U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. WESTBROOK and U.S. POSTAL SERVICE,
FRESNO MAIN OFFICE, Fresno, CA

Docket No. 00-2201; Submitted on the Record;
Issued October 23, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.

On June 12, 1999 appellant, then a 47-year-old automation clerk, filed a traumatic injury claim, alleging that on June 11, 1999 he experienced pain in his chest, left arm and back, sweating, and blurred vision due to stress at work, which was caused by his supervisors. Appellant stopped work on June 11, 1999.

By decision dated September 23, 1999, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while 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 illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the

employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[1]

Perceptions and feelings alone are not compensable. 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 factors of his federal employment.[2] To establish his claim that he sustained an emotional or physical condition in the performance of duty, appellant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (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 the diagnosed condition.[3]

Appellant alleged that his emotional condition was caused by harassment from his coworker and supervisors. Specifically, appellant stated that he worked with a hearing impaired coworker, Tamara Stogdell, whom he had difficulties with in the past. He stated that other employees also had difficulties with Ms. Stogdell a few days earlier. Appellant further stated that he informed supervisors about his difficulties, but no one took any action except Diego Marquiz. He also alleged that he was pressured by Dennis Gagnon and Nate Gonzales, the employing establishment supervisors, in a meeting on June 11, 1999, with his union representative, Tim Sager, to submit a written statement about his problems with Ms. Stogdell. Appellant stated he was told that he would not be allowed to leave until he filled out a statement and that an investigation was going to be conducted by the employing establishment inspectors. He alleged that Mr. Gonzalez told him that he was going to "hound" him until a statement had been filled out. Appellant stated that after the meeting, he went to lunch and returned to work on his machine. He described the physical symptoms he experienced as a result of the meeting and noted that he went to the hospital for medical treatment.

The Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. For harassment to give rise to a compensable disability there must be evidence that harassment or discrimination did, in fact, occur.[4] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[5] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[6] To establish entitlement to benefits, a

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

[2] *Pamela R. Rice*, 38 ECAB 838 (1987).

[3] *Ruby I. Fish*, 46 ECAB 276 (1994); *Mary A. Sisneros*, 46 ECAB 155 (1994).

[4] *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[5] *See Lorraine E. Schroeder*, 44 ECAB 323 (1993); *Sylvester Blaze*, 42 ECAB 654 (1991).

[6] *William P. George*, 43 ECAB 1159 (1992).

claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7]

Appellant has not submitted any evidence in support of his allegation that he was harassed by Ms. Stogdell. In response to appellant's allegation of harassment by her, Mr. Gonzalez provided a description of the June 11, 1999 meeting in a June 16, 1999 narrative statement. He stated that Mr. Gagnon informed appellant that he would have to work with Ms. Stogdell as part of the rotation and that appellant expressed his concerns about working with her because she had previously threatened him, but that he did not want her to be fired. Mr. Gonzalez stated that Mr. Gagnon asked appellant when was the last time Ms. Stogdell threatened him and he responded last February, but that he did not report it because the previous supervisors only conducted an official discussion. Mr. Gonzalez noted that appellant refused to give Mr. Gagnon the names of those who witnessed this incident. He also noted that Mr. Gagnon told appellant that he would be investigating the incidents and would call the employing establishment's inspectors to help alleviate the problem. Mr. Gagnon explained that appellant had to work with Ms. Stogdell because of complaints filed by employees with the Equal Employment Opportunity Commission because they wanted their assignments and the persons they worked with rotated.

Because appellant has failed to submit sufficient evidence, such as witness statements, to support his allegation that he was harassed by a coworker, the Board finds that appellant has failed to meet his burden of proof.

The Board finds that the record does not support appellant's allegation that his supervisors harassed him. Mr. Sager's August 15, 1999 narrative statement provided a description of the June 11, 1999 meeting. He stated that Mr. Gagnon and Mr. Gonzalez applied pressure on appellant to provide them with a detailed statement of facts regarding any and all assaults or problems related to Ms. Stogdell. Mr. Sager noted that Mr. Gonzalez went so far as stating that he was going to "ride" appellant until he produced a statement. He contended that management was trying to make appellant the scapegoat for the firing of Ms. Stogdell. The Board finds that this evidence is not sufficient to establish error or abuse on the part of appellant's supervisors in requesting that appellant provide a statement.

The Board further finds that the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

In a May 11, 2000 decision, the Office hearing representative found that appellant abandoned his October 5, 1999 request for an oral hearing. The Office hearing representative noted that the hearing was scheduled for April 24, 2000 and that appellant failed to appear at the scheduled hearing.

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[7] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997; previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[8]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[9] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: [T]he claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, [Branch of Hearings and Review] H&R will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [District Office] DO. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

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[8] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[9] 20 C.F.R. § 10.622(b) (1999).

> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
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> "This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[10]

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on April 24, 2000. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The May 11, 2000 and September 23, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 23, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).