U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERMAN HOWARD and DEPARTMENT OF THE AIR FORCE, AIR FORCE AUDIT AGENCY, ANDREWS AIR FORCE BASE, Washington, DC

Docket No. 98-599; Submitted on the Record;
Issued March 24, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he developed an emotional condition in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On September 20, 1994 appellant, then a 47-year-old auditor, filed a claim for mental stress, which he related to harassment and discrimination at work. In support of his claim appellant submitted more than 30 documents including personal narrative statements, witness affidavits, copies of Equal Employment Opportunity (EEO) complaints, investigations and decisions and medical evidence. Appellant did not stop work but missed intermittent time from work on the advice of his physicians, as a result of his emotional condition. In a letter dated November 2, 1994, Frances E. Jacobs, a representative of the employing establishment, controverted appellant's claim. By decision dated September 9, 1995, the Office rejected appellant's claim on the grounds that the evidence submitted by appellant was insufficient to establish that his diagnosed emotional condition arose in the performance of his federal employment duties. Following appellant's request for an oral hearing, in a decision dated June 13, 1997 and finalized June 16, 1997, an Office hearing representative affirmed the prior decision.

Subsequent to the hearing representative's decision, appellant requested reconsideration and submitted additional evidence in support of his request. In a decision dated November 14, 1997, the Office found that the evidence submitted with appellant's request was insufficient to warrant merit review of his claim. The instant appeal follows.

The Board finds that appellant failed to meet his burden of proof to establish that he developed an emotional condition in the performance of duty.

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, rather, caused by the employing establishment.[3]

In his narrative statements and in his hearing testimony, appellant noted that the job of auditor is highly stressful, involving strict deadlines and an often hostile or adverse working environment. Appellant explained that his job required him to perform on-site audits and as his final recommendations sometimes resulted in the elimination of jobs, he was not favorably received and was sometimes given a hard time. He added that, while he was not required to work overtime, if he wanted to finish his projects in a reasonable amount of time, he worked overtime and did not report it to management. Appellant indicated that because the position was already stressful, any additional stress from his own employing establishment management made things worse. For example, appellant stated that if he did not meet his audit deadlines he was "marked down" and that the fact that he was always being called into his supervisor's office for one thing or another caused him to lose time on his audits and to miss goals, which added to his level of stress. Appellant explained that his problems began in 1990 when he was transferred to a new supervisor, a white, female, Air Force Major, whom he believed discriminated against him. He alleged that he was often required to do things that other auditors were not required to do, such as give morning and afternoon briefings, informing his supervisor of his daily progress, and was not allowed as others were, to get help from his coworkers. He alleged that his work was criticized more than that of white auditors in his branch, that this criticism was done openly in front of others, that his supervisor took credit for his suggestions, that his branch chief told him he was lazy and that he received satisfactory, rather than excellent, performance appraisals for the periods July 1, 1991 to June 30, 1992 and July 1, 1992 to June 30, 1993, which resulted

[1] *Lillian Cutler*, 28 ECAB 125 (1976).

[2] *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Allen C. Godfrey*, 37 ECAB 334 (1986); *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).

in his being denied a promotional opportunity. Appellant also asserted that he was reprimanded, counseled and given unusual directives as reprisals for having filed EEO claims. Appellant also asserted that the general office environment was hostile and discriminatory in that his white coworkers did not speak to him and did not include him in their activities. Appellant stated that he has had no problems since 1995 when he was transferred to Texas.

By letter dated November 2, 1994, the employing establishment contested appellant's allegations, stating that appellant's job did not require him to work overtime and that his emotional condition arose from his disagreement with his performance appraisals rather than from the duties of his position. The employing establishment also submitted information establishing that in addition to a 1990 EEO complaint, which was settled without admission of wrongdoing by the agency, appellant filed an EEO claim on September 5, 1992 pertaining to his performance appraisal, he filed two EEO claims on March 7, 1994 contesting his performance appraisal and alleging unfair treatment and reprisals, he filed a May 12, 1994 EEO claim contesting a performance feedback and counseling letter he received and on July 28, 1995, and he filed an EEO claim contesting the nonextension of his overseas tour. The 1992, 1994 and 1995 claims are still pending.

Initially, the Board finds that appellant has established that he had a very heavy work load and that his work as an auditor was stressful by its nature and these assertions were not refuted by the employing establishment. The Board has held that where a claimant demonstrates a heavy work load or overwork as part of their job requirements, reactions from the heavy work load are compensable.[4] However, in the instant case, appellant does not appear to be asserting that the responsibilities of the job itself caused his anxiety reaction. Rather, he has attributed his condition to alleged incidents, which he characterizes as harassment and hostility at the employing establishment. Based on the evidence submitted, the Board finds that the record does not support appellant's allegations.

With respect to appellant's specific allegations that he was reprimanded, counseled and given unusual directives as reprisals for having filed EEO claims, the Board finds that appellant has not met his burden to establish that harassment or discrimination occurred with respect to these matters. The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment, may constitute factors of employment giving rise to coverage under the Act. 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.[5] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[6] To establish entitlement to benefits, a claimant

[4] *O. Paul Gregg*, 46 ECAB 624 (1995) (where the Board held that appellant demonstrated that changes in the employing establishment procedures resulted in an increased work load in appellant's regular day-to-day duties and constituted a compensable factor of employment).

[5] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *William P. George*, 43 ECAB 1159 (1992).

[6] *See Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991); *Arthur F. Hougens*, 42 ECAB 455, 462 (1991); *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7] In this case, appellant has not established that his supervisors harassed or discriminated against him, as alleged, when issuing reprimands, counseling letters or performance appraisals. The review of an employee's work performance is an administrative matter and, therefore, is not considered to be a compensable factor of his employment unless the employing establishment was in error or abusive in these administrative matters.[8] There is no evidence of record that the actions of appellant's supervisors or the employing establishment were in error or abusive to appellant with respect to these administrative functions.

In an affidavit dated September 22, 1994, Lieutenant. Colonel Kirk K. Links, Chief, Resource Management Services, stated that he could confirm that with respect to appellant's performance, Mr. Kinzig, appellant's supervisor, was "[m]ore negative than towards any other member of his staff," and that Mr. Kinzig acknowledged being critical of appellant's work. However, Lt. Co. Links indicated that he could not determine whether discrimination, as alleged by appellant, was ever a factor in his performance appraisals. While Lt. Co. Links' statement, as well as statements by several unidentified witnesses referenced in an EEO counselor's summary report dated November 17, 1993, indicate that appellant may have been referred to as a "slacker," such evidence is not specific as to the dates, time or individuals involved. It does not appear from the record that appellant complained of this term being made directly to appellant by any coworker or supervisor.[9] The record also contains a November 28, 1990 affidavit from Captain Laura L. Patterson, who became appellant's first line supervisor in April 1989. She noted that she heard Major Pesola, appellant's subsequent supervisor, speak to him in a "demeaning" way. Capt. Patterson's statement, however, is not specific as to the comments she overheard and merely provides her own perceptions of Major Pesola's actions. This evidence is insufficient to establish that appellant was discriminated against. The record contains an affidavit dated October 2, 1994 in which Ms. Carolyn M. Richards, Secretary, Air Force Audit Agency, stated that she overheard appellant's supervisors, Mr. Kinzig and Mr. Giancola, make critical remarks about appellant. She indicated that when appellant made a comment or asked a question in staff meetings, "the white auditors would look at each other as if to say 'how stupid can you get.'" Ms. Richards stated that the staff "made sport" of appellant, treated him as if he were not "very bright," and would openly criticize him and "enjoyed making a mockery of his audit reports." This statement again is not specific as to the dates, time and individuals alleged to have made comments and only provides Ms. Richards' own perceptions of the motives of the individuals involved. This evidence is insufficient to establish harassment directed towards appellant.

In *Kathleen D. Walker*,[10] the employee attributed her emotional disability, in part, to disputes with coworkers. The Board noted that, while disputes arising from the performance of one's duties could give rise to coverage under the Act, the employee's unfounded perceptions

[7] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993).

[8] *See Thomas D. McEuen*, *supra* note 3.

[9] *See Mary A. Sisneros*, 46 ECAB 155 (1994).

[10] *Supra* note 6.

could not constitute a compensable factor of employment. In *David W. Shirey*,[11] the employee asserted that he had been called a "sucker" by a coemployee. However, the Board found that the employee did not provide sufficient details of specific verbal exchanges or incidents such that his assertions represented vague and general allegations of long-term job dissatisfaction. In *Gracie A. Richardson*,[12] the employee asserted that she was devastated by perceptions of coworkers gossiping behind her back and spreading rumors concerning her marital and personal relationships. The Board found that employee's perception of gossip and rumors was a personal frustration, which was not established by the evidence of record, nor related to her job duties or requirements and, therefore, was not compensable. In *Mildred D. Thomas*,[13] the employee perceived an unsympathetic atmosphere among her coworkers following her return from bereavement leave and alleged harassment by coworkers. The Board held that the employee's perceptions were not compensable and that her general allegations of harassment were not sufficiently specific to support her claim of an emotional disability.

It is well established that verbal altercations or abuse among coworkers may constitute a compensable factor of employment.[14] This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[15] For the foregoing reasons, appellant has not submitted evidence sufficient to establish a compensable factor of employment and has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.[16]

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Following the decision dated June 13, 1997 appellant requested that the Office reconsider his case. In support of this request for reconsideration, appellant submitted copies of evidence previously submitted as well as three new witness statements. These new witness statements, however, are not supportive of appellant's claim. In a statement dated December 6, 1990, Ray Marcel Jordan, who identified himself as a black male, did not confirm appellant's allegations of discrimination but rather stated that he had not noticed any differences in the way management generally treats employees because of race or sex. Similarly, in a statement dated September 2, 1994, Cindy G. Aydt, who identified herself as a white female, refuted appellant's allegations stating that she strongly disagreed that management at the employing establishment permitted an office environment to exist that subjected appellant to discrimination, that she did not believe

[11] 42 ECAB 783 (1991).

[12] 42 ECAB 850 (1991).

[13] 42 ECAB 888 (1991).

[14] *Mary A. Sisneros*, *supra* note 9.

[15] *Id.*

[16] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

appellant had in fact been subjected to any racial or sexual discrimination and that she felt appellant had caused his own isolation from other staff members due to his attitude and work behavior. Finally, in a statement dated September 13, 1994, Gena Goode, also a white female, asserted that she had no reason to believe that appellant was discriminated against by his coworkers based on his race or sex and that she had neither witnessed nor heard racially or sexually discriminatory acts or comments against appellant by anyone in the office.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[17] Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[18]

The Office in denying appellant's application for review properly noted that, as appellant neither raised substantive legal questions not previously considered by the Office nor submitted relevant evidence supportive of his claim, appellant's arguments and new evidence did not require a reopening of the case for merit review.

[17] 20 C.F.R. § 10.138(b)(1).

[18] 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated November 14 and June 13, 1997 and finalized June 16, 1997 are hereby affirmed.

Dated, Washington, D.C.
March 24, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member