U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE F. HOUSTON and DEPARTMENT OF AGRICULTURE, PACKERS & STOCKYARDS ADMINISTRATION, Lancaster, PA

Docket No. 98-1489; Submitted on the Record;
Issued December 20, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On April 27, 1996 appellant, then a 37-year-old auditor, filed a claim for stress, high blood pressure and hypertension which he attributed to factors of his federal employment. Specifically appellant related:

> "I had filed EEO [Equal Employment Opportunity] complaints in the past because of discrimination and harassment from my supervisor, Durwood Helms. I contacted the Deputy Administrator in September about not being promoted. Shortly thereafter I received a letter of caution from [Mr.] Helms. This caused me to be very upset and the same day I went to see my doctor. The stress causes blood pressure, etc."

By decision dated November 21, 1997, the Office of Workers' 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 had not alleged a compensable factor of employment. In a decision dated March 11, 1998, the Office denied modification of the prior decision.

The Board has duly reviewed the case record and finds that the 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 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.

Many of appellant's allegations of employment factors that caused or contributed to his condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[5] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[6] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into the category of administrative or personnel actions include: the denial of a promotion;[7] disciplinary actions taken by his supervisor;[8] and the disposition of leave requests.[9] Appellant has presented no evidence of administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

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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] S*ee supra* note 2.

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

[7] *Tanya A. Gaines*, 44 ECAB 923 (1993).

[8] *Effie O. Morris*, 44 ECAB 470 (1993).

[9] *See William P. George*, 43 ECAB 1159 (1991).

Appellant has also alleged that his supervisor, Mr. Helms, harassed him and discriminated against him on the basis of race. Specifically, appellant contends that Mr. Helms did not promote him because of his race, issued a letter of caution against him as retaliation for complaining of discrimination and physically threatened and pushed him when he returned to work on January 30, 1997. The Board has held that for harassment and discrimination to give rise to a compensable disability, there must be some independent evidence that harassment of discrimination did, in fact, occur.[10] Mere perceptions alone of harassment or discrimination are not compensable.[11] In support of his contention, appellant submitted a statement from a former coworker, Gerald L. Godbout, who stated: "There was one time when Mr. Helms brought [appellant] into his office and kept riding him and [appellant] was losing it emotionally. But [Mr.] Helms would [not] let it go. I overheard the yelling and I ran in, because I was afraid it was going to come to blows." Mr. Godbout's statement, however, is not specific enough to support appellant's claim of harassment as he made no reference to the time the incident occurred or the subject matter discussed. He further indicated that he heard Mr. Helms state that he did not want to send appellant out on travel with female coworkers. However, in view of the fact that appellant received a letter of caution for gender inappropriate behavior and intimidating coworkers in September 1994, this statement does not amount to discrimination by Mr. Helms. Mr. Helms, in response to appellant's contentions, indicated that he did not select individuals for promotion to the current vacancies mentioned by appellant, that the letters of caution and reprimand issued against appellant were warranted by his actions and that he did not threaten or touch appellant. The record contains a precomplaint negotiated settlement dated August 29, 1995, in which appellant agreed to withdraw his April 1995 EEO complaint of discrimination and the employing establishment agreed to have "teambuilding sessions." However, the settlement contained no finding of error or abuse on the part of the employing establishment.[12] Thus, as appellant has not submitted sufficient factual evidence to substantiate his claim of harassment and discrimination by his supervisor, he has not established a compensable factor of employment.

Appellant further attributed his emotional condition to harassment and discrimination by coworkers. He described one occasion in which he was subjected to a racial slur and another occasion in which a coworker told him that he would not be eligible to join the Ku Klux Klan. The use of an epithet which is derogatory in nature can constitute harassment under the Act.[13] In the instant case, appellant's supervisor verified that these events occurred and indicated that the coworker who made the racial slur received a disciplinary action and that the coworker who made the statement about the Ku Klux Klan apologized to appellant.[14] As the evidence supports appellant's claim of a derogatory epithet, the Board find that appellant has established a

[10] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[11] *Id*.

[12] *See Arthur F. Hougens*, 42 ECAB 455 (1991).

[13] *Abe E. Scott*, 45 ECAB 164 (1993).

[14] Mr. Helms stated that appellant also apologized to the coworker for what appeared to be a mutually antagonistic conversation.

compensable factor of employment.[15] Therefore, the issue is whether the medical evidence establishes that this factor contributed to appellant's emotional condition.[16]

The case will be remanded to the Office for the preparation of a statement of accepted facts to include the established factors delineated above. The Office shall then submit the statement of accepted facts to an appropriate medical specialist for an opinion on the causal relationship between the compensable factors of employment and appellant's diagnosed condition. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate decision on appellant's entitlement to benefits.

The decisions of the Office of Workers' Compensation Programs dated March 11, 1998 and November 21, 1997 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
December 20, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

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[15] Appellant further submitted a letter dated July 11, 1997 on the letterhead of the employing establishment and signed by "Joe Camel" which offered him a promotion. Appellant maintained that coworkers left him the note as harassment; however, there is no factual evidence supporting that his coworkers actually wrote the letter.

[16] *See Abe E.Scott*, *supra* note 13.