U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH JENKINS and SOCIAL SECURITY ADMINISTRATION, NEPSC, Jamaica, NY

Docket No. 98-1087; Submitted on the Record;
Issued November 15, 1999

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On March 6, 1997 appellant, then a 59-year-old technical controller, filed a claim alleging that he suffered from high blood pressure, stress and hypertension as a result of harassment by management. Appellant listed the date of injury as February 25, 1997. Treatment notes dated February 25, 1997 from the employing establishment health unit indicated that appellant suffered sharp and intermittent chest pain at work and that he was transferred by ambulance to a local hospital. On the reverse side of the CA-1 form, the employing establishment noted that a disagreement occurred between appellant and his supervisor concerning his attendance at an onsite training session.

In a statement transmitted by facsimile on March 26, 1997, Tom Van Iderstine, appellant's supervisor, advised that appellant was absent from work on February 25, 1997 until 11:00 a.m. to attend a medical appointment and that when appellant returned to work a discussion ensued as to when appellant would be allowed to attend a training course which was previously scheduled for that day and was already in progress. Mr. Iderstine stated:

> "[Appellant] was dissatisfied with my decision regarding his attendance at this course. He walked into the course while it was in session and was disruptive. After lunch, we had a further discussion about the training schedule. Appellant went to the onsite [h]ealth [u]nit complaining of chest pains and was taken to the hospital. He returned to work on March 4, 1997. Appellant was unhappy with my decision regarding the training course. This does not constitute an on-the-job injury."

In reports (Form CA-16 and CA-17) dated March 11, 1997, Dr. Henry J. McCabe, a Board-certified internist, noted that appellant experienced chest pain and was hospitalized on February 25, 1992 following a disagreement with management. He diagnosed that appellant suffered from stress-induced hypertension. He approved appellant for light-duty work with restrictions.

In a statement dated April 12, 1997, appellant generally alleged that he was subjected to racial discrimination by his supervisor. He noted that he had no prior health problems until his supervisor was placed in charge.

In an April 27, 1997 letter, the employing establishment acknowledged that the Equal Employment Opportunity Commission (EEOC) was processing a complaint filed by appellant for racial discrimination.

In a report dated April 28, 1997, Dr. McCabe reported that appellant was treated in late February 1997 for headaches and chest pains "due to increasing strain and confrontation with his supervisor at work." He noted physical findings including a normal cardiac stress test. He prescribed medication for high blood pressure and chest pain. According to Dr. McCabe, appellant was later seen on April 25, 1997 for noncardiac-related chest pain for which anti-inflammatory medication was prescribed. Dr. McCabe opined that appellant's symptoms were related to "the stress situation" described by appellant at work.

In a decision dated May 12, 1997, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish that appellant sustained an emotional condition in the performance of duty.[1]

By letter dated May 26, 1997, appellant requested reconsideration and resubmitted copies of medical evidence and the April 27, 1997 EEOC letter which were already of record. Appellant also submitted copies of EEOC counseling reports dated February 3, 1997 and September 10, 1996.[2]

In a July 12, 1997 decision, the Office denied appellant's request for a merit review.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or

[1] Appellant was previously apprised by the Office that he needed to submit factual evidence to support his allegations of harassment.

[2] The Office mistakenly referenced the dates of the EEOC counseling reports in the July 12, 1997 decision. The February 3, 1997 investigative report concerned appellant's allegation that Mr. Iderstine made obscene remarks to him on January 1, 1997 in the midst of a heated argument he was having with appellant over shift assignments. The September 9, 1996 report, also generally alleged that Mr. Iderstine did not keep him informed of project assignments in an attempt to have him fired for not getting involved in the work.

incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[3] Rationalized medical opinion evidence is medical evidence which 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. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical 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.[4]

Workers' compensation law is not applicable 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 coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.[5] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[6]

In the instant case, appellant alleged that he was harassed and racially discriminated against by his supervisor. Although harassment and racial discrimination by a supervisor may constitute a compensable factor of employment, there must be evidence that harassment or discrimination did, in fact occur.[7] Mere perceptions or feelings of harassment and discrimination do not constitute a compensable factor of employment.[8] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[9] 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.[10]

Because appellant has not supported his allegations of harassment and racial discrimination with sufficient probative evidence, the Board finds that appellant has failed to meet his burden of proof. Appellant has only offered his own version of events without

[3] *Donna Faye Cardwell*, 41 ECAB 730 (1990)

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

[7] *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[8] *See Lorraine E. Schroeder*, 44 ECAB 323 (1993); *Sylvester Blaze*, 42 ECAB 654 (1991).

[9] *William P. George*, 43 ECAB 1159 (1992).

[10] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993)); *Ruthie M. Evans*, 41 ECAB 416 (1990).

corroborating witness statements. His allegations of harassment and discrimination were denied by the employing establishment. Although appellant submitted an April 27, 1997 letter verifying that a discrimination complaint was being investigated by EEOC, the Office properly noted at the time of its decision that there was no favorable final resolution with respect to that complaint. Accordingly, the Board finds that appellant has not established a claim based on harassment or discrimination.

Appellant has also alleged that he had a heated discussion with his supervisor on February 25, 1997 over whether he could attend a training session which caused him undue stress and resulted in chest pains. Inasmuch as the subject of the "heated discussion" between appellant and his supervisor concerned an administrative matter, it is not a compensable factor of employment unless appellant shows error or abuse on behalf of the employing establishment in carrying out its administrative function. Because there is no probative evidence of record to establish that appellant's supervisor acted in error or was abusive in his decision to reschedule appellant's training session, the Board concludes that appellant failed to establish a compensable factor of employment. The Board, therefore, finds that the Office properly denied appellant's claim for compensation.[11]

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a merit review.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[12] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[13] When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[14] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[16] Where a claimant fails to submit relevant evidence not previously of record

[11] Since no compensable factors of employment have been substantiated, it is unnecessary for the Office to address the medical evidence; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[12] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[13] 20 C.F.R. § 10.138(b)(1).

[14] 20 C.F.R. § 10.138(b)(2).

[15] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[16] *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Act.[17]

On reconsideration, appellant submitted copies of medical evidence and an April 21, 1997 EEOC letter which were already of record and are therefore insufficient to constitute a basis for reopening the case. Although appellant submitted two additional EEOC reports which were not previously of record, that evidence is deemed repetitious as it merely shows that the EEOC is investigating appellant's discrimination complaint. At the time the Office issued its May 12, 1997 decision denying compensation, the Office was fully aware of appellant's pending EEOC discrimination complaint but found the complaint itself insufficient to establish appellant's allegations as there had not been a final resolution of the complaint by the EEOC. The Board notes that the EEOC counseling reports submitted by appellant on reconsideration are repetitious and merely corroborate that appellant's discrimination complaint is being investigated. They do not establish the truth of appellant's allegations. Thus, because appellant has submitted an insufficient evidentiary basis for reopening the record under section 10.138(b)(1), the Office properly employed its discretion in refusing to reopen the case for further review on the merits.

The decisions of the Office of Workers' Compensation Programs dated July 12 and May 12, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[17] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).