U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ESTEBAN A. SOTUYO and U.S. POSTAL SERVICE,
POST OFFICE, Provo, Utah

Docket No. 98-649; Submitted on the Record;
Issued April 10, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

The Board has duly reviewed the case record and finds that the case is not in posture for a decision.

On March 3, 1995 appellant filed an occupational disease claim alleging that he sustained stress due to factors of his federal employment. By decision dated June 5, 1995, the Office of Worker's Compensation Programs denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. The Office found that appellant did not allege any compensable factors of employment.

By decision dated October 31, 1995, the Office denied appellant's request for reconsideration of his claim, finding that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that the case is not in posture for decision.

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

[1] 5 U.S.C. §§ 8101-8193.

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]

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.[3] 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.[4]

In the present case, appellant has alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act

Appellant attributes his emotional condition, in part, to receiving an August 26, 1994 letter of dismissal. He states that he filed a complaint with the Merit System Protection Bureau (MSPB) and received a settlement allowing him to return to work on November 7, 1994. Regarding appellant's termination from employment, while the handling of disciplinary actions is generally related to employment, it is an administration function of the employer and not a duty of the employee.[5] However, the Board has held that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[6] In the instant case, the record contains no evidence which establishes that the employing establishment erred in its action.[7] The mere fact that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.[8]

Appellant further attributes his emotional condition to his supervisor failing to assign him voluntary overtime work. The record indicates that appellant filed a grievance because he did not receive overtime, and that the grievance was settled on March 1, 1995. The Board, however,

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

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

[4] *Id.*

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

[6] *Id*.

[7] The settlement agreement is not in the record.

[8] *Id*; *Joe E. Hendricks*, 43 ECAB 850 (1992).

has held that the fact that an appellant was not permitted to work overtime for a specified period does not constitute a work factor for compensation purposes.[9]

Appellant further alleges that he did not receive adequate help with his operation and that the employing establishment removed two female employees assigned to work with him and did not replace them. The employing establishment denies that appellant did not receive sufficient help and that his coworkers were not replaced. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative reliable evidence.[10] Appellant has submitted no evidence to substantiate his claim that he did not receive adequate assistance in performing the duties of his position.

Regarding appellant's contention that on December 19, 1994 the employing establishment wrongly denied his request for either sick leave or leave without pay, the Board has held that allegations pertaining to leave denials 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.[11] Appellant has offered insufficient evidence that the employing establishment erred or acted abusively in denying his leave request, and thus has not established that the incident is a covered factor of employment.

Appellant maintains that his coworkers harassed him by talking about him secretly and by one coworker lining up cages such that he could not see the SPLSM operation. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[12] The employing establishment maintains that the cages were in the appropriate position but that some doors were closed, and further commented that appellant did not need to see the SPLSM operation. Appellant has submitted no independent evidence establishing harassment by his coworkers.

Appellant also contends that his supervisor, Mr. Moesinger, harassed him. Specifically, appellant alleges that Mr. Moesinger repeatedly stared at him, ignored him from November 7 to December 5, 1994, flipped his paycheck on a ledge instead of handing it to him, told him he was going to sue him for slander, and read aloud portions of letters written by him to the postmaster complaining about actions occurring in the employing establishment and then told his coworkers that appellant wrote the letters. Mr. Moesinger contradicts appellant's contentions, relating that he read excerpts from appellant's letters aloud in order to improve the conduct of the employees but did not mention the name of the author and placed appellant's paycheck on a ledger because his arms were full. Mr. Moesinger further indicated, regarding the allegation that he ignored appellant, that appellant was acceptably performing his job duties and had no need for instructions. The Board notes that the record, as assembled, does not provide enough

[9] *Ruth C. Borden*, 43 ECAB 146 (1991).

[10] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[11] *Isabel Apostol Gonzales*, 44 ECAB 901 (1993).

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

information for adjudication as to whether the reading of appellant's letters to the employees constitutes harassment. In this case, appellant has alleged that Mr. Moesinger disclosed his identity to his fellow employees, a contention Mr. Moesinger denies. On return of the case record the Office should further develop this aspect of the claim and make a finding on this contention.

Appellant further attributes his emotional condition to the loud volume of the overhead radio at work. Appellant related that "upon my return to work on Nov[ember] 17, 1994, Mr. Moesinger would turn the overhead radio on really loud which made it unbearable because the thirteen sorting machines that we have make a lot of noise." With regard to appellant's complaint of noise exposure, everyday noise encountered as part of appellant's regular or specially assigned duties would constitute an employment factor.[13] Appellant's supervisor acknowledged that appellant regularly complained about the volume of the radio but stated that the volume was minimal and that appellant used his own radio with headphones. The Office, in its October 31, 1995 decision, accepted without explanation the employing establishment's statement that appellant used headphones and thus was not exposed to unwelcome noise. As exposure to noise involves conditions of employment encountered in the performance of day-to-day duties, appellant's contention, if substantiated, could constitute an employment factor.[14] The Office, therefore, as part of its adjudicatory function, should further develop this aspect of appellant's claim.

Since appellant has implicated several compensable factors of employment, the case will be remanded for the Office to make detailed factual findings regarding appellant's allegation. If the evidence substantiates appellant's contentions, the Office must base its decision on an analysis of the medical evidence.[15] The Office should then refer appellant, together with the case record and a statement of accepted facts, to an appropriate specialist for an opinion on whether appellant sustained an emotional condition in the performance of duty, causally related to factors of her federal employment.

[13] *See Kathleen D. Walker*, 42 ECAB 603 (1991); *Peter Sammarco*, 35 ECAB 631 (1984).

[14] *Petter Sammarco, supra* note 13.

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

The decisions of the Office of Workers' Compensation Programs dated October 31 and June 5, 1995 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
April 10, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member