U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRIK F. LANGHJELM and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Bremerton, WA

Docket No. 99-2543; Submitted on the Record;
Issued September 5, 2001

DECISION and ORDER

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

The issue is whether appellant sustained an emotional condition in the performance of duty.

Appellant, then a 40-year-old shipfitter, filed a notice of occupational disease on July 24, 1995 alleging that his stress/anxiety disorder was caused by reprisal and harassment by the employing establishment, which arose after reporting safety issues stemming from his duties as an industrial planning specialist in the operations department. Appellant alleged that he raised safety questions concerning the methods used to dismantle or recycle decommissioned U.S. Naval submarines along with health/hazard-related concerns which he believed were against Federal Regulations, but the employing establishment failed to act upon his concerns. Appellant alleged that due to his advocacy of these concerns, he was dismissed from the operations department and demoted from a WG-12 to a WG-10 position on July 7, 1995. Appellant related several incidents in which he felt the employing establishment acted, including supervisory harassment and retaliation for filing a safety complaint; failure of the employing establishment to respond to his safety complaint; a change in work start time; loss of a temporary promotion; assignment to work which appellant found demeaning; coworker comments regarding the safety complaint, a demotion and payment of advanced sick leave due to medical limitations.

By decision dated November 16, 1995, the Office of Workers' Compensation Programs denied the claim on the grounds that the evidence was insufficient to establish that his psychiatric condition had arisen in the performance of duty. The Office found that appellant's emotional reaction to the alleged incidents were noncompensable as it was an administrative or personnel matter for which no error or abuse had been proven.

By decision dated November 15, 1996, an Office hearing representative set aside the November 16, 1995 decision and remanded the case for further development as he found that the employing establishment's failure to respond to appellant's safety complaint was, in part,

erroneous, even though it was not proved to be abusive, harassing, or retaliatory. He noted that appellant raised new allegations at the hearing. The Office hearing representative found that appellant had not established by the employing establishment harassment or retaliation for filing the safety complaint. Although appellant established a change in work start time, the loss of a temporary promotion, the assignment to work which appellant found demeaning and his exposure to coworkers comments regarding the safety complaint and demotion, these were noncompensable factors. The new employing factors appellant alleged at the hearing included: pay problems, failure of the base commander to address appellant's concerns, being given no assignments or given assignments which appellant felt were an attempt to set him up or which exposed him to further comments by work personnel, his shop head, Mr. Ron Ruggerio, caused him stress by asking him to take an early retirement and grilled him over his activities with Occupational Safety and Health Administration (OSHA).

By decision dated August 5, 1998, the Office denied appellant's claim on the grounds that he had not established any compensable factors of employment. The Office noted that, with regard to the employment factor which the Office hearing representative had found to be within the performance of duty, appellant's complaint did not address the specific violation for which OSHA cited the employing establishment. Thus, the employing establishment did not err in its response to appellant's complaint.

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

Under the Federal Employees' Compensation Act,[1] 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. To establish that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) 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]

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.[3] There are distinctions regarding the type of work situation giving rise to an emotional condition, which will be covered under the Act. For example, disability resulting from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employing establishment is covered.[4] However, an employee's emotional reaction to an administrative or personnel matter is generally not covered[5] and disabling conditions caused by an employee's fear of termination or frustration

[1] 5 U.S.C. §§ 8101-8193.

[2] *Vaile F. Walders*, 46 ECAB 822, 825 (1995).

[3] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[4] *Jose L. Gonzalez-Garced*, 46 ECAB 559, 563 (1995).

from lack of promotion are not compensable. In such cases, the employee's feelings are self-generated in that they are not related to assigned duties.[6]

If the evidence demonstrates that the employing establishment erred or acted abusively or unreasonably in the administration of a personnel matter, an emotional condition arising in reaction to such error or abuse may be covered.[7] However, an employee must support his allegations with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.[8]

The Board notes that the Office made findings in this case with respect to appellant's reporting of workplace environmental and safety concerns. In its November 15, 1996 decision, the Office hearing representative found that the employer's failure to properly respond to appellant's safety complaint was a factor of appellant's employment as OSHA had identified a violation. In its later decision of August 5, 1998, the Office found that this was not a compensable factor as appellant's safety complaint did not allege the specific violation which OSHA had found. The Board finds that although appellant lodged a valid safety complaint with regards to the methods of paint removal from dismantled submarines as verified by a February 6, 1996 letter from OSHA, appellant's reaction to the employing establishment's response to his safety complaint is not compensable. Appellant contends that the employing establishment erred in not giving a more specific response to his safety complaint. However, management's response to appellant's safety complaint is an administrative matter,[9] and, absent a showing of error or abuse, appellant's reaction to the employing establishment's response to his safety complaints is not compensable. Although OSHA substantiated some of appellant's safety complaints, the nature or method by which management responded to the safety complaint had no immediate effect on appellant. The record indicates that appellant worked in the operations department, not on site with the alleged hazardous exposure. Moreover, appellant's contention revolves around the premise that he became offended as the employing establishment did not adequately address his concerns in its written response. This is a self-generated reaction to the employing establishment's response to his complaints.

With respect to appellant's allegation that he suffered reprisal and harassment as a result of the filing of the safety complaint, the evidence of record supports the Office's finding that the employing establishment was not abusive, harassing or retaliatory in appellant's filing of the safety complaint. To the extent that disputes and incidents alleged as constituting discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[10] However, for

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[5] *Sharon J. McIntosh,* 47 ECAB 754, 756 (1996).

[6] *Barbara E. Hamm*, 45 ECAB 843, 850 (1994).

[7] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

[8] *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

[9] *See Anne L. Livermore*, 46 ECAB 425 (1995).

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

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.[11]

Appellant alleged that he was dismissed from the operations department due to his advocacy of the health/environmental concerns and demoted from a WG-12 to a WG-10 position on July 7, 1995. In this case, appellant has not submitted sufficient evidence to establish that the employing establishment discriminated against him in determining, as a preliminary matter, that either his advocacy of health/environmental concerns or the filing of the OSHA complaint effected his position within the operations department.[12] The record establishes that the operations department forward appellant's complaints to the appropriate department within the employing establishment and responded on numerous occasions to appellant's concerns. In an October 13, 1995 letter, Mr. James W. Wooley, the acting operations support manager, stated that he informed appellant that he should articulate his environmental and safety concerns in writing so that they may be forwarded to the appropriate organization. Moreover, appellant was encouraged to submit a beneficial suggestion for his ideas concerning the reduction of lead omissions. Mr. Wooley related that neither he nor anyone else within the operations department ever told appellant that further pursuit of his concern would affect his position in the operations department.

Contrary to appellant's assertions, the record establishes that appellant was temporarily promoted to his position as an industrial planning specialist and the employing establishment, due to budgetary constraints within the operations department, had determined that he would be the particular employee moved back to his permanent grade and parent organization as his loss would have the least impact. Mr. Wooley stated more than 85 percent of all positions within the operations department were temporary in nature and people were moved back to their permanent grade every day as the workload fluctuated. He stated that in the formulation of the Fiscal Year 96 budget, the operations department was forced with a 25 percent reduction in manpower in overhead. As part of that reduction, he was forced to reduce one position in the planning staff, of which appellant was assigned. In early May 1995, the entire staff was made aware of this fact in a regular staff meeting. Mr. Wooley stated that based on the future workload, backgrounds and skills and special qualifications on the existing staff members, appellant was chosen as providing the least impact. He stated that on June 30, 1995 he informed appellant that his decision to return him to his permanent organization was based strictly on budget concerns, that he was pleased with his work and that appellant had his recommendation for other project-related jobs benefiting from his experience gained from the staff.

Appellant, therefore, has not provided any corroborating evidence that the employing establishment engaged in actions which constituted reprisal or harassment as a result of the filing of the safety complaint.

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[11] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[12] *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).

Appellant asserted that Mr. Wooley also demoted him from the operations department on June 30, 1995 for three other underlying reasons. These were: appellant nodding or dozing off during a June 29, 1995 project management seminar; appellant's tardiness to work on two separate occasions, which resulted in a change in work starting time; and a complaint Mr. Wooley received in March from a female employee overhearing appellant express four-letter expletives which appellant admitted he had expressed in the Building 879 lunchroom. Appellant further alleged that Mr. Wooley lacked authority to dismiss him.

As a general rule, the exercise of supervisory discretion in an administrative capacity relates to the supervisor's performance of duties, not appellant's and is, therefore, not compensable absent a showing of error or abuse.[13] With respect to appellant's allegation that his work starting time changed, the evidence of record supports the Office's finding that this incident was verified. Appellant stated that he needed flexible work hours because he was a single parent and Mr. Wooley never had a problem with his flexible schedule until after he wrote a letter to Captain Williams. He further asserted that Mr. Wooley monitored the times he started work daily and that he felt intimadated. These contentions, however, are not substantiated and, thus, cannot be considered compensable. Similarly, there is no evidence in the record regarding appellant's assertion of a complaint concerning an incident in the Building 879 lunchroom. Although appellant asserted that Mr. Wooley lacked authority to order him in regards to such situations such as discipline or in his removal from his position as industrial planning specialist, the evidence of record supports that Mr. Wooley was in a supervisory position and there was no error or abuse and thus, these administrative/personnel functions may not be considered compensable.

Regarding the June 29, 1995 incident whereby appellant dozed off during the attendance of a project management seminar, the record reflects that appellant has the condition of obstructive sleep apnea syndrome and a missing index finger of the right hand. Appellant asserted that at the seminar in question it was hot and stuffy in the room were the seminar was held and other personnel were not reprimanded or demoted. Appellant filed an Equal Employment Opportunity (EEO) complaint on the basis that he was discriminated against due to his physical disability of sleep apnea and alleged that he was changed to a lower grade on June 30, 1995 to WG-10 shipfitter from his temporary promotion to the GS-12 industrial planning specialist. An EEO counselor interviewed the respective parties and appellant was informed of the counselor's findings on October 6, 1995. The record is devoid of any finding made by an investigator or official that appellant had in fact been discriminated against.

Although the record reflects that appellant made allegations that the employing establishment erred and acted abusively in conducting its investigation into such matters, appellant has not provided sufficient evidence to support such a claim. A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with his removal from the operations department were unreasonable. In this case, Mr. Wooley stated that if he had retained appellant and let another staff member go, it would have required additional training for appellant and based upon a review of the future workload and current responsibilities, appellant was chosen to return to his parent shop because a loss of his position

[13] *Daryl R. Davis*, 45 ECAB 907 (1994).

would have the least impact on the work of the department and was the least necessary. Moreover, Mr. Wooley stated that the duties appellant performed were assigned to other staff members with little impact on the work. Thus, appellant has not established a compensable employment factor under the Act in this respect. Moreover, appellant's desire to receive training is an administrative matter, which is not covered under the Act unless the refusal constitutes error or abuse.[14] As the record does not establish error or abuse, this administrative/personnel function may not be considered compensable.

Appellant also asserted that he was constantly approached by individuals who were concerned or curious as to why he was no longer with the operations department. Mr. Wooley denied that anyone within his department released any information concerning his private matters. He stated that any difficulty appellant was experiencing due to others making comments to him at work, was soley due to appellant's own actions. All information concerning appellant has not been discussed with anyone, other than to respond to specific questions or actions taken in issues appellant raised through the grievance procedures, EEO complaints and congressional inquiries. The Office properly found that, although established, this was a nonperformance of duty factor.

Appellant asserted his belief that when he was returned to his parent organization, he was assigned to work which he believed to be demeaning. Further, allegations during the Office hearing concerned appellant's belief that he was later given no work assignments or assignments to reception, telephone duties and work-packaging duties in an attempt to set him up or to expose him to further negative comments by work personnel. The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[15] Thus, the Office properly found that this was not considered to be an employment factor.

In its November 15, 1996 decision, the Office hearing representative further noted that appellant indicated several employment factors at the hearing which he alleged also caused him stress. These were summarized as pay problems, failure of the base commander to address appellant's concerns, being given no assignments or given assignments which appellant felt were an attempt to set him up or which exposed him to further comments by work personnel, his shop head, Mr. Ruggerio, caused him stress by asking him to take an early retirement and grilled him over his activities with OSHA. The Office in its August 5, 1998 decision, also identified additional causes of distress to include the delay by the Office in connection with his claim, appellant's failure to receive awards he believes were promised to him and his belief that he did not receive proper training. Those allegations which appellant asserted at the hearing which were previously discussed will not be readdressed.[16]

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[14] *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[15] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[16] Appellant's allegations concerning work assignments and training were previously discussed and, therefore, will not be readdressed.

Appellant asserted his belief that his wages were withheld and/or delayed as a method of retaliation against him after he submitted his safety concerns to Captain Williams. Although the evidence of record reflects that appellant experienced problems with his wages, back pay and advance leave, there is no evidence that the employing establishment deliberately withheld the monies due appellant. The record establishes that the employing establishment made every effort to provide appellant with monies owed him as expeditiously as possible and that the delays were unavoidable.

Appellant has presented no evidence of administrative error or abuse over his frustration over not being able to communicate directly with the base commander and his belief that he should have been issued a performance award. Appellant's frustration at not being able to discuss his concerns with the base commander are properly found to be self-generated and not in the performance of duty. The evidence of record reflects that appellant's complaints were properly processed within an established chain of command and responses were received which addressed appellant's complaints. The issuance of performance awards is an administrative procedure and, absent any showing of error or abuse, is a noncompensable factor of employment. Appellant's belief that he was promised such awards without any collaborating evidence is not enough to establish that any error or abuse occurred.

There is no probative evidence to establish appellant's allegation that his supervisor, Mr. Ruggerio, either grilled him, abused him, or attempted to force him to take a disability retirement. Although witness statements support that appellant had a telephone conversation with Mr. Ruggerio and appellant was upset thereafter, there is no probative evidence to establish the exact nature of the conversations to collaborate appellant's allegations concerning any error or abuse on Mr. Ruggerio's part.

Regarding appellant's allegations that the employing establishment mishandled his compensation claims and that the delay by the Office caused him distress, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.[17]

[17] *See George A. Ross*, 43 ECAB 346, 353 (1991).

The August 5, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member