U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS X. PARTEE and FEDERAL DEPOSIT INSURANCE CORPORATION, CHICAGO REGIONAL OFFICE, Chicago, IL

Docket No. 97-2305; Submitted on the Record;
Issued August 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a lumbar condition, cardiac condition, bilateral carpal tunnel syndrome, hemorrhoids or urologic condition in the performance of duty and; (2) whether appellant sustained depression, anxiety, obsessive-compulsive disorder or other "stress-related" emotional condition in the performance of duty.

This is appellant's second appeal before the Board in this case. By decision and order issued April 19, 1995, the Board reversed the Office of Workers' Compensation Programs' May 19, 1993 decision, finding that appellant had abandoned his request for an oral hearing and remanded appellant's case to the Office's Branch of Hearings and Review for scheduling of the requested hearing.[1] The law and facts of the case as set forth in the Board's decision and order are incorporated by reference.[2]

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[1] Appellant's hearing was originally scheduled for July 23, 1991. Appellant requested and was granted a 30-day postponement. In a July 25, 1991 letter, appellant identified 11 witnesses whom he wished to subpoena. Appellant's hearing was rescheduled for November 16, 1992. By letter decision dated October 15, 1992, the Office hearing representative denied appellant's request for subpoena, on the grounds that appellant submitted insufficient information regarding which pertinent facts would be established by the testimony of those witnesses, and because appellant failed to demonstrate that the same information could not be obtained through methods other than the Office's subpoena power. In a November 2, 1992 letter, appellant requested a postponement of the scheduled hearing, asserting that the location of the scheduled hearing in Indianapolis, Indiana, approximately 130 miles from his home, would cause undue financial and personal hardship. In a November 6, 1992 letter, the Office granted the postponement. The hearing was rescheduled for May 11, 1993, again in Indianapolis. In an April 27, 1993 letter, appellant again requested postponement, and that the hearing be moved to Fort Wayne, nearer to his home than Indianapolis, due to his poor health. By decision dated May 19, 1993, the Office's Branch of Hearings and Review found that appellant had abandoned his right to a hearing, as he failed to appear for the scheduled May 11, 1993 hearing and did not show good cause for such failure. Appellant then filed an appeal with the Board.

[2] On May 12, 1988 appellant filed Claim No. A10-373867 for a February 28, 1988 bilateral knee injury when he fell on ice, while on temporary-duty assignment. In a June 18, 1988 form report, appellant noted that he fell on ice on the way to his car, and fell again the next day while walking from his car to the work site. This claim is not before the Board on the present appeal.

A hearing was held in appellant's case on March 25, 1996. At the hearing, appellant asserted that he sustained the following conditions, which he related to factors of his federal employment: a lumbar spine condition; bilateral knee problems; bilateral carpal tunnel syndrome, cardiac conditions including arrhythmia and palpitations; hemorrhoids; urologic difficulties and depression. Appellant argued that sitting at work for eight hours per day, five days a week strained his low back and that keyboarding requirements caused bilateral carpal tunnel syndrome. Appellant stated that he had not undergone recent treatment for knee problems and that he had not sought psychiatric treatment or evaluation. He submitted a statement describing the claimed physical and mental conditions, alleging that the depression was due to discrimination at work and his reactions to performance appraisals. Appellant also submitted a birthday card from Dr. Peter A. Jakacki, a chiropractor, stating in part that appellant should not wait "until things get bad before getting treated and spinal motion normalized so that as much permanent damage does not occur."[3]

After the hearing, appellant submitted an April 15, 1996 statement alleging that on January 8, 1990 George J. Masa, an employing establishment official, equated his filing a claim as "poor judgment" and a "pretext for disciplinary action" resulting in his termination.[4] Appellant stated that he was harassed by being placed on restricted sick leave from February 15 to May 15, 1990 while on a personal improvement plan (PIP) and being found absent without leave (AWOL) for missing work due to a sinus infection. He noted that his Equal Employment Opportunity (EEO) claim was rejected by an August 8, 1991 decision, due to a misunderstanding about the role of the Merit Systems Protection Board (MSPB). Appellant was presented with a July 6, 1990 notice of proposed termination on the grounds of a poor performance for the period April 27, 1989 to April 27, 1990,[5] leading to a denial of a step increase in pay.[6] Appellant alleged that the union did not pursue his grievances regarding the performance appraisal, that in February 1988, he was placed in the "long end" of a training program as retaliation for filing a knee injury claim for the December 1987 fall, and that he was not assigned practice jobs. Appellant also alleged that in September 1989, there was an office "joke" that he would be

[3] Appellant also submitted a July 27, 1990 report by Dr. Jakacki, which mentions that he obtained x-rays of appellant's spine but does not diagnose a spinal subluxation.

[4] Appellant submitted a January 8, 1990 letter from Mr. Masa identifying incidents of appellant's use of poor judgment. Mr. Masa noted that in August 1989, appellant claimed to be unable to file required correspondence due to the December 1987 knee injury. He stated that the Office had denied the knee injury claim as it was not filed until May 1988, demonstrating appellant's poor judgment in not promptly notifying his supervisor of a possible compensation claim at the time of the incident. Mr. Masa noted that appellant claimed excessive mileage in May and June 1989, left a July 9, 1989 discussion with bank and loan officers without explanation, started work half an hour before his instructed start time and ended half an hour later than scheduled on August 21, 1989, then claimed credit time with no authority. He concluded that the incidents reflected judgment "not commensurate with that required of an examiner or assistant examiner, and that if his future behavior did "not improve substantially," "formal disciplinary action" would be considered.

[5] The record contains a May 21, 1990 memorandum from Mr. Masa recommending the termination of appellant's employment due to a lack of improvement during the 90-day PIP period. Mr. Masa commented that appellant's "job skills [were] well below an acceptable level for an assistant examiner with three years experience."

[6] Appellant's May 16, 1990 performance evaluation indicates weakness in "job knowledge," including retaining information and ascertaining pertinent facts during investigations, inability to "adapt to varied programs and procedures," "unsatisfactory" work products which appeared "completed with the minimal amount of time and effort," and a lack of communication with supervisors necessitating increased supervision.

assigned a practice job in Elkhart, Indiana, made by officials Don Gorney and Don Imel, witnessed by examiners Marsha Clevenger and Charles Bonesteel. When appellant asked Mr. Imel for verification of the practice job, Mr. Imel stated that appellant was not assigned a practice job. Appellant also alleged that in December 1989, his final job training course was postponed as retaliation for filing a compensation claim.[7]

Appellant also submitted medical evidence. In a December 12, 1989 report, Dr. James D. Heckman, an attending neurosurgeon, who noted examining appellant on November 1, 1989 for a history of lumbar complaints dating to December 1987. Dr. Heckman stated that a "firm diagnosis ha[d] not been established," but that findings on examination indicated a lumbar nerve root dysfunction.

By decision dated and finalized June 7, 1996, the Office hearing representative affirmed the Office's March 14, 1991 decision, finding that appellant had submitted insufficient rationalized medical evidence to establish that he sustained a physical or emotional condition in the performance of duty. The Office found that as Dr. Jackacki did not qualify as a physician under the Federal Employees' Compensation Act as he did not diagnose a spinal subluxation by x-ray. The Office accepted as factual that appellant was required to sit eight hours per day, five days a week at work from April 1987 to August 1990 and held case files with his left hand and entered data into a computer with his right hand for several hours each day. The Office also accepted that appellant filed several union grievances and MSPB claims, but found that the record did not establish harassment, discrimination or unfair labor practices by the employing establishment, or inappropriate conduct regarding the May 16, 1990 performance evaluation. The Office also found that the employing establishment did not commit "error or abuse" such that the "performance appraisal, PIP and termination," would be considered to have been in the performance of duty.[8]

Regarding the first issue, the Board finds appellant has not established that he sustained a lumbar condition, cardiac condition, bilateral carpal tunnel syndrome, hemorrhoids or urologic condition in the performance of duty.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[9] (2) a factual statement identifying employment factors alleged to have caused or contributed to the

[7] Appellant also submitted an April 17, 1996 letter, noting that after the hearing, he had received treatment for carpal tunnel syndrome, depression, anxiety attacks, obsessive-compulsive disorder and lack of concentration, but that he could not pay for further treatment. He submitted an April 4, 1996 bill from Dr. Robert E. Wilkins, an attending internist, diagnosing "wrist pain" and a prescription for Relafen.

[8] Appellant, through his attorney representative, filed correspondence with the Board requesting an appeal within one year of the June 7, 1996 decision, perfecting his appeal with the Board on July 3, 1997. On September 26, 1997 the Director filed a Motion to Dismiss, on the grounds that appellant's appeal was not timely filed within one year of the June 7, 1996 decision of the Office hearing representative. On December 19, 1997 the Board issued an Order Denying Motion to Dismiss Appeal on the grounds that appellant filed timely correspondence with the Board within one year of the June 7, 1996 decision requesting an appeal.

[9] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

presence or occurrence of the disease or condition;[10] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[11] The medical opinion must be one of reasonable medical certainty,[12] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

Section 8101(2) of the Act provides that the term "physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."[14] As Dr. Jakacki did not diagnose a spinal subluxation by x-ray, he does not qualify as a physician under the Act for the purposes of this case and his opinions do not constitute medical evidence.

Therefore, the only medical report of record is that of Dr. Heckman, an attending neurosurgeon, who on December 12, 1989 provided a tentative diagnosis of lumbar nerve root dysfunction. However, he did not mention any work factors, or provide medical rationale explaining how and why appellant's lumbar condition would be related to his federal employment. Therefore, this opinion on causal relationship is of greatly diminished probative value and is insufficient to establish appellant's claim.[15] Also, Dr. Heckman does not mention the other claimed physical conditions of cardiac arrhythmia, bilateral carpal tunnel syndrome, hemorrhoids or a urologic condition. Consequently, appellant has not established that he sustained a physical condition in the performance of duty.

Regarding the second issue, the Board finds that appellant has not established that he sustained depression, anxiety, obsessive-compulsive disorder or other "stress-related" emotional condition in the performance of duty.

When an employee experiences an emotional reaction to his or her regular or specially assigned duties or requirements, or has fear and anxiety regarding his or her ability to carry out those duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act.[16] To establish appellant's emotional condition claim, he must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his conditions; (2) rationalized medical evidence establishing that he has an emotional or psychiatric

[10] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979). The Office, as part of its adjudicatory function, must make findings of fact and a determination as to whether the implicated working conditions constitute employment factors prior to submitting the case record to a medical expert; *see John A. Snowberger*, 34 ECAB 1262, 1271 (1983); *Rocco Izzo*, 5 ECAB 161, 164 (1952).

[11] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[12] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[13] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[14] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[15] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[16] *Donna Faye Cardwell*, 41 ECAB 730 (1990); *Lillian Cutler*, 28 ECAB 125 (1976).

disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[17] The Office must make findings of fact regarding, which of the alleged 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.[18] Perceptions and feelings alone are not compensable.

In the present case, the Office made specific findings on each of the factors appellant implicated. Regarding the PIP, the letter regarding appellant's poor judgment and his subsequent termination, the Office found that disciplinary actions are not considered to be in the performance of duty.[19] The Board has held that these disciplinary actions 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.[20] Although the handling of disciplinary actions, evaluations and other similar actions are generally related to the employment, they are administrative functions of the employer and not the duties of the employee.[21] 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.[22] Appellant has not submitted sufficient evidence in corroboration of his claim to establish that the employing establishment erred or acted abusively with regard to the reprimands. Thus, appellant has not established a compensable employment factor under the Act in this respect.[23]

Regarding appellant's allegations regarding restricted sick leave, being found AWOL and the handling of union or MSPB grievances, appellant offered no independent evidence that the employing establishment erred or acted abusively in these matters.[24] Therefore, the Board finds that they did not occur in the performance of duty.

Regarding appellant's May 16, 1990 performance evaluation, this evaluation was an administrative function of the employer and not the duty of appellant. Lacking evidence of error or abuse on the part of the employer, such functions did not constitute factors of employment. The Board has held that reactions to assessments of performance are not covered by the Act.[25]

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[17] *See Donna Faye Cardwell*, *supra* note 16.

[18] *See Barbara Bush*, 38 ECAB 710 (1987).

[19] *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[20] *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

[21] *Id.*

[22] *See Richard Dube*, 42 ECAB 916 (1991).

[23] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

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

[25] *Michael Thomas Plante*, *supra* note 24; *Effie O. Morris*, 44 ECAB 470 (1993).

Regarding appellant's allegation of the September 1989 "office joke" concerning a practice job assignment, appellant failed to submit corroborating evidence. The Board has considered the lack of corroboration and concluded that appellant has submitted insufficient evidence to sustain his allegations of events.[26]

Regarding appellant's allegations of not being assigned "practice jobs," the Board has held that disabling conditions resulting from an employee's desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[27]

Appellant has also alleged a pattern of harassment from the employing establishment, in particular, that his job training was tampered with in February 1988 and December 1989 as retaliation for filing a compensation claim. In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur. The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.[28] In the present case, appellant has not submitted sufficient evidence to support the alleged incidents of harassment. Accordingly, the Board finds that appellant has failed to substantiate his claims of harassment.

Appellant did allege and substantiate that he had to sit for eight hours a day, five days a week and enter computer data with his right hand while holding case records with his left hand. However, appellant did not submit rationalized medical evidence attributing any psychiatric or physical condition to these accepted work factors. The Board notes that appellant did not submit any medical records or reports pertaining to psychiatric diagnosis and treatment. Therefore, he failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

[26] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Mary N. Kolis*, 25 ECAB 53 (1973).

[27] *Raymond S. Cordova*, 32 ECAB 1005 (1981); *Lillian Cutler*, *supra* note 16.

[28] *Kathleen D. Walker*, 42 ECAB 603 (1991).

The decision of the Office of Workers' Compensation Programs dated June 7, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 11, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member