

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE M. BERARDI and DEPARTMENT OF THE NAVY,
NAVY SHIPS PARTS CONTROL CENTER, Mechanicsburg, PA

*Docket No. 97-630; Oral Argument Held February 10, 2000;
Issued May 10, 2000*

Appearances: *Suzanne E. Berardi, for appellant; Miriam D. Ozur, Esq., for the Director, Office
of Workers' Compensation Programs.*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

On December 27, 1994 appellant, then a 39-year-old library technician, filed an occupational disease claim alleging that he sustained an emotional condition, which he attributed to being criticized by his supervisors regarding the quality of his work, being closely monitored by his supervisors, being criticized for his use of leave and being asked to provide medical documentation to support his absences and receiving a proposal to terminate his employment.

In a written statement, appellant stated that he received a letter of admonishment in January 1990 from supervisor William Little for throwing out a box of documents by mistake, that Mr. Little slandered and threatened him at a meeting in March 1990, that in August 1991 he received a letter of admonishment from supervisor Dale Zulli stating that appellant's performance had fallen below minimally successful, that he received another letter of admonishment regarding misfiled library cards, that he was criticized by Mr. Zulli in March 1992 for talking too long on the telephone, that in April 1992 Mr. Zulli threatened him with disciplinary action for not filing books in the movable stacks, that in July 1992 he received a notice of proposed removal, that in July 1992 Mr. Zulli, supervisor William Evans and coworker Judy Cashman libeled and slandered him and that in December 1992 he was coerced into signing a settlement agreement regarding his complaint filed with the Merit Systems Protection Board (MSPB).

In a notice of proposed removal dated July 2, 1992, Mr. Zulli advised appellant that the employing establishment proposed to terminate him from his position due to the failure to carry

out his work assignments, being absent without official leave and failure to properly request leave.

In an undated statement, J.W. Long stated that he was appellant's second level supervisor from March 1987 through September 1990. He stated that appellant continually used all of his leave as soon as he had earned it and that he was given numerous memoranda concerning his excessive use of leave and reprimands for unauthorized absences. Mr. Long noted that appellant was suspended several days for misconduct and that he was offered assistance with any work or personal problems he might have.

In a report dated July 7, 1992, Dr. Frank J. Battista, appellant's attending Board-certified family practitioner, related that appellant had been his patient for the past 17 years and had chronic difficulty with anxiety, a personality disorder and alcohol abuse. He stated his opinion that appellant's difficulties would continue to be aggravated by his work situation, which appellant perceived as unsupportive and demanding.

In a letter dated July 10, 1992, supervisor Bill Little related that appellant worked for him as a supply clerk from July 30, 1989 to April 22, 1990 and was subsequently reassigned as a result of his complaints of being harassed and his job being too stressful. He stated that during the nine months he supervised appellant he required frequent monitoring and supervision in order to maintain a minimally successful job performance level and frequently requested sick leave and unscheduled annual leave. Mr. Little stated that his conversations with appellant regarding the need to improve his performance were interpreted by appellant as harassment.

In a memorandum dated July 16, 1992, Mr. Zulli provided a description of appellant's job duties. He indicated that appellant received letters of admonishment for the unsatisfactory quality of his work and he provided a detailed list of incidents regarding appellant's job performance and information regarding appellant's absences from work. Mr. Zulli noted that appellant had made complaints of harassment in the past and had always requested reassignment to resolve the problems and, therefore, he had worked under five supervisors in the past five years. Mr. Zulli indicated that appellant's complaints did not stop despite his numerous reassignments.

The record shows that appellant filed a complaint with the MSPB alleging that his removal by the employing establishment was not justified, that his failure to properly request leave and being absent without official leave was due to management's failure to approve properly submitted and documented requests for leave and that he was discriminated against because of his medical conditions of anxiety and depression. A settlement agreement was reached on December 4, 1992 between appellant and the employing establishment. Under the terms of the agreement, appellant agreed to apply for disability retirement and the employing establishment agreed to cancel its removal action. Appellant agreed to resign from the employing establishment if his application for disability retirement was not approved.¹

¹ The record shows that appellant's application for disability retirement was denied and that the employing establishment processed his resignation and separated him in September 1993.

In a report dated December 11, 1992, Andrea Johnson, a therapist, related that appellant was being counseled for depression, generalized anxiety disorder and alcohol abuse and she indicated that work stress was a factor.²

In a report dated March 4, 1994, John Tardibuono, a psychologist, provided a history of appellant's condition, noting that he had been involved in a drug and alcohol rehabilitation program in the early 80's. He related that appellant had been taking medications, including antidepressants, since he was 16 or 17. Mr. Tardibuono provided the results of a mental status examination and diagnosed major depression, panic disorder and a personality disorder.

In a report dated July 18, 1995, Dr. Battista related that appellant felt that his medical history was a cause for discrimination and oppressive supervision at work. He stated his opinion that appellant's job aggravated his emotional condition.

By decision dated September 14, 1995, the Office of Workers' Compensation Programs denied appellant's claim.

By letter dated September 25, 1995, appellant requested an oral hearing before an Office hearing representative.

On April 16, 1996 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated August 23, 1996, the Office hearing representative affirmed the Office's September 14, 1995 decision.

The Board finds that appellant has failed to meet 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.³ 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.⁴

² It is not evident that Ms. Johnson qualifies as a clinical psychologist or other physician under the Act; *see Jane A. White*, 34 ECAB 515, 518-19 (1983).

³ 5 U.S.C. §§ 8101-8193.

⁴ *See Thomas D. McEuen*, 41 ECAB 387, 391 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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.⁵ 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.⁶

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.⁷ 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.⁸

Regarding appellant's allegations that the employing establishment issued unfair disciplinary letters and evaluations regarding his job performance, criticized and reprimanded him for his excessive use of leave and required medical documentation for his absences and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁹ Although the handling of employment evaluations, discipline, leave requests and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁰ However, the Board has also found that 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.¹¹ In this case, several of appellant's supervisors submitted statements in which they stated that appellant had abused his use of leave and had many unauthorized absences and, therefore, appellant was required to provide medical documentation regarding his use of sick leave. His supervisors also stated that appellant's job performance was below the minimally successful standard and he needed close supervision due to numerous mistakes in performing his tasks. The supervisors noted that appellant was granted transfers several times to attempt to resolve his complaints concerning his supervisors, although

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473 (1993).

⁷ *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁸ *Margaret S. Krzycki*, *supra* note 7.

⁹ *See Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹⁰ *Id.*

¹¹ *Id.*

the employing establishment felt that the complaints were without merit, but that appellant was not satisfied in any of his job assignments and reacted to criticisms of poor performance by filing complaints of harassment and discrimination. The Board finds that there is insufficient evidence of record to establish that the employing establishment erred or acted abusively or unreasonably in regard to its handling of administrative or personnel matters and, therefore, appellant has not established a compensable employment factor under the Act in this respect.

Regarding the employing establishment's proposed removal of appellant, 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.¹²

Regarding appellant's allegation of denial of promotions, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.¹³ Thus, appellant has not established a compensable employment factor under the Act in this respect.

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 or co-workers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁴ 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.¹⁵ In the present case, in a complaint filed with the MSPB, one of appellant's allegations was that the employing establishment discriminated against him regarding his conditions of anxiety and depression. However, 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.¹⁶ Although appellant's MSPB complaint resulted in a settlement agreement with the employing establishment in which appellant agreed to retire or resign if the employing establishment agreed to cancel its removal action, the employing establishment did not admit discrimination or harassment and the MSPB made no finding of harassment or discrimination. Appellant alleged that he was coerced into signing the settlement agreement but he provided no evidence in support of this allegation. Appellant also alleged that his supervisors and a coworker threatened,

¹² *Lillian Cutler*, *supra* note 5.

¹³ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹⁴ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁵ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁶ *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).

libeled and slandered him but he submitted insufficient evidence to support this allegation. Thus, appellant has not established a compensable employment factor under the Act in this respect.

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.¹⁷

The decision of the Office of Workers' Compensation Programs dated August 23, 1996 is affirmed.

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

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki, supra* note 7.