position. He indicated that he only received a total of six hours of training in February 1995. Regarding the employing establishment's allegation that appellant rarely worked his regular five-day shift because he regularly used leave, appellant testified that he used annual leave, one day at a time, per employing establishment's procedures. Further, he asked for accommodation several times and requested a transfer to the mainland because of medical problems and was denied. He indicated that the employing establishment issued a letter proposing to remove him from his position, that he appealed the decision to remove him and negotiated a temporary position after much delay, on the mainland until he retired. Appellant testified that he had to deal with an employee with a substance abuse problem, that there was a lack of communication with the mainland because it did not have a working telephone system. He also stated that he had problems obtaining supplies. Additionally, appellant did not have authority to set schedules. Further, he indicated that the employing establishment changed the work week from four days per week, ten hours per day to five days per week, eight hours per day.

In a December 2, 2002 statement, the employing establishment responded to comments from the transcript of hearing. The employing establishment indicated that appellant's computer use comprised approximately 10 percent of his time and that he was provided with numerous training courses.[2] Regarding the staffing on the island, the employing establishment indicated that the staff assigned to appellant increased over a period of several months and that he had sufficient staff to complete various tasks. Regarding telephone service, the employing establishment responded that appellant's duty station always had a telephone connection to the mainland which may have been unreliable at times, but a cellular telephone was available as early as 1987. The employing establishment repeated their earlier comments that appellant had direct control over his employees as a supervisor, that the tour of duty was changed per management and confirmed his transportation expenditures.

On December 9, 2002 appellant provided statements from witnesses. The witnesses responded to questions regarding personnel schedules, island support, the work shifts, telephone service, boat service and supplies.

Appellant responded to the employing establishment's comments in a December 10, 2002 letter. He indicated that he was the only supervisor who did schedules by hand until 2001 when he became more proficient with his computer skills. Appellant repeated that he was having personnel shortages and that he was left during the week of September 12, 2000 with only one other employee. He denied that there was a cellular telephone during the middle of 2000.

In a January 24, 2003 decision, the Office hearing representative affirmed the Office's January 8, 2002 decision.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

Workers' compensation law does not apply to each and every 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 concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3] 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.[4]

[2] The employing establishment provided copies of the courses and training received by appellant.

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991); *Lillian Cutler,* 28 ECAB 126 (1976).

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.[5] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[6]

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 the physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[7] 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated January 24, 2003, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. 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 that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly denied leave or overtime, failed to provide him with supplies and improperly assigned work duties, 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.[9] Although the handling of disciplinary actions, evaluations and leave requests and the assignment of work duties are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[10] 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

[5] *Pamela R. Rice*, 38 ECAB 838, 841(1987).

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

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

[8] *Id.*

[9] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[10] *Id.*

the employing establishment acted reasonably.[11] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[12]

Regarding appellant's allegation of denial of promotions, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[13] Appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's requests for a different position or transfer, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but, rather constitute his or her desire to work in a different position.[14]

The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[15]

The Board has held that an employing establishment's refusal to give an employee training as requested is an administrative matter, which is not covered under the Act unless the refusal constitutes error or abuse.[16] In the instant case, the employing establishment denied that appellant was given insufficient training and provided documentation of various courses that appellant had attended. As there is no evidence of error or abuse on the behalf of the employing establishment with regard to the employing establishment's training practices, this contention cannot be considered a compensable employment factor.

Appellant alleged that the employing establishment improperly changed his workshift from four, ten hour days per week to five, eight hour days per week. As noted above, disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. On the other hand, the Board has held that a change in an employee's work shift may, under certain circumstances, be a factor of

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

[12] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[13] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[14] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[15] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[16] *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

employment to be considered in determining if an injury has been sustained in the performance of duty.[17] Appellant's assertion that the proposed change in work shift was made contrary to the relevant policy relates to an administrative function of the employing establishment. To show that an administrative action, such as the proposed change in work shift, implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse.[18] The employing establishment documented that the change was a policy decision which was made in effort to reduce costs and increase effectiveness. Appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the proposed change in work shift.

Appellant also alleged that his emotional condition was caused by overwork due to staff shortages. The Board has held that overwork may be a compensable factor of employment.[19] In the instant case, appellant alleged that at times, he was short staffed and unable to meet his performance requirements due to the staffing shortages. He alleged that on an occasion, he only had one employee. However, the employing establishment responded that, not only did appellant meet his requirements; he was able to do so without using all of his allotment. Additionally, the employing establishment indicated that appellant was provided with support staff to enable him to complete his requirements. Appellant has not established a compensable factor with respect to overwork due to a staffing shortage.

Appellant also alleged that he was stressed because there was no cellular telephone or telephone service. He included witness statements that indicated that telephone service was not always reliable. The employing establishment indicated that, although the service may have been unreliable, there were cellular telephones for back up. As there is insufficient evidence to show otherwise, appellant has not established a compensable factor with respect to not having a cellular telephone.

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.[20]

[17] *See Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

[18] *See Richard J. Dube*, *supra* note 11.

[19] *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *William P. George*, 43 ECAB 1159 (1992); *Georgie A. Kennedy*, 35 ECAB 1151 (1984).

[20] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The January 24, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member