U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORNELIUS J. DESPANIE and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 98-1710; Submitted on the Record;
Issued December 16, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

On September 5, 1997 appellant, then a 44-year-old supervisor, filed a Form CA-1, notice of traumatic injury, alleging that on August 22, 1997 "MDO Jessie Plenos, in an act of retaliation for my requesting union representation for a cc: mail I felt unjust, begin a process of discipline that could lead to termination." Appellant indicated that he stopped work on September 27, 1997 and did not return; however, he took annual leave to go on vacation beginning August 27, 1997.

Accompanying the claim the employing establishment submitted a September 16, 1997 letter of concern, which noted that appellant claimed that he suffered anxiety after receiving a cc: mail message and that this led to headaches, insomnia, increased perspiration, lack of concentration, angry outbursts, tension in the back, neck and legs and depression. The employing establishment noted that appellant alleged that he attempted to resolve the issue regarding the cc: mail message, but was unable to do so during a meeting with his immediate supervisors. It noted that appellant further alleged that he was issued a letter of warning as an act of retaliation for requesting that he have his union representative present at the meeting. The employing establishment noted that according to appellant's senior manager's, Kenneth Sloan, statement, when he was informed of the intent to issue discipline to appellant, Mr. Sloan persuaded the MDO to hold off on the action until he had a chance to speak with appellant. He further stated that when he conveyed his disappointment that a supervisor would request a representative at a meeting that was being held to resolve a management problem, appellant said that this was the way he wanted it and proceeded to leave. The manager further stated appellant's immediate supervisor issued the discipline because appellant was unwilling to talk and not as an act of retaliation.

Also included was a September 10, 1997 letter from Mr. Sloan which stated that when MDO Plenos informed him of his intent to issue appellant a letter of warning for failure to discharge duties, he asked MDO Plenos to hold off until he had a chance to speak with appellant. Mr. Sloan later provided appellant with a copy of the write up from Mr. Plenos, appellant stated his position and his displeasure at several of the comments that were written. Mr. Sloan agreed that some of the comments were unnecessary and stated that he would speak to Mr. Plenos and relay appellant's comments. Thereafter, Mr. Sloan spoke to Mr. Plenos and he agreed to hold off on any action until the three of them had a meeting.

Mr. Sloan noted that prior to the meeting appellant requested that a union representative be present at the meeting. When appellant appeared at the meeting in order to resolve the issue and avoid taking any corrective action, Mr. Sloan stated that he conveyed his disappointment that a supervisor had to request a meeting with a union representative prior to trying to sit down as managers and resolve a problem. Appellant replied that was the way he wanted it and left. Mr. Plenos then called appellant over and informed him that since he was not willing to talk, he was giving him a day in court and appellant made a few comments that Mr. Sloan was unable to hear. Mr. Sloan stated that the action taken by Mr. Plenos was in no way in retaliation for appellant's request for a union representative, as Mr. Plenos had already made his decision to initiate action prior to receiving appellant's request. Mr. Sloan noted that he was the one who convinced Mr. Plenos to hold off on any action until they were all able to meet and that it was appellant's unwillingness to participate which lead to the processing of the disciplinary action.

Mr. Sloan also noted that appellant claimed that the injury occurred on August 22, 1997 but worked until he was scheduled to go on annual leave beginning August 27, 1997 and did not report the injury until September 8, 1997.

A copy of the August 21, 1997 letter of warning was submitted charging a failure to discharge duties. The conduct involved failure to provide jitneys to pick up the DOV mail containers that were available for dispatch at the MPLSMs, resulting in 26 feet of San Jose letters and 20 feet of Sacramento mail missed appropriate dispatch. Mr. Plenos also attached a statement of the incident during which he questioned appellant's sense of responsibility and urgency due to the missed mail.

Appellant additionally submitted a statement describing his symptoms and stating that he attempted to have this resolved on August 27, 1997 in order to have a nice vacation on August 28, 1997 when his airplane left. Appellant stated that this was the reason for his delay in filing the claim and seeing his doctor. Appellant stated that during the meeting Mr. Plenos acted very unprofessional, kept interrupting him and then asked him if he was calling Mr. Plenos a liar. Appellant alleged that Mr. Plenos stormed out of the meeting saying, "I deny your grievance, I will not remove the letter and that you can take it upstairs." Appellant stated that it was at this point that he became symptomatic.

Appellant submitted disability certificates and a September 30, 1997 report from Dr. John Roumasset, a Board-certified psychiatrist, who diagnosed an adjustment disorder with anxiety and who opined that he was unable to work through October 31, 1997.

By decision dated October 14, 1997, the Office of Workers' Compensation Programs rejected appellant's claim finding that he failed to implicate a compensable factor of employment as the cause of his condition. The Office found that appellant had alleged that his condition arose out of a disciplinary action, which was considered to be an administrative matter and that administrative error or abuse was not supported by the record. The Office found no evidence of retaliation for requesting a union representative for the meeting.

By letter dated November 19, 1997, appellant requested reconsideration; he submitted further medical reports and argued that if a disciplinary action was overturned as a result of an error or abuse of discretion, the Office's finding may be modified.

In support of his request, appellant submitted further medical evidence and an Equal Employment Opportunity (EEO) settlement agreement, in which the letter of warning issued August 22, 1997 charging appellant with failure to discharge his duties, would be rescinded and removed from his records. The agreement stated that "management regrets any misunderstanding that may have occurred between the complainant and his higher level managers. No reprisal action will be taken … for filing this EEO complaint." However, in an accompanying explanatory memorandum to appellant regarding the Step B decision, the senior manager for distribution operations, Barbara Y. Faciane, noted that she had rendered the following decision: "In an effort to afford you the opportunity to demonstrate that you can effectively perform your duties, the letter of warning dated August 21, 1997 is to be rescinded and will be removed from all files and records." Ms. Faciane concluded: "However, you are reminded of your responsibility to discharge all of your supervisory duties in conscientious and efficient manner."

Appellant also submitted a January 9, 1998 statement in which he reiterated the circumstances on August 18, 1997 alleged that he got upset when Mr. Sloan told him and a coworker that they'd "better get [their] s__t together," alleged that Mr. Sloan told him that he was acting like a craft employee instead of a supervisor and claimed that he almost blacked out when he received the letter of warning, that he was kept in his former job as retaliation for his EEO activity, that he did not get paid for two months after he requested sick leave, which caused stress and that he did not get sweatshirt or a reimbursement for film development at an employing establishment event.

Appellant also implicated events during a meeting held on January 15, 1998 regarding the August 1997 letter of warning and his two months of pay. Appellant alleged he was criticized at that meeting for taking breaks and playing dominos with workers whom he supervised, which gave other managers the perception that he had a craft mentality.

By decision dated February 3, 1998, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office noted that appellant voluntarily withdrew his EEO complaint on the stipulation that the August 21, 1997 letter of warning would be removed from his records, that management explained the fact that the letter of warning was removed should not be construed as an admission of discrimination or wrongdoing on the part of the employing establishment and that his physician noted that he had felt fine until he learned of Mr. Plenos' e-mail regarding the August 19, 1997 actions. The Office found that there was no evidence of administrative error or

abuse, that the filing of EEO grievances by themselves do not establish that harassment occurred in the workplace and that there was no evidence to support that Mr. Sloan or Mr. Plenos were abusive in their meetings with appellant.

By letter dated February 9, 1998, appellant, through his representative, requested reconsideration and he argued that there was administrative error and abuse. He alleged that the letter of warning was unreasonable and punitive, that Mr. Sloan's language was unreasonable, that harassment did occur and that appellant's EEO complaint was still ongoing.

In support of the request, appellant submitted some statement previously submitted to the record and already considered by the Office, a statement from Mr. Sloan stating that he never commented on why Mr. Plenos issued the letter of warning that the dominos incident was used as an example, that managerial employees had procedures to follow as opposed to craft employees and that he was gone for several weeks during the time appellant did not get paid. EEO complaint documents were also submitted. Additionally submitted were two medical reports which stated that appellant was upset since he had been reprimanded.

By decision dated February 12, 1998, the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification. The Office found that there was no evidence of administrative error or abuse.

The Board finds that appellant has failed to establish that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[1]

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2] Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

[1] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[3]

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.[4] Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.[5] Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."[6]

When working conditions are alleged as factors in causing 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.[7] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[8] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.[9] If the evidence fails to establish that any compensable factor of employment is implicated in the

[3] *Id.*

[4] *Donna Faye Cardwell, supra* note 2; *see also Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Id.*

[6] *See Joseph DeDenato,* 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

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

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

[9] *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

development of the claimant's emotional condition, then the medical evidence of record need not be considered.

In the present case, the Office properly found that none of the causative factors appellant alleged were compensable factors of employment.

Appellant's primary allegation regarding the onset of his stress had to do with his receipt of an August 21, 1997 letter of warning regarding the incidents of August 19, 1997. The Board has held that disciplinary actions, including counseling and letters of warning, do not involve an employee's regularly or specially assigned duties and are, therefore, not considered to be employment factors.[10] They are administrative matters and absent evidence of error or abuse, do not constitute compensable factors of employment.[11] Appellant has presented no evidence of administrative error or abuse, as the record and text of the letter supports that the letter of warning dealt with the performance of his work duties on August 19, 1997 which appellant was not able to successfully complete and did not deal with requesting a representative for the August 22, 1997 meeting as appellant alleges. Further, the mere fact that the letter was later rescinded is not evidence of administrative error of abuse, particularly as the person rescinding it explained that she was doing so to afford appellant an opportunity to demonstrate that he could effectively perform his duties.[12]

With regard to appellant's other allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[13] An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[14] Words and actions that appellant implicated as being harassment must be confirmed by supporting evidence that they did, in fact, occur as alleged. However, in this case, such corroboration was not forthcoming from appellant and no evidence of retaliation for any of appellant's prior actions was adduced.

Appellant further alleged ongoing verbal abuse, unprofessionalism and harassment by superiors but he provided no corroborating evidence to support that such abuse occurred. No evidence corroborating that Mr. Plenos or Mr. Sloan called him names or used unreasonable language to him was submitted. Consequently, the alleged verbal harassment and abuse by Mr. Sloan or Mr. Plenos was not established.

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[10] *Gregory N. Waite*, 46 ECAB 662 (1995); *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[11] *Id.*

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

[13] *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

[14] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

Additionally, appellant's complaints regarding not getting an employing establishment event sweatshirt and not receiving reimbursement for film development after the event, do not, along with the playing of dominos, involve his regular or specially assigned duties so as to bring them under the coverage of the Act. Therefore, appellant's allegations regarding these circumstances are not compensable.

Finally, the Board finds that appellant has not established that the employing establishment committed error or abuse during the events of the January 15, 1998 meeting. Appellant's interpretation that "the measures taken to inform me of my shortcomings were too harsh, inappropriate and threatening to my career" merely represents his perception of the events at the meeting especially when considered in light of the supervisor's written response.

As no compensable factors of appellant's employment have been identified, implicated or substantiated, there is no need to review the medical evidence of record.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 12 and 3, 1998 and October 14, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 16, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member