U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID K. GUNTHER and U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX

Docket No. 98-1298; Submitted on the Record; Issued July 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On May 3, 1995 appellant, then a 41-year-old postal inspector, filed a claim for an emotional condition which he attributed to factors of his federal employment. By decision dated September 12, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. The Office found that appellant had not alleged any compensable factor of employment.

In a letter dated September 13, 1995, appellant requested a hearing before an Office hearing representative. By decision dated May 20, 1995, the hearing representative modified the Office's September 12, 1995 decision to reflect that appellant had established a compensable factor of employment. The hearing representative found that the employing establishment's late submissions of a Form CA-1 dated June 1994 and a Form CA-2 dated May 3, 1995 constituted administrative error. The hearing representative, however, affirmed the denial of benefits after finding that the medical evidence did not establish that the compensable factors of employment caused or contributed to appellant's emotional condition.

By letter dated June 3, 1996, appellant requested reconsideration. In a decision dated June 25, 1996, the Office denied modification of its prior decision. He again requested reconsideration on August 6, 1996. By decision dated September 16, 1996, the Office modified the hearing representative's decision to reflect that appellant had not established an injury in the performance of duty after finding that the employing establishment did not err in the late submission of appellant's claim form dated June 1994. The Office further found that the employing establishment did not intentionally delay the submission of appellant's May 1995 emotional condition claim and that therefore he had not established a compensable employment factor.

In a request for reconsideration dated October 18, 1996, appellant argued that the Office did not have the authority to modify the hearing representative's finding. By decision dated November 5, 1996, the Office denied modification of its prior decision. In a letter dated January 13, 1996, appellant requested reconsideration and, by decision dated January 21, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant merit review of its prior decision. He requested reconsideration by letter dated October 6, 1997, which the Office denied in a merit decision dated December 23, 1997.

The Board has duly reviewed the case record and 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]

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.[3] 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.[4]

In the present case, appellant essentially attributed his emotional condition to the following: (1) the employing establishment's investigation into his alleged misconduct; (2) disciplinary actions by the employing establishment; (3) harassment and discrimination by his supervisors; and (4) being placed on administrative leave and referred for a fitness-for-duty

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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] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[4] *Id.*

examination. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.[5]

Appellant attributed his emotional condition, in part, to the employing establishment's investigation into his conduct in January 1994. He contended that his supervisors, Bill Cunningham and B.L. Smith, erroneously questioned him and a friend about his sexual activities, wrongly used the word "affair" in a January 26, 1994 notice of proposed adverse action, made false statements during the course of the investigation and lied at a 650 hearing held regarding disciplinary action which arose out of the January 1994 incident. The Board notes that an employing establishment retains the right to conduct investigations if wrongdoing is suspected or as part of an evaluation process. Generally, investigations are related to the performance of an administrative function of the employer and are not compensable factors of employment unless there is affirmative evidence that the employer either erred or acted abusively in the administration of the matter.[6] Thus, appellant must support his allegations with reliable and probative evidence.

Regarding appellant's supervisors questioning him regarding his sexual conduct and using of the word "affair" in a proposed disciplinary action, appellant has not established error or abuse on behalf of the employing establishment. The record indicates that Mr. Smith issued appellant a notice of proposed adverse action, reduction-in-grade, on January 26, 1994. The employing establishment charged appellant with violating the code of ethical conduct which "governs the collection of information for official purposes" and for failing to be truthful. Mr. Smith related:

> "On January 5, 1994, [] Inspector-in-Charge Bill Cunningham, received a complaint from Ben Timberlake. [He] reported that you had conducted a surveillance of him and had run his license plates only because he was changing a flat tire for a woman with whom you had an affair."

Mr. Smith further noted that in a meeting with Mr. Cunningham on January 6, 1994 appellant initially lied about running Mr. Timberlake's license plate. Mr. Smith stated:

> "[Mr.] Cunningham then asked you about the ICW [injured compensation worker] cases you were working on at the time you went by Ms. Irving's residence. In responding you looked through your listing of periodic roll cases for several minutes and even took out a map to show [Mr.] Cunningham where you had been working. After continued questioning by [Mr.] Cunningham about your conduct, however, you admitted to him that you had lied about working on ICW cases. You admitted that you had left your office on January 4, 1994, specifically to drive by Ms. Irving's residence."

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[5] Appellant initially attributed his emotional condition, in part, to pain and limitations arising out of a prior employment-related knee injury. The Office, in its decision dated September 12, 1995, informed appellant that he should file a claim for a consequential injury associated with his accepted knee condition. In a letter dated September 13, 1995, he indicated that he had attempted to do so.

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

In a statement dated April 3, 1996, Mr. Cunningham noted that appellant alleged that the employing establishment wrongfully used the word "affair" in the notice of proposed adverse action. Mr. Cunningham stated:

> "The term 'affair' was first used by the complainant, Mr. Timberlake, when he originally complained about [appellant's] activities to me ([Mr.] Cunningham) on January 5, 1994. In the [n]otice of [p]roposed [a]dverse [a]ction dated January 26th, [] [Mr.] Smith first uses the work to describe the way the complaint was lodged by Mr. Timberlake regarding [appellant]. Later during the 650 hearing, [appellant] questioned [Mr.] Smith regarding the use of the wor[d] 'affair' and [Mr.] Smith stated, 'In my opinion, there is no importance and it could have been left out of the notice.' [Mr.] Smith was stating simply that [appellant] was not charged with having an affair. The conduct that [appellant] was charged with is clearly set out in the [n]otice of [p]roposed [a]dverse [a]ction."

Mr. Cunningham further stated that he questioned appellant "about the nature of his relationship with another individual, which was pertinent to the investigation and inquiry that was taking place" rather than about his sexual activities *per se*. Mr. Cunnigham related:

> "The initial purpose of the inquiry was to determine whether or not [appellant] had misused his position and resources available to him as a federal agent for personal reasons. As the inquiry progressed, the focus turned more toward whether or not [appellant] was telling the truth, which by necessity focused to some extent on the nature of his relationship with the individuals involved."

Mr. Smith testified at the 650 hearing that appellant did not need to discuss his sexual activities with Mr. Cunningham but that the "subject did come up." In a statement dated June 26, 1995, Mr. Smith stated that appellant "has been unable to comprehend that the administrative action was for lying, not having an "affair."

It appears from the record that the investigation by the employing establishment was into appellant's conduct in the beginning of January 1994 based on a complaint from a private citizen and that the inquiry into appellant's personal life resulted from his own misconduct, misuse of his position and failure to be truthful. Further, he has not established that his supervisors lied during the 650 hearing or made any false statements. Although appellant has alleged that the employing establishment erred and acted abusively in conducting its investigation, he did not submit sufficient evidence to support such a claim and thus has not established a compensable factor of employment.

Appellant further attributed his emotional condition to disciplinary actions taken by the employing establishment. Disciplinary actions are administrative functions of the employer and not duties of the employee. However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment[7] The mere fact that personnel actions are later modified or rescinded

[7] *Mary L. Brooks*, 46 ECAB 266 (1994).

does not, in and of itself, establish error or abuse on the part of the employing establishment.[8] Appellant received a notice of proposed adverse action, reduction-in-grade, on January 26, 1994, which was subsequently changed to a suspension for two weeks from October 24 to November 7, 1994. He further received an October 13, 1995 notice of proposed adverse action, reduction-in-grade, for insubordination. Appellant did not submit any evidence showing that these actions were unwarranted or constituted error or abuse by the employing establishment.

Regarding the employing establishment's referral of appellant for a fitness-for-duty examination and placing him on administrative leave pending the result of the examination, appellant has presented no evidence of administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act. He also contended that he was emotionally distressed when, in a meeting on February 9, 1995, Mr. Smith told him that he wanted him to accept a transfer. Mr. Smith explained that appellant had requested placement on a transfer list and that he thought a transfer for appellant should be pursued in view of the his reaction to recent disciplinary matters arising from the January 1994 incident. As matters regarding a transfer or the denial of a transfer are not compensable absent a showing of error or abuse by the employing establishment, appellant had not established a compensable factor of employment.[9]

Appellant has also alleged that harassment and discrimination on the part of his supervisors contributed to his claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[10] 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.[11] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.[12] He contended, *inter alia*, that his supervisors called him derogatory names at the 650 hearing and that the chief postal inspector referred to the facts of his case in a speech given October 1994. Appellant further claimed that his supervisors harassed and discriminated against him because he filed claims for workers' compensation. In response, his supervisors denied calling him derogatory names at the 650 hearing or discriminating against him because he filed workers' compensation claims and the chief postal inspector denied referring to appellant's case in his October 1994 speech. As appellant has not submitted any evidence supporting his allegations, they cannot be considered compensable factors of employment.

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[8] *Garry M. Carlo*, 47 ECAB 299 (1996).

[9] *Minnie L. Bryson*, 44 ECAB 713 (1993).

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

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

[12] *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).

Appellant further contended that, as part of the harassment, his supervisors did not timely file a June 1994 traumatic injury claim or the emotional condition claim which is the subject of the instant proceedings. Section 10.102 of the regulations implementing the Act provides that written notice an injury must be filed by the employing establishment to the Office within 10 working days if it is likely to result in medical charges against the Office, disability for work beyond a day, prolonged medical treatment, future disability, a permanent impairment or continuation of pay.[13] Regarding the late submission of appellant's traumatic injury claim, Mr. Cunningham stated:

> "[Appellant] attempts to show an intentional pattern of willful discrimination as a result of a late submission of a CA-1 completed by [appellant] on June 14, 1994. [Mr.] Smith takes full responsibility for any delay which may have been experienced; however, the delay was not intentional but rather an oversight and a result of administrative errors. Additionally, this injury was classified as a first-aid injury and [appellant] received medical attention at a contract medical facility with the [employing establishment] where the treating physician indicated no further treatment was required. In accordance with Department of Labor regulations, the CA-1 was sent to the [h]uman [r]esources office of the inspection service in California and kept in the employee's file."

As appellant's June 1994 injury to his toe was initially classified as a no-time lost case, the employing establishment did not err in failing to file the claim with the Office within 10 working days. Regarding appellant's emotional condition claim, which was signed by appellant and Mr. Smith on May 4, 1995 and received by the Office on July 17, 1995, the Board finds that there is no evidence to support appellant's contention that it demonstrated harassment by his supervisors. Appellant has not alleged that the late filing itself caused his emotional condition but instead that it demonstrated harassment on behalf of the employing establishment, an intentional attempt to prevent his claim from proceeding and a lack of "good faith." In a letter dated June 12, 1995, an official with the employing establishment explained that appellant's supervisor had not yet finished preparing comments to accompany the claim but that the supervisor had been asked to forward the claim to the Office "[s]o as not to delay the submission of [appellant's] claim any longer...." It does not appear from the record that the employing establishment delayed the submission of appellant's emotional condition claim in order to harass him, as alleged. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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.[14]

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[13] 20 C.F.R. § 10.102.

[14] 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).

The decision of the Office of Workers' Compensation Programs dated December 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member