U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL D. WRIGHT and DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTE, Otisville, N.Y.

Docket No. 97-2813; Submitted on the Record;
Issued July 13, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

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

On October 16, 1995 appellant, then a 52-year-old safety manager, filed a claim for duodenal ulcer, hiatus hernia with reflex and gastritis which he related to stress on the job and long commutation from his home to the employing establishment. He indicated that the injury occurred on May 1, 1988. Appellant submitted a copy of a July 20, 1988 letter, in his supervisor indicated that the medical evidence was insufficient to show that his duodenal ulcer would prevent his transfer to another facility. He also submitted other documents which showed he had previously been treated for an ulcer, which he claimed was due to stress on the job. In a February 14, 1996 decision, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of record failed to demonstrate that his condition occurred in the performance of duty. In a December 2, 1996 decision, an Office hearing representative, after a review of the written record, found that appellant had not established that he was injured in the performance of duty or that his condition was causally related to his employment. He therefore, affirmed the Office's February 14, 1996 decision. In an August 14, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was irrelevant and therefore insufficient to warrant review of the Office's December 2, 1996 decision.

The Board finds that appellant has not established that he was injured in the performance of duty.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability

comes within the coverage of the Act. On the other hand, the disability is not covered where it 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[2] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[3]

Appellant cited two general sources of stress, commuting to work and stress on the job. Commuting to work cannot be considered a compensable factor of employment. The Board has stated as a general rule that off premises injuries sustained by employees having fixed hours and place of work, while going to or coming from work, are not compensable as they do not arise out of and in the course of employment but are merely the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.[4] Due primarily to the myriad factual situations presented by individual cases over the years, certain exceptions to the general rule have developed where the hazards of the travel may fairly be considered a hazard of the employment. The Board has said, "These recognized exceptions are dependent upon the particular facts and related to situations: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls as in the case of firemen; (4) where the employee uses the highway to do something incident to his employment with the knowledge and approval of the employer."[5] None of these exceptions apply to appellant's commute from home to work and back. His commute to work therefore cannot be considered to be within the performance of his duty.

Appellant described his stress on the job in a November 19, 1996 affidavit. He stated that he was transferred from a position as a safety manager to a new site where he was the deputy safety manager. He indicated that the safety manager, his new supervisor, had less experience but seemed to be looking for anything to criticize, finding fault in appellant's work where

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

[2] *Artice Dotson,* 41 ECAB 754 (1990); *Allen C. Godfrey,* 37 ECAB 334 (1986); *Buck Green,* 37 ECAB 374 (1985); *Peter Sammarco,* 35 ECAB 631 (1984); *Dario G. Gonzalez,* 33 ECAB 119 (1982); *Raymond S. Cordova,* 32 ECAB 1005 (1981); *John Robert Wilson,* 30 ECAB 384 (1979).

[3] *Thomas D. McEuen,* 41 ECAB 387 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991).

[4] *Robert F. Hart,* 36 ECAB 186 (1984); *Estelle M. Kasprzak,* 27 ECAB 339 (1976).

[5] *Robert F. Hart, supra.; Estelle M. Kasprzak, supra.; Robert A. Hoban,* 6 ECAB 773 (1954); *Lillie J. Wiley* 6 ECAB 500 (1954).

appellant found none. Appellant commented that it seemed his supervisor believed his mandate was to find fault with a former safety manager who previously had a more responsible job than the supervisor. Appellant stated that the feeling of having someone look over his shoulder, filling his personnel file with complaints and official reprimand for matters that appellant had not done, was causing stress. Appellant also submitted a letter from a colleague who indicated that a safety manager for the employing establishment is responsible for hearing conservation, mechanical services, fire system and evacuation, food service personnel and cleaning supplies, pest control and inmate care. The colleague indicated that even a simple matter such as the proper materials and means to clean the various type of floors in the employing establishment would cause a problem if a safety manger failed to instruct those responsible on how to care for the floors, management would come down hard on the safety manager. The colleague commented that this seemed to happen to appellant more frequently than usual. He noted that in a conversation in 1992, appellant complained that his stomach was in bad condition because of the constant frustration from his job and being harassed by others at the employing establishment in the way he did his job.

To establish his claim, appellant must describe specific instances or situations which caused his stress or which he believed to be harassment. Appellant made a general allegation that her emotional condition was due to harassment by her supervisors. The actions of a supervisor, which an employee charaterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[6] Appellant has not provided the specific information necessary to determine whether the incidents of employment to which he attributed his emotional condition occurred as alleged and constituted compensable factors of employment. He therefore, has not established that he sustained an injury in the performance of duty. In view of this decision, it is unnecessary to consider the medical evidence to determine whether appellant's ulcer was causally related to compensable factors of employment. Such factors must be identified and established before it can be determined, through medical evidence, whether a claimant's disability is causally related to such factors.[7]

[6] *Joan Juanita Greene*, 41 ECAB 760 (1990).

[7] The appeal in this case was filed on September 5, 1997. Subsequently, in a December 2, 1997 decision, the Office again denied appellant's request for reconsideration. The Office and the Board cannot have concurrent jurisdiction on the same issue in a case at the same time. *Douglas E. Billings*, 41 ECAB 880 (1990). The Office's December 2, 1997 decision was a reconsideration of the same issue that was on appeal to the Board. That decision, therefore, is null and void.

The decisions of the Office of Workers' Compensation Programs, dated August 14, 1997 and December 2, 1996, are hereby affirmed.

Dated, Washington, D.C.
July 13, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member