U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK J. IMBERGAMO and U.S. POSTAL SERVICE,
POST OFFICE, Cambridge, MA

Docket No. 99-2303; Submitted on the Record;
Issued December 4, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof in establishing that he 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 claim for reconsideration on the merits pursuant to section 8128(a) on October 2, 1998 and again on June 23, 1999.

On April 24, 1997 appellant, then a 45-year-old customer service supervisor, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his depression was due to harassment by his supervisor for the past one to two years.

In various letters dated from April 19, 1997 through January 10, 1998, Dr. Alba De Simone, a psychotherapist, diagnosed severe depression due to severe job stress and stated that appellant was totally disabled due to his depression. In the May 17 and 31, 1997 letters, Dr. De Simone opined that it would be in appellant's best interest to be assigned to another unit or supervisor.

In a report dated May 5, 1997, Dr. Kathleen McKibbin, an attending Board-certified internist, noted that appellant had been diagnosed with major depression and concurred with appellant's therapist that appellant's "symptoms are clearly exacerbated by his employment situation." Dr. McKibbin further noted that appellant's difficulties with his supervisors had led to "feelings of low self-esteem and depression" and "[w]hen discussing the work situation he becomes visibly agitated and stressed which further confirms a causal relationship."

In a May 16, 1997 fitness-for-duty evaluation, Dr. Richard P. Zimon, a Board-certified internist for the employing establishment, noted that appellant had been off duty due to stress since April 16, 1997. Dr. Zimon stated that "[i]t is clear from the documentation received that he is fit for duty. However, his treating physicians believe a change in assignment would be

necessary." He added that "until a specific interpersonal relationship is dealt with in some way, the employee will continue to remain in his current status."

In response to an Office request for additional information, appellant by letter dated June 19, 1997 contended he had been subject to harassment by Tom Reardon, his supervisor. Appellant alleged that on July 10, 1997, Mr. Reardon ordered him to go to another facility and have some spare truck keys made, that when he arrived Cal Ramsey told him to have the keys made at a hardware store, and that as he was leaving Nelson Rodriques became upset with appellant for going to Mr. Ramsey about the keys. Upon appellant's return, Mr. Reardon screamed and swore at appellant, indicating that he had lied about the keys. Appellant also alleged that he had been threatened on two other occasions by Mr. Reardon and had reported these threats to Frank Carbonneau, the postmaster, who appellant stated did nothing.

Next, appellant stated that in March 1997, Mr. Reardon requested his vacation preferences but only allowed him as "a regular supervisor to take vacation dates that acting supervisors had not already taken."

Appellant stated that on July 24, 1996, Mr. Reardon and Mr. Carbonneau came to his office to talk about an accident report that had been filed by Michael Hannon on July 23, 1996, when appellant had been off duty. Mr. Reardon's manner in questioning appellant about the accident was threatening and intimidating. Next, appellant indicated that Mr. Reardon harassed him by continually altering his nonscheduled days off and his assignments. On May 15, 1996 appellant alleged that Mr. Reardon informed him there were only two jobs open to him when appellant knew there were in fact three jobs open.

On April 15, 1997 appellant was informed that his parcel post job had been given to a junior supervisor and that appellant would have Sunday and Tuesday as his nonscheduled days while the junior supervisor would have Saturday and Sunday as his nonscheduled days. Appellant also alleged that he had been scheduled to work at a time that interfered with a computer class that he wished to attend that was from 5:30 p.m. to 9:30 p.m. Lastly, appellant noted that he had filed an Equal Employment Opportunity (EEO) claim regarding his working conditions.

In a September 8, 1997 report, Dr. De Simone noted that he had been treating appellant for major depression since April 17, 1997 and that appellant indicated he had been subject to harassment for the past two years by his supervisor. Appellant stated that his supervisor intimidated him, threatened him, continually altered his nonschedule workdays and work assignments, and usurped and undermined appellant's authority as a supervisor. In conclusion, Dr. De Simone opined that appellant suffered "from serious symptoms due to his clinical depression that is directly related to the work conditions he was subjected to" which included "a significant loss of self-esteem due to the intimidation by his supervisor."

In an October 23, 1997 report, Dr. Mary McNaughton Collins, a Board-certified internist, noted that she had seen appellant on October 16, 1997 for his depression and elevated cholesterol. Dr. Collins stated that appellant had been diagnosed and treated by Dr. De Simone for major depression which was attributable to appellant's job situation.

In a statement dated November 5, 1997, Mr. Reardon responded to appellant's allegations and denied that he had harassed appellant.

By decision dated December 5, 1997, the Office denied appellant's claim on the grounds that he had not established a compensable factor of employment.

By letter dated October 30, 1997, appellant's counsel requested an oral hearing.

A hearing was held on May 20, 1998 at which appellant submitted copies of his superior achievement awards, the fitness-of-duty examination, Dr. Collins' report, and Dr. De Simone's May 18, 1998 report indicating he was fit for duty. In his testimony, appellant reiterated his allegations that Mr. Reardon had harassed him to the point that he became severely depressed.

Subsequent to the hearing, appellant's counsel submitted a copy of the January 20, 1998 EEO settlement agreement and a copy of a June 23, 1997 supervisory evaluation. In the EEO settlement agreement, the employing establishment agreed to detail appellant to human resources for an indefinite period of time and restored 600 hours of sick leave a year; and 177 hours of annual leave which was half of the leave appellant had used from April 1997 through January 1998. The settlement also included an agreement that appellant would drop his pending EEO complaints and was responsible for his attorney's fees.

By decision dated August 20, 1998, the hearing representative affirmed the December 5, 1997 Office decision. The hearing representative found that appellant had failed to substantiate his allegations and thus, failed to establish any compensable factor. The hearing representative also noted that some of the allegations involved administrative matters which were not compensable unless error or abuse on the part of the employing establishment had been established; appellant failed to establish any error or abuse.

By letter dated September 17, 1998, appellant requested reconsideration and submitted an October 23, 1997 report by Dr. Collins, a May 16, 1997 report by Dr. Zimon, two pages from Dr. De Simone's September 8, 1997 report, and an article on proving causal relationship by Bert Doyle.

By decision October 2, 1998, the Office denied appellant's request for merit review of the August 20, 1998 hearing representative's decision.

Appellant again requested reconsideration by letter dated March 31, 1999 and submitted a handwritten statement dated October 13, 1998, an employing establishment bulletin about assigning an injured worker to an appropriate assignment, a September 20, 1998 letter from Dr. De Simone, an October 5, 1998 letter from Dr. McKibbin, a December 29, 1998 letter from claimant to Congressman Moakley, a January 27, 1999 letter to Senator Kennedy's office and a copy of the January 20, 1998 EEO settlement agreement.

By decision dated June 23, 1999, the Office denied appellant's request for merit review.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

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 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]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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.[5] 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.[6]

In this case, appellant alleged that his emotional condition was caused by a number of employment incidents and conditions. By decisions dated December 5 and August 20, 1998, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under of the Act.

Appellant has alleged that harassment and discrimination by his supervisor contributed to his depression. To the extent that disputes and incidents alleged as constituting harassment and

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

discrimination by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[7] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[8]

In this case, appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[9] Appellant alleged that his supervisor yelled and screamed at him, and made statements and engaged in actions which he believed constituted harassment, but he provided no corroborating evidence, such as witnesses' statements, to establish that the statements actually were made or that the actions actually occurred.[10] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that the employing establishment improperly changed his work shifts and his days off, and disregarded his seniority in choosing vacation time. As noted above, disability is not covered where it results from frustration caused by not being permitted to work in a particular environment or hold a particular position. On the other hand, the Board has held that a change in an employee's work shift may under certain circumstances be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty.[11] Appellant's assertion that the changes in his work shifts and days off, and the disregard of his seniority in choosing vacation time were contrary to the relevant policy relates to an administrative function of the employing establishment. To show that an administrative actions such as the proposed work shift changes, day off changes and choosing vacation time implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse.[12] Furthermore, the agreement appellant made on January 20, 1998 to settle his EEO complaints does not support a finding of abuse or error on the part of the employing establishment, particularly as part of the settlement agreement appellant agreed to drop any pending EEO cases. Appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the proposed change in work shift.

[7] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[8] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[9] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[10] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[11] *See Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[13]

Next, the Board finds that Office did not abuse its discretion by refusing to reopen appellant's claim for reconsideration on the merits pursuant to section 8128(a) on October 2, 1998.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[15] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[16] 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.[17] Furthermore, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[18]

Appellant's September 17, 1998 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that appellant resubmitted medical evidence already contained in the record and that the issue was whether appellant had established any compensable factors of employment. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.[19] Consequently, the repetitive nature of this evidence renders it insufficient to warrant reopening of appellant's claim on the merits.[20]

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[13] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.138(b)(1). *See generally* 5 U.S.C. § 8128.

[16] 20 C.F.R. § 10.138(b)(2).

[17] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[18] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[19] *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, *supra* note 17.

[20] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995).

Inasmuch as the newly submitted evidence on reconsideration is both repetitious and irrelevant, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).

Lastly, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for reconsideration on the merits pursuant to section 8128(a) on June 23, 1999.

The Office's regulations were revised effective January 4, 1999. Appellant could thereafter 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office[21]

The Office denied appellant's claim for compensation based on his emotional condition because he failed to establish error or abuse on behalf of the employing establishment in the administration of his personnel matters or any evidence supporting that appellant had been harassed by his supervisor. On reconsideration, appellant has not alleged that the Office erroneously applied or interpreted a point of law; nor has he advanced a point of law or a fact not previously considered by the Office in this case. In support of his March 31, 1999 reconsideration request, appellant submitted additional medical evidence but that evidence is not pertinent to the issue in this case, which is whether appellant's supervisor acted abusively or had harassed appellant. Thus, the new evidence submitted by appellant, both in the form of argument and medical evidence, is cumulative and immaterial to the central issue of this case.[22] In conclusion, because appellant did not offer any new and relevant evidence on reconsideration to establish the factual basis of his allegations of harassment, the Board finds that the Office properly denied his request for a merit review.[23]

[21] 20 C.F.R. § 10.606(b).

[22] *Paul K. Kovash*, 49 ECAB ____ (Docket No. 96-2354, issued February 23, 1998)

[23] Appellant's allegations without corroborating witness statements were found by the Office to be insufficient to establish that he was harassed by Mr. Reardon. He has not provided any witness statements to support his claim and warrant reconsideration.

The decisions of the Office of Workers' Compensation Programs dated June 23, 1999 October 2 and August 20, 1998 are hereby affirmed.

Dated, Washington, DC
December 4, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member