U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD MARTINEZ and DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Hawaii

Docket No. 95-2503; Submitted on the Record;
Issued February 5, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his employment.

On September 28, 1993 appellant, then a 52-year-old crane operator, filed an occupational disease claim alleging that he sustained an emotional condition in the performance of duty. Appellant attributed his claimed emotional condition to being discriminated against based on a mental condition (stress) and a physical condition (asbestosis). He alleged that he was unfairly rated on his performance appraisal because of his light-duty status and inability to work overtime due to his medical conditions. He also alleged that he was required to perform work which exceeded his physical limitations.

In a report dated September 28, 1993, Dr. Timothy O. Ahu, a Board-certified internist, related that appellant was complaining of depression and that he felt unable to perform his duties at the employing establishment. He related that appellant was involved in an accident at work and was suspended for three months from performing his usual duties. Dr. Ahu related that there was a second accident and that appellant felt that his supervisor was trying to get him fired. He diagnosed reactive depression due to situational stress, ruled out adjustment disorder, and indicated that appellant could perform light-duty work.

In a report dated October 22, 1993, Brian Goodyear, Ph.D., a clinical psychologist, related that appellant reported a history of conflict with supervisors throughout his 15-year employment at the employing establishment. He related that appellant felt he had been discriminated against and that favoritism had been shown towards other employees. Dr. Goodyear related that appellant complained of being overworked and assigned to less desirable jobs and that he had been denied light-duty work when it was medically indicated and threatened with a downgrade if he did not accept the work that was assigned to him. Dr. Goodyear related that, in the recent past, appellant had been involved in a number of relatively minor accidents at work, and was unhappy at the way these had been handled and that

he felt that he had been punished more severely than other employees with similar types of accidents. Dr. Goodyear provided findings on examination and psychological test results and diagnosed major depression, recurrent, moderate; personality disorder, not otherwise specified, with paranoid and schizoid features. Dr. Goodyear stated his impression that appellant had been experiencing episodic periods of emotional stress secondary to long-standing difficulties with supervisors and coworkers. He stated that appellant believed that he had been persecuted and discriminated against and this perception resulted in chronic feelings of alienation and resentment.

By decision dated March 21, 1994, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he had failed to establish that his claimed emotional condition was causally related to any compensable factors of employment.

By letter dated March 18, 1995, appellant requested reconsideration of the denial of his claim and submitted additional evidence.

In a letter dated January 6, 1995, Dr. Goodyear stated that he had been treating appellant since October 21, 1993 for a major depressive disorder which he believed was directly related to problems appellant had experienced at his workplace. He related that appellant felt that his supervisors frequently discriminated against him on the basis of his medical conditions and reported that he was denied light-duty work when it was medically indicated and was threatened with a downgrade if he did not accept the work that was assigned to him. Dr. Goodyear related that appellant was also required to perform overtime work even though it was medically contraindicated. He related that appellant's complaints to his supervisors about his problems were ignored and appellant began to fear retaliation from his supervisors which created psychological stress.

The Equal Employment Opportunity Commission (EEOC) investigated appellant's complaints that he had been discriminated against by the employing establishment because of his mental handicap (stress) and physical handicap (asbestosis). The EEOC noted that on June 15, 1994 appellant was informed, through a union representative, of a minimally successful (Level 2) performance rating for the period ending June 30, 1993 which appellant believed to be based on his light-duty limitations and inability to perform overtime work and that this rating had not been communicated to appellant by the employing establishment. Pursuant to its regulations, 29 C.F.R. § 1614.107(h), the EEOC resolved the case through a settlement agreement and Certification of Offer of Full Relief from the employing establishment dated December 23, 1994 which stated:

> "a. Your performance rating will be changed from Level 2 to Level 4, 'Exceeds Fully Successful' for the rating period ending 30 June 1993.
>
> "b. In the Settlement Agreement to your previous complaint DON No. 94-00311-003RM which was signed by you and Code 982 management (K. Correa) on 2/24/94 and 2/25/94, the first action agreed upon was to assign you out of the Crane Shop, Code 982. You were reassigned to Shop 55 on unallocated duties and also referred for medical placement through the Employment Division Code 1114.3. The initial referral for medical placement was not processed due to the

requirement for your current medical documentation and an updated SF-171 application. You submitted your current medical documentation at the conclusion of the informal inquiry into this complaint. You have been accepted for medical placement processing and Code 1114.3 is awaiting your submission of your updated SF-171."

* * *

"As required by 29 C.F.R. § 1614.107(h),[1] I have been designated by the Department of the Navy, Director of Equal Employment Opportunity, to certify in writing, that the above offer constitutes an offer of full relief of your complaint and is the appropriate relief as provided for in 29 C.F.R. § 1614.501."[2]

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[1] 29 C.F.R. § 1614.107(h) (1994) provides for dismissal of a complaint:

> "If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer, or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501."

[2] 29 C.F.R. § 1614.501 (1994), entitled "Remedies and relief" provides, in pertinent part:

> "(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of part 1613 of this chapter, which shall include the following elements in appropriate circumstances:
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> "(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;
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> "(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;
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> "(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;
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> "(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and
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> "(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.
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> "(b) *Relief for an applicant*."
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> * * *
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> "(c) *Relief for an employee*. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

By decision dated April 5, 1995, the Office denied modification of its March 21, 1994 decision.

The Board finds that this case is not in posture for a 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 coverage of workers' compensation. Where the 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 coverage of the Federal Employees' Compensation Act. On the other hand, the disability is not covered where its 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.[3]

Appellant has alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. Harassment and discrimination by supervisors may constitute a compensable employment factor.[4] In this case, the EEOC investigated appellant's complaints that he had been discriminated against by the employing establishment because of his mental handicap (stress) and physical handicap (asbestosis). The EEOC noted that on June 15, 1994 appellant was informed of a minimally successful (Level 2) performance rating for the period ending June 30, 1993 which appellant believed to be based on his light-duty limitations and inability to perform overtime work. Pursuant to its regulations, 29

FOOTNOTE 2 CONTINUED ON NEXT PAGE.

CONTINUATION OF FOOTNOTE 2.

"(1) Nondiscriminatory placement, with back pay ... unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination…."

* * *

"(3) Cancellation of an unwarranted personnel action and restoration of the employee.

"(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

"(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

"(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages."

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

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

C.F.R. § 1614, the EEOC resolved the case through a settlement agreement and Certification of Offer of Full Relief from the employing establishment dated December 23, 1994 which stated:

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The Board finds that the opinion of an agency such as the EEOC, which has jurisdiction to investigate complaints of discrimination by an employer, carries much weight and therefore the Certification of Offer of Full Relief by the employing establishment, following the EEOC investigation into appellant's complaints, constitutes an acknowledgement that the type of discrimination alleged by appellant, an unsatisfactory performance rating based upon medical conditions, was error or abuse by the employing establishment and may be deemed a compensable factor of employment for purposes of determining entitlement to compensation benefits under the Act.

Regarding appellant's allegation that he was required to work beyond his medical restrictions, the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[5] In this case, appellant's burden of proof was met by the Certification of Offer of Full Relief by the employing establishment and his transfer from Crane Shop Code 982 to Shop 55 on unallocated duties. The Certification of Full Relief is tantamount to an acknowledgement that appellant was assigned work beyond his physical limitations.

As appellant has established compensable factors of employment, discrimination in rating his job performance based on light-duty status due to employment-related medical conditions, and being required to work beyond his physical limitations, this case must be remanded for consideration of the medical evidence.

[5] *Diane C. Bernard*, 45 ECAB 223 (1993).

The April 5, 1995 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
February 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member