U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIO PALOMO and U.S. POSTAL SERVICE,
BULK MAIL ENTRY UNIT, San Francisco, CA

Docket No. 01-1373; Submitted on the Record;
Issued April 3, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing on his claim by 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 July 25, 2000 appellant, then a 53-year-old clerk, filed an occupational disease claim alleging that he developed an emotional condition as a result of his removal from employment, false allegations made by coworkers and discrimination and unfair treatment by management, causing him to suffer undue stress and humiliation. By decision dated December 22, 2000, the Office denied appellant's claim finding that he failed to establish a compensable factor of employment. By letter dated January 25, 2001, appellant requested an oral hearing and by decision dated March 21, 2001, an Office hearing representative denied his request as untimely.

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.[1] On the other hand, the disability is not covered where it results from such factors as an

[1] 5 U.S.C. §§ 8101-8193.

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.[2]

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.[3] 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.[4]

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.[5] 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.[6]

In this case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated December 22, 2000, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that in 1998 the employing establishment improperly suspended him following an incident where appellant stuck a razor blade in his mouth and threatened to swallow it and again improperly suspended him on June 22, 1999 for unacceptable behavior, when he was heard to have said that he would have brought an apple with a razor blade in it to the instructor if he had not passed his bulk mail entry unit test.[7] The Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned

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

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[6] *Id.*

[7] Appellant admitted making this statement, but asserted that he was merely repeating what a coworker had said and that the statement was made in fun.

work duties and do not fall within the coverage of the Act.[8] Although the handling of disciplinary actions is generally related to the employment, it is related to the administrative functions of the employer and not duties of the employee.[9] 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[10] In this case, the employing establishment submitted documents explaining that they have a zero percent tolerance policy against violence. The employing establishment further stated that, following the second incident, on September 8, 1999, appellant was issued a letter of removal, but a settlement was reached under which it was agreed appellant could return to work pending a psychiatric fitness-for-duty examination. Subsequently, the examining physician found him unfit for duty. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[11] The employing establishment fully explained its actions and appellant acknowledged both the 1998 incident and the 1999 statement. The Board finds no evidence of error or abuse with respect to these administrative matters. Appellant has not established a compensable employment factor under the Act with respect to the 1998 suspension or 1999 letter of removal.

With respect to appellant's allegations that the psychiatric fitness-for-duty examinations mandated by the employing establishment caused him embarrassment and depression, the Board has held that requiring these examinations was an administrative function of the employer and absent error or abuse, on its part, coverage will not be afforded. The Board finds no such error or abuse.[12]

Appellant alleged that during the investigation into his behavior, he was shocked and dismayed by the details of the investigation. The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors, absent evidence of error or abuse.[13] A review of the evidence establishes that appellant has not shown that the employing establishment's actions in connection with its investigation of him were unreasonable or in error. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that the issuance of removal notices by the employing establishment amounted to harassment and discrimination, that management manipulated facts and records pertaining to his actions and that coworkers made false allegations against him. To

[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[9] *Id.*

[10] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[11] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[12] *Alice M. Washington*, 46 ECAB 382 (1994); *Donald E. Ewals*, 45 ECAB 111 (1993).

[13] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers 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 this case, the employing establishment explained the reasons for the letters of removal and appellant has not submitted any corroborative evidence to support his assertion that he was harassed or discriminated against by his supervisors or coworkers.[16] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

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 Board further finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Following the issuance of the Office's December 22, 2000 decision, by letter dated January 25, 2001, appellant, through his representative, requested an oral hearing. In a decision dated March 21, 2001, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked January 31, 2001, which was more than 30 days after the issuance of the Office's December 22, 2000 decision and that he was, therefore, not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.[18] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[19] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[20] In such a

[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).

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[18] 5 U.S.C. § 8124(b)(1).

[19] 20 C.F.R. § 10.616; *Maxwell L. Harvey*, 46 ECAB 993 (1995).

[20] *William E. Seare*, 47 ECAB 663 (1996).

case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[21]

Although the Office found that appellant's request for an oral hearing was postmarked January 31, 2001, the case record before the Board does not contain the envelope, or a copy thereof, that accompanied appellant's request for reconsideration. Therefore, the Board will use the date of the letter itself to determine the timeliness of the request.[22] The 30-day period for determining the timeliness of appellant's hearing request commenced on December 23, 2000, the date following the issuance of the Office's December 22, 2000 decision denying his claim. However, 30 days from December 23, 2000 would be January 21, 2001, which fell on a Sunday. The next regular business day was Monday, January 22, 2001.[23] As appellant's letter was dated January 25, 2001, after the expiration of the 30-day period, appellant's request was untimely.

The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.[24]

The March 21, 2001 and December 22, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 3, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[21] *Id.*

[22] *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990).

[23] *See Maxwell L. Harvey*, *supra* note 19.

[24] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).