U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH E. JORDAN and U.S. POSTAL SERVICE,
POST OFFICE, Wilmington, DE

Docket No. 98-2211; Submitted on the Record;
Issued September 22, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

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

The Board has duly reviewed the case on appeal and finds that appellant failed to meet his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

Appellant filed an occupational disease claim on May 12, 1995, alleging that he sustained an emotional condition due to mental abuse and harassment from coworkers. In a supplemental statement, appellant alleged that his coworkers called him derogatory names for the past seven to eight years; on February 6, 1995 a derogatory photograph of cockroaches was left in his work area, on April 13, 1995 a coworker (Jim Keeton) made a threatening gesture with his hands with the supervisor (Isaiah "Ike" Boyer) present, which caused appellant to become upset and leave work to seek medical treatment. The record reflects that appellant's supervisor requested medical justification for an unscheduled absence following a disagreement regarding overtime. The Office of Workers' Compensation Programs denied appellant's claim on September 27, 1995 finding that the evidence of file failed to demonstrate that appellant's stress-related condition arose out of the performance of appellant's regular or specially assigned duties. Appellant requested an oral hearing. The hearing representative noted that appellant's attorney, in a July 19, 1995 response, described, in addition to the above incidents, other incidents, which appellant alleged constituted abuse and harassment from coworkers. These included: an incident in late February 1995 whereby appellant was called a curse word by a coworker, a situation in which appellant took emergency annual leave on March 17, 1995 to assist his daughter and was told to bring in doctor certification and, when he arrived back to work on March 20, 1995 he was told by different individuals that he was in trouble with management as it was suspected that he was at a pub or bar; a rubber was placed at appellant's work station; appellant's work and personal vehicle had been vandalized in the work parking lot and when appellant returned to work in July 1995 he found a note which said his time was coming to an

end. By decision dated July 25, 1996 and finalized July 26, 1996, an Office hearing representative denied appellant's claim finding that appellant failed to establish any compensable factors of employment. In an October 7, 1996 letter, appellant requested reconsideration and submitted additional evidence and argument.

A letter dated March 8, 1995, which served as a formal Equal Employment Opportunity (EEO) complaint alleged that, appellant was frequently called names, phrases and curse words on the workroom floor for several years, appellant found a derogatory photocopy of a bunch of cockroaches in his workcase drawer on February 6, 1995 and that new employees call him derogatory names thinking they were nick names. On May 31, 1995 the EEO complaint was withdrawn after it was agreed that both the employing establishment and appellant would take affirmative steps to stop harassment of any kind including name calling or comments made for the purpose of harassing a coworker. None of the stipulations were factual findings pertaining to any of the incidents appellant alleged in his complaint.

A July 30, 1996 notice of suspension noted that the employing establishment included the April 13, 1995 incident as a work-related injury/accident in arriving at its conclusion that appellant had failed to work in a safe manner.

An August 1994 conduct in the workplace -- policy noted that complaints on the subject of harassment, ethnic and derogatory statements and physical and verbal abuse have continued to surface at both the national and district level of the employing establishment and advised the employees from every level to report any and all behaviors that are threatening, intimidating or hostile.

A February 7, 1995 note from appellant's supervisor reflects that he advised all the workers of zone 10 that an offensive photograph was placed in a carrier's drawer at his case and the carrier did not think it was funny. The supervisor instructed all the carriers to immediately cease from such activity and to stop name calling and teasing of other carriers. He additionally asserted that the matter would be investigated.

Duplicate copies of an April 13, 1995 statement from Mr. Keeton, the coworker whom appellant alleged made the threatening gesture on April 13, 1995 and statements from Mr. Boyer, supervisor, relating to the April 13, 1995 incident were received.

Appellant's attorney also advanced legal arguments and contentions of error. He noted error with Dr. Perry A. Berman's report stating that the report was more of a legal discussion than a bona fide attempt at a psychiatric evaluation and advanced specific arguments pertaining to Dr. Berman's report. Appellant's attorney also argued that the Office hearing representative erred in finding that in order for appellant's claim to be compensable, there must be an intent to cause harm or abuse by the employer shown and referenced the case of *Burke v. United States of America*[1] for the proposition that the hearing representative utilized the wrong legal standard. Under *Burke*, appellant argued that a claim is compensable without any showing of fault as it only has to be shown that the condition is related to the conditions under which the employee

[1] 644 F. Supp. 566 (E.D. LA. 1986).

worked or the duties he was required to perform and that he required medical treatment or was disabled for work.

By decision dated September 30, 1997, the Office denied modification of its prior decision for the reason that the evidence submitted in support of the reconsideration request was not sufficient to modify the prior decision.

Appellant again requested reconsideration by letter dated December 23, 1997 and advanced new arguments and submitted additional evidence. Appellant, through his attorney, stated that the harassment and credibility of appellant have never been challenged and asserted that the harassment occurred in the workplace and was in direct retaliation of appellant reporting violations of postal policy. Appellant thus argued that the retaliatory actions by coworkers are related to his employment and supported this contention with excerpts from the Postal Service Labor Relations Manual.

Appellant also argued that the September 30, 1997 reconsideration decision purports to be a merit decision, but instead concerns the scope of the Federal Employees' Compensation Act, coverage in ruling that the injury was "not within the scope of performance of duty" and "not considered to have developed a medical condition in the performance of duty." Appellant accordingly asserted that the September 30, 1997 decision departed from the *Burke* case, which was argued in that decision. Appellant again reiterated that the Act does not require proof of employer negligence and an employee's fault is not relevant. Appellant further asserted that, even if the evidence does not prove appellant's version of the April 13, 1995 event, the result is not altered (*i.e.*, that appellant had a stress attack) and the claims examiner ignored the issue of credibility addressed by the new documentation.

By decision dated March 18, 1998, the Office again denied appellant's request for modification finding that the evidence submitted in support of the reconsideration request was not sufficient to establish that appellant's injury occurred in the performance of duty.

The Board finds that appellant has failed to establish that he developed an emotional condition in the performance of duty causally related to factors of his federal employment.

To establish appellant's claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2] Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

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

certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[3]

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition, which will be covered under the 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. Disability is not compensable, however, where it results from factors such as an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position or to secure a promotion.[4]

When working conditions are alleged as factors in causing 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] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[6] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.[7]

To the extent that disputes and incidents alleged as constituting harassment and discrimination by coworkers are established as occurring and arising from appellant's performance of his or her regular duties, these could constitute employment factors.[8] However, for harassment or discrimination to give rise to a compensable disability under the Act, there

[3] *Id.*

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

[5] *See Barbara Bush*, 38 ECAB 710 (1987).

[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

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

[8] *See David W. Shirey*, 42 ECAB 783 (1991); *Kathleen D. Walker*, 42 ECAB 603 (1991).

must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[9]

Appellant has alleged that he was called names for the past seven to eight years; there was a name calling incident in late February 1995; a rubber was placed at his work station; his work and personal vehicle vandalized and he was told by various individuals that he was in trouble with management when he arrived at work on March 20, 1995 after having taken emergency annual leave on March 17, 1995. However, appellant presented no evidence, in the form of witness statements, a settlement agreement or written documentation other than his doctor's reports, which contain only appellant's version of the events, to support his allegations that his coworkers participated in the above allegations. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The EEO complaint and resulting settlement agreement submitted by appellant only alleges harassment; they do not establish that it occurred. A claimant must substantiate such allegations with probative and reliable evidence.[10] With regards to appellant being told by different individuals that he was in trouble with management, the Board has held that appellant's fear of gossip or rumors is a personal frustration that is not related to an employee's job duties or requirements and, therefore, is not compensable.[11] Additionally, the employing establishment's justification of leave requests are administrative functions of the employer and, absent any showing of error or abuse on the part of the employing establishment, it does not constitute a compensable employment factor.[12] Inasmuch as the record is devoid of evidence that the employing establishment erred or acted abusively in requesting documentation of appellant's leave, appellant has not established a compensable factor with respect to that administrative function.

The evidence supports that appellant had submitted sufficient evidence to establish on February 6, 1995 appellant found a derogatory photograph of cockroaches in his work area, on April 13, 1995 a fellow coworker, with a supervisor present, made a gesture with his hands, which appellant perceived to be threatening, which caused him to become upset and leave work and, when appellant returned to work in July 1995, he found a note stating that his time had come to an end. The Office properly found, however, that these incidents were not compensable factors of employment.

Although the evidence of record reflects that appellant found a derogatory photograph of cockroaches in his work area and that the employing establishment had advised all of the workers in appellant's section that such an event happened and would not be tolerated, there is no finding by either the employing establishment or any corroborating evidence submitted by

[9] 5 U.S.C. §§ 8101-8193*; see Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

[10] *Donna Faye Cardwell*, *supra* note 2 (for harassment to give rise to a compensable disability there must be some evidence that harassment or discrimination did in fact occur); *Ruthie M. Evans*, *supra* note 6. *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[11] *Gracie A. Richardson*, 42 ECAB 850 (1991).

[12] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *see also Richard J. Dube*, 42 ECAB 916, 920 (1991).

appellant as to who or why the photograph was placed in appellant's work area. Additionally, although appellant submitted a copy of the note stating that appellant's time was coming to an end, appellant has not submitted any corroborating evidence as to his belief who placed the note, submitted any witness statements, or noted that he advised the employing establishment of such. Absent such corroborating evidence, appellant has not established compensable employment factors under the Act.

Although it is established that the April 13, 1995 incident occurred, there is no probative or reliable evidence to support appellant's allegation that he was threatened, harassed, discriminated against or, as appellant's attorney alleges, reporting violations of postal policy. As previously noted, mere perceptions and feelings will not support an award of compensation absent probative and reliable evidence supporting such allegations. The statement from Mr. Keeton, the coworker accused of threatening appellant, reflects that he told the supervisor, Mr. Boyer, that he had another 25 minutes to case on appellant's job and appellant told the supervisor that the coworker started his job at 0840. The coworker stated that he started the job at 0850 and appellant again insisted that he had started the job at 0840. The coworker stated that he got up, pointed his finger at appellant and told him not to make a liar out of him. The statement from Mr. Boyer, the supervisor, supports the coworker's version of events. He related that appellant had come to him numerous times to tell him when carriers were late beginning their tour. Mr. Boyer stated that, appellant openly confessed to running to management to tell on someone and was known as "telling and/or ratting on fellow carriers." The supervisor stated that on April 13, 1995 he was giving appellant instructions on his assignment for the day. The assignment included a half-hour pivot piece from another route to be served within his eight-hour tour. Appellant became upset and began to accuse Mr. Keeton (his router) of lying about what time he started to route his case. Appellant's eyes began to swell up with tears as he claimed the coworker had less time to case. Mr. Keeton stood up and said "I am tired of you trying to make me out to be a liar. I know how much time I have to case flats." The supervisor related that he stepped in and told appellant that he was aware of how much time Mr. Keeton had left to case and, after providing rationale, stated that Mr. Keeton would be pivoting for a half hour. Appellant again brought up that Mr. Keeton was not telling the truth about the time spent on his route. Mr. Keeton, then stood up and again told him not to call him a liar and threw his hands up. The supervisor stated that he said the conversation was over, that he had made his decision. He stated that both parties went back to their respective duties and that he walked pass appellant's case to assure that there would not be any more talk between the two. Approximately five minutes later, appellant approached stating that he had been threatened because Mr. Keeton had put his hands towards his neck. Appellant asserted that this gestured occurred in front of the supervisor. The Board notes that the assignment of work is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[13] Appellant has not submitted any evidence to show that the distribution of work was unfairly made. Moreover, there is no showing that appellant was reporting violations of postal policy or that Mr. Keeton's gesture, whether it was a throwing up of the hands or finger pointing, was meant to harass or harm appellant. Given the context of the situation, it appears as though appellant disagreed with the

[13] *See Peggy R. Lee*, 46 ECAB 527 (1995).

work assignment and believed that Mr. Keeton was misrepresenting his work. As appellant has not expressed any fear or anxiety about his own ability to carry out the assignment, but rather expressed concerns regarding another employee's work duties, appellant has not established a compensable factor under the Act with respect to the claimed harassment and discrimination. Although appellant's attorney advanced numerous arguments regarding appellant's credibility, those arguments are irrelevant as appellant's allegation is not supported by the evidence of record.

For the foregoing reasons, as appellant has not established any compensable factors of employment, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[14]

The decisions of the Office of Workers' Compensation Programs dated March 18, 1998 and September 30, 1997 are hereby affirmed.

Dated, Washington, DC
September 22, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[14] 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). Accordingly, appellant's arguments on appeal pertaining to the deficiencies in medical evidence and not receiving copies are rendered moot.