U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTONIO F. FREIRES, JR. and DEPARTMENT OF JUSTICE, BUREAU OF PRISON, METROPOLITAN CORRECTIONAL CENTER, San Diego, CA

Docket No. 98-185; Submitted on the Record;
Issued September 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty.

On March 21, 1995 appellant, then a 39-year-old physician's assistant, filed a claim for anxiety disorder and depressive disorder. He stated that the health service administrator had created a stressful and hostile environment by showing prejudice, unfair management, inconsistency in decisions, harassment and discrimination. Appellant contended that the administrator had made the lives of some physician's assistants miserable while taking good care of two other physician's assistants. In a February 26, 1996 decision, the Office of Workers' Compensation Programs rejected appellant's claim on the grounds that the evidence of record did not establish that appellant's condition arose out of the performance of his job duties. In a September 17, 1997 decision, an Office hearing representative found that appellant had not established that compensable factors of employment existed in his case. He therefore affirmed the Office's February 26, 1996 decision.

The Board finds that this case is not in posture for decision.

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]

In a May 6, 1995 letter, appellant described the factors of employment which he alleged caused his emotional condition. He alleged that his supervisor, June Hannabach, the health services administrator, engaged in harassment of the physician's assistants at the employing establishment while favoring another physician assistant. Appellant stated that in August 1994 Ms. Hannabach and the pharmacist at the employing establishment destroyed several medical books and journals. The employing establishment's fraud and abuse hot line was called but no action was taken. He contended that this action enraged Ms. Hannabach and caused her to take reprisal actions. Appellant indicated that he received notice for jury duty twice but Ms. Hannabach instructed him to reschedule both times. He stated that Ms. Hannabach disapproved his scheduled three weeks of annual leave while approving two weeks of annual leave for her favored physician's assistants even though he did not have sufficient annual leave at that time and subsequently had to take 18 hours of leave without pay. Appellant related that Ms. Hannabach changed his work duty for three consecutive weeks in August 1994, working duty for the day watch the first week, sick call the second week and morning watch the third week. He subsequently explained that duty watch was assigned to handling emergencies, sick call was assigned to go out to the prison population and the morning watch was the 12:00 a.m. to 8:00 a.m. shift. He stated that on January 7, 1995, he was scheduled to work 16 hours straight, from 4:00 p.m. to 8:00 a.m. the following morning. From January 12 through January 16, 1995, Ms. Hannabach required the physician's assistants to work mandatory overtime to complete physical examinations. Appellant stated that in March 1995 Ms. Hannabach, on several occasions, either gathered evidence or took actions against physician's assistants for errors made on the job. She threatened to fire the assistant health services administrator. In this time period, one physician's assistant resigned and another took leave due to high blood pressure. Appellant contended that the administrator's favored physician's assistant, however, made serious errors on the job such as failing to have a semi-comatose inmate brought to the employing establishment dispensary, only taking blood pressure when he was required to perform complete physical examinations and throwing a syringe into a shredder. Appellant stated that no action was taken against this particular physician's assistant for these errors. He noted that on March 1, 1995 he received a notice for a three-day suspension for failure to respond to a request for medical assistance. Appellant indicated that the inmate involved had been experiencing heroin

[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).

withdrawal for four days and therefore the situation was not an emergency. He requested that the inmate be brought down but was informed that the escort officer was not available because the employing establishment was having an inmate count. Appellant noted that the inmate was brought down after the count was completed. He indicated that on February 14, 1995 he was diagnosed with high blood pressure. On March 8, 1995 his blood pressure was measured at 150/120 and he was placed on leave for seven weeks due to stress. Appellant reported that Ms. Hannabach harassed him for the medical reports and placed him as absent without leave.

At the June 9, 1997 hearing, appellant discussed his claim further. He noted that in the rotation of duties, the rotation was to occur every three months and he was required to receive 24 hours notice of the change in shift. Appellant testified that he was not suppose to work back-to-back shifts. He stated that he had filed an Equal Employment Opportunity complaint against the suspension which had resulted in a settlement in which the suspension was dropped but the employing establishment did not admit its actions were discriminatory.

Appellant made a general allegation that his emotional condition was due to harassment by his 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 perception 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.[4]

Appellant made a general allegation that Ms. Hannabach harassed her employees but did not give specific examples of such harassment, such as degrading comments or specific actions. The only examples he cited were disciplinary actions, such as suspensions, taken for errors. Such actions are administrative actions and therefore are not, by themselves, compensable factors of employment.[5] Investigations to see if errors had occurred also are not compensable factors of employment.[6] Appellant therefore must establish that the investigations and disciplinary actions were taken in error or abusively. The only evidence offered by appellant to support his claim of error or abuse was the settlement of his suspension notice in which the suspension was withdrawn. The employing establishment, however, indicated, as related by appellant, that the withdrawal of the suspension was not an admission of error. Appellant also contended that a request for annual leave was denied and that when he stopped work, he was listed as absent without leave. Matters pertaining to leave are administrative in nature and therefore are not compensable factors of employment.[7] Appellant has not shown error or abuse in the denial of the leave or that the denial was a form of harassment. He therefore has not established that harassment occurred or that the actions which he contended constituted harassment.

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

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

[6] *Manual W. Vetti,* 33 ECAB 750 (1982).

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

Appellant, however, has raised the claim that he was subjected to discrimination. He contended that another physician's assistant at the employing establishment made repeated errors, including an action similar to his for which Ms. Hannabach proposed his suspension. Appellant claimed that the other physician's assistant was never subjected to disciplinary action for his errors. He also contended that when his request for annual leave was denied, the other physician's assistant was granted annual leave even though he did not have sufficient leave for the two weeks that were granted. The employing establishment was requested to respond to appellant's allegations but failed to do so. Appellant listed several witnesses, including several coworkers, to corroborate his statements but the Office did not seek to investigate appellant's contentions further. The Office is required by its procedures to develop the evidence further if incidents of harassment or discrimination are credibly alleged.[8] Such development includes obtaining information from witnesses and agency personnel. The Office failed to carry out such development by determining whether appellant was actually subjected to disparate treatment when compared to a coworker.

Appellant also contended that he was required to work changing shifts, a double shift and mandatory overtime at various times. The Office found that appellant's assignment to such duties did not constitute a factor of employment. However, appellant performed the work specially assigned to him which included the overtime and the double shift. The extra work and increased workload performed by appellant would be considered a compensable factor of employment as this constituted performance of his assigned duties.[9] In addition, appellant contended that the assignment of such duties, particularly the assignment of three different shifts in three weeks, was contrary to the employing establishment's rules on the number of weeks or months appellant was to remain on an assigned shift and the time of advanced notice that appellant was required to receive prior to the change in shift. The Office did not develop the record further by asking officials at the employing establishment whether the assignment of shifts and job duties to appellant were contrary to the employing establishment's rules and therefore constituted error or abuse.

The case must therefore be remanded for further development. The Office should request from the employing establishment additional information on whether appellant was subjected to disciplinary action while a coworker in the same situation was not subjected to similar action. The Office should also request information on the requirements for notice of assignment to different shifts, the duration of such assignments and whether such assignments as double shifts or mandatory overtime are permitted. The Office should then prepare a statement of accepted facts, setting forth the factors of employment, if any, found to be compensable, which includes the increased work load assigned to appellant in the double shift and mandatory overtime. The Office should then refer appellant, together with the statement, any factors of employment found to be compensable and the case record, to an appropriate specialist for an examination and an opinion on whether the compensable factors of employment caused appellant's emotional condition. After further development as it may find necessary, the Office should issue a *de novo* decision.

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.17(j) (March 1994).

[9] *James W. Griffin*, 45 ECAB 774 (1994)

The decision of the Office of Workers' Compensation Programs, dated September 17, 1997, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
September 1, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member