U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEDRO L. CASIAS and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

Docket No. 99-383; Submitted on the Record;
Issued July 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On December 3, 1997 appellant, then a 44-year-old senior operations analyst, filed an occupational disease claim, alleging that his emotional condition was due to a stressful environment at work caused by his supervisor, Ralph Barnard, and his associates, including Mr. Barnard's wife, Jan Barnard, a senior labor relations specialist, and others in upper management. He stopped work that day. On the reverse of the claim form, Mr. Barnard noted that appellant had been reassigned due to disciplinary measures for just cause. By letter dated December 31, 1997, the Office informed appellant of the type of information needed to support his claim. Following further development, by decision dated April 8, 1998, the Office denied the claim, finding that appellant failed to establish compensable factors of employment. In a letter postmarked May 22, 1998, appellant requested a hearing. In a July 17, 1998 decision, an Office hearing representative denied appellant's request on the grounds that it was not timely filed. The instant appeal follows.

In support of his claim, appellant submitted a statement dated November 26, 1997 in which he described incidents that occurred on October 30, 1996 including a discussion with one of his subordinates, Kay Gonzalez, and a confrontation with her husband later that day in which appellant stated that Mr. Gonzalez locked the door to appellant's office and pulled his telephone cord from the wall. Appellant alleged that he notified the inspection service and labor relations concerning the confrontation with Mr. Gonzalez but heard nothing further and voiced his fear that Mr. Gonzalez was stalking him. He enumerated other factors including that Mr. Barnard undermined his authority by reassigning Mrs. Gonzalez to report directly to him, that Mrs. Barnard telephoned him to blame him for the results of an Equal Employment Opportunity Commission (EEOC) decision, that Mr. Barnard called him a "smart-ass," and that he was

reassigned to a position not within his job knowledge where he had to eat and take breaks with craft employees. Appellant also submitted copies of memoranda addressed to Mr. Barnard dated October 31, 1996 in which he described the incidents that had occurred the previous day.

Appellant also submitted a statement received by the Office on January 27, 1998 in which he additionally alleged that Mr. Barnard would not allot him additional staff, that he had associates listen in on appellant's telephone conversations, and that he made unreal demands on appellant regarding, *inter alia*, travel policy, use of red ink, allowing insubordination of appellant's staff, and that analysts assigned to appellant were detailed elsewhere without replacements being supplied. Appellant also alleged that his department was understaffed and he worked late almost daily and took work home with him, that he was not sent to training in order to "enhance" his performance, that his workspace was changed from an office to a cubicle and that when Mr. Barnard was out of town, appellant was supervised by a lower level employee.

The record contains a Merit Systems Protection Board (MSPB) decision dated March 21, 1995 in which an employing establishment action demoting appellant was changed to a 60-day suspension. The MSPB found that the employing establishment had proven improper conduct by appellant for inappropriate and abusive comments and in rifling employees' desks and taking personal materials without authorization but that the demotion exceeded the bounds of reasonableness. The record indicates that appellant filed an EEO claim regarding the demotion.

Regarding the October 30, 1996 incident, Mr. Barnard submitted an incident report in which he noted that appellant and Mrs. Gonzalez had told him conflicting stories about what occurred between the two of them. He also stated that Mr. Gonzalez talked with him regarding his concerns regarding the situation between Mrs. Gonzalez and appellant and his concerns regarding her safety. Mr. Barnard stated that appellant voiced his concerns about Mr. Gonzalez. Mr. Barnard advised appellant that he would reassign Mrs. Gonzalez to neutralize the situation.

The employing establishment submitted a notice of proposed reduction in grade dated November 5, 1997. The basis for the reduction was improper conduct (retaliation) on appellant's part. By letter dated December 16, 1997, the reduction was finalized. Appellant was reassigned to a position of part-time city carrier, effective January 3, 1998.

In a December 31, 1997 statement, Mr. Barnard, Manager, Operations Program Support, countered appellant's claims regarding management decisions. He advised that the job where appellant was placed in November 1997 did not require familiarity with the subject and stated that appellant's usual workday was 8:00 a.m. to 5:00 p.m. Monday through Friday. He advised that appellant seldom worked more than eight hours. Regarding the "smart-ass" comment, Mr. Barnard admitted that, while he did not call appellant a "smart-ass," he told appellant that his actions regarding travel accommodations for visiting managers were "smart-ass" because appellant had made a bad business decision that would cost the employing establishment approximately $500.00.

Carrie Kesterson, Manager, Transportation/Networks, submitted a statement dated January 5, 1998 in which she noted that appellant had been assigned to her on November 5, 1997. She noted that she scheduled training for appellant and explained why he did not have an office.

In a January 16, 1998 statement, Janette Barnard, Labor Relations Specialist, advised that her job representing the employing establishment in arbitration and EEO matters required that she provide guidance to employees and explained that she discussed specific findings with the implicated employees, including appellant. She attached copies of EEO decisions and employing establishment conclusions with findings adverse to appellant.

In a statement dated February 25, 1998, Mrs. Gonzalez advised that in 1994 appellant had searched her desk and stolen personal property. She also described what she considered harassment and discrimination by appellant including the events of October 1996.

The relevant medical evidence in this case[1] consists of a January 5, 1998 report written by Nancy M. Daniels, a nurse counselor, and signed by Dr. Joe Simpson, a Board-certified psychiatrist. The report states:

> "[Appellant] continues to be unable to work due to medical problems. He is actively involved in a treatment program. He must remain off work for an indefinite period of time and will not be able to perform work of any kind until his condition is significantly improved. It is unlikely that he will be able to return to work prior to January 27, 1998."

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 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 his emotional condition.[2] Workers' compensation law is not applicable to each and every injury or illness that is somehow related to 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.[3] 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.[4] The disability is

[1] Appellant also submitted reports from Nancy M. Daniels, R.N., M.N.C.S. and Michael Davis, L.M.S.W. The Board notes that a report from a licensed clinical social worker is not medical evidence, as it is not the report of a "physician" as defined in section 8101(2) of the Act. *See Frederick C. Smith*, 48 ECAB 132 (1996). Similarly, a registered nurse is not a physician and a nurse's opinion regarding diagnosis or causal relationship is of no probative value. *See Sheila A. Johnson*, 46 ECAB 323 (1994).

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

[3] 5 U.S.C. § 8101 *et seq.*

[4] *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

not covered when it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position. Disabling conditions resulting from an employee's feelings of job insecurity, or the desire for a different job, promotion, or transfer do not constitute personal injury sustained in the performance of duty within the meaning of the Act.[5]

Regarding appellant's allegations, as a general rule, a claimant's reaction to administrative or personnel matters fall outside the scope of coverage of the Act. Absent error or abuse on the part of the employing establishment, administrative or personnel matters, although generally related to employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee.[6] Likewise, an employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which a supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his or her duties and that in performance of these duties, employees will at times dislike actions taken. Mere disagreement or dislike of a supervisory or management action is not actionable, absent evidence of error or abuse.[7] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[8] To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.[9] Moreover, for harassment to give rise to a compensable disability under the Act, there must be some evidence that acts alleged or implicated by the employee did, in fact, occur. A claimant's own feeling or perception that a form of criticism or disagreement is unjustified, inconvenient or embarrassing is self-generated and should not give rise to coverage under the Act absent objective evidence that the interaction with his or her supervisor was, in fact, abusive.[10]

In this case, there is nothing to indicate that Mr. Barnard acted inappropriately in reassigning Mrs. Gonzalez or in any other way acted in an abusive manner toward appellant. Likewise, while appellant made a general allegation regarding overwork, he provided no specific explanation, and Mr. Barnard reported that appellant generally worked 8 a.m. to 5 p.m.

The Board, however, finds that the MSPB decision dated March 21, 1995 establishes that the employing establishment committed error in demoting appellant. The Board nonetheless finds that appellant did not meet his burden of proof to establish that his emotional condition was work related because he did not submit rationalized medical evidence explaining how the demotion caused or aggravated his emotional condition. By letter dated December 31, 1997, the

[5] *See Elizabeth Pinero*, 46 ECAB 123 (1994).

[6] *Gregory N. Waite*, 46 ECAB 662 (1995).

[7] *Daniel B. Arroyo*, 48 ECAB 204 (1996).

[8] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[9] *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

[10] *Daniel B. Arroyo, supra* note 7.

Office informed him of the type of evidence necessary to establish his claim which was to include a comprehensive medical report from his physician with an explanation of how employment exposure caused his condition. The only medical evidence of record is a January 5, 1998 report from Dr. Simpson who indicated that appellant could not work for a period of time and provided no opinion regarding the cause of his condition. Appellant, therefore, has not established a compensable employment factor and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.

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

Here, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its July 17, 1998 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request had not been made within 30 days of its April 8, 1998 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether he sustained an employment injury could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] In the present case, appellant's request for a hearing was postmarked May 22, 1998 and was thus made more than 30 days after the date of issuance of the Office's prior decision dated April 8, 1998. On appeal, appellant alleges that the Office did not mail the April 8, 1998 decision until April 15, 1998. Even if this were true, his request postmarked May 22, 1998 was not been made within the required 30 days. The Office was therefore correct in stating in its July 17, 1998 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its July 15, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether he sustained an injury causally related to factors of employment could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[12] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.[13]

[11] *Henry Moreno*, 39 ECAB 475 (1988).

[12] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[13] The Board notes that appellant submitted additional evidence subsequent to the Office April 8, 1998 decision and with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is

The decisions of the Office of Workers' Compensation Programs dated July 17 and April 8, 1998 are hereby affirmed.

Dated, Washington, D.C.
July 13, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).