U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS C. SNEAD and PENSION BENEFIT GUARANTY CORPORATION, COLLECTION & COMPLIANCE DIVISION, Washington, DC

Docket No. 99-2418; Oral Argument Held January 8, 2002;
Issued April 9, 2002

Appearances: *David F. Power, Esq.*, for appellant; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment; and (2) whether the Branch of Hearings and Review properly denied appellant's requests for subpoenas.

Appellant, a 41-year-old accounting technician, filed a notice of occupational disease alleging that he developed an emotional condition due to an assault by Irvin Silverzahn, a coworker, which occurred in the performance of duty on October 26, 1995. By decision dated May 8, 1996, the Office of Workers' Compensation Programs denied his claim. Appellant requested an oral hearing on May 24, 1996. The oral hearing took place on December 8, 1997. By decision dated May 3, 1999, the hearing representative affirmed the Office's May 8, 1996 decision.

The Board finds that appellant has not met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

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 concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[1]

[1] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

In this case, appellant attributed his emotional condition to an alleged sexual assault by a coworker on October 26, 1995. He submitted several statements to the Office, the police, the Office of Investigator General (OIG) and to an arbitrator regarding the events of that date. Appellant alleged that he visited Mr. Silverzahn on a work-related matter and as he was leaving the office, Mr. Silverzahn grabbed him from behind and proceeded to touch his genitals against appellant's buttocks.

In support of his claim, appellant submitted several statements from Silva S. Pierce, a coworker, who confirmed appellant's statement that Mr. Silverzahn had held him from behind and that he touched his genitals against appellant's buttocks. Ms. Pierce was unclear whether this touching was an assault or horseplay by Mr. Silverzahn. Furthermore, Ms. Pierce's statements were not consistent regarding her actions following the event as well as the statements made by appellant.

Mr. Silverzahn denied that he touched appellant from behind. He stated that appellant came to his office after an unpleasant encounter the night before, that appellant appeared jovial and asked his opinion of his new hair style. Mr. Silverzahn stated that he asked appellant to approach him for a closer look, that he commented favorably on the new look while shaking appellant's right hand and slapping appellant's shoulder with his left hand. Mr. Silverzahn attributed appellant's allegations to a disagreement regarding union business and his desire for an early retirement.

Melinda Fitzpatrick, a coworker, did not observe the events, but stated that she heard appellant, Mr. Silverzahn and Ms. Pierce laughing and joking on October 26, 1995. Ms. Fitzpatrick stated that appellant later advised her that he was alleging sexual harassment and that she thought he was joking given the nature of the prior interaction.

Adalberto E. Inoa, a former coworker, submitted statements that he met Ms. Pierce at a bar and that she told him that she and appellant had set up Mr. Silverzahn. Ms. Pierce denied these statements and indicated that Mr. Inoa was a spurned suitor.

The employing establishment noted that Ms. Pierce had previously been subjected to disciplinary action as a result of Mr. Silverzahn's report that she signed out seven minutes early. The employing establishment suspended appellant for fighting with a supervisor, insubordination and making a false statement on September 22, 1992. The arbiter overturned the finding of making a false statement and reduced the suspension due to appellant's disciplinary record, fully successful performance appraisal and remorse.

The OIG completed a report on February 15, 1996 and concluded that the preponderance of the evidence refuted appellant's allegation. However, the OIG relied on the overturned finding that appellant had previously made a false statement during the 1992 investigation.

A 1996 arbitration finding which addressed the removal of Ms. Pierce and appellant by the employing establishment noted that Ms. Fitzpatrick was the sole witness with no associations with the parties, that she reported that appellant was laughing and joking and that this behavior on the part of appellant was inconsistent with his later demeanor and actions. The arbiter also examined Mr. Silverzahn's office and found that it would have been difficult for Mr. Silverzahn

to have answered the telephone, as appellant alleged, and then intercept and assault appellant before appellant could leave his office given the location of Mr. Silverzahn's desk and its position to the door.

Appellant bears the burden of proof in establishing that the employment event occurred as alleged. His allegations of a sexual assault were denied by Mr. Silverzahn. Ms. Pierce's support of appellant's version of the events is not determinative as her character has been called into question due to the statements from Mr. Inoa and her prior discipline due to actions of Mr. Silverzahn. Ms. Fitzpatrick did not see what transpired, but overheard the remarks between appellant, Ms. Pierce and Mr. Silverzahn and found no indication of anything but horseplay and pleasant interactions. The arbiter examined Mr. Silverzahn's office and noted that, due to the locations of his desk and the door, it would have been almost impossible for Mr. Silverzahn to have assaulted appellant as he described. The Board notes that the arbiter had the opportunity to examine the demeanor of the witnesses and found that appellant and Ms. Pierce were not credible. Due to the lack of supportive evidence, appellant has failed to meet his burden of proof to establish this factor of employment.

Appellant also alleged that Mr. Siverzahn attempted to have appellant touch his genitals in August 1995. In support of this claim, appellant submitted a statement by Willie Tyrone Black, Jr., a coworker, who merely stated that appellant had reported this event to him. He did not have any personal knowledge of whether or not the event occurred as appellant alleged. Mr. Silverzahn denied that he attempted to cause appellant to touch him. Appellant has also failed to submit any evidence to substantiate this event.

As appellant has failed to submit the necessary factual evidence to establish that his injury occurred as alleged, the Office properly denied his claim.

The Board further finds that the hearing representative did not abuse her discretion in denying appellant's requests for subpoenas.

Appellant, through his attorney, requested subpoenas for Ms. Pierce, Mr. Inoa, Susan Silverzahn, Mr. Silverahn, Michael Zacour and Nancy Miller. The hearing representative initially granted these requests, however, the hearing representative subsequently determined that all the witnesses had previously submitted written statements, other than Ms. Silverzahn, and that her testimony was not necessary given the documents of record.

Section 8126 of the Federal Employees' Compensation Act[2] provides, in relevant part, "[t]he Secretary of Labor, on any matter within his jurisdiction under this subchapter, may: (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles." This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[3]

[2] 5 U.S.C. §§ 8101-8193, 8126.

[3] 20 C.F.R. § 10.619.

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[4] The function of the Board on appeal is to determine whether there has been an abuse of discretion. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[5]

The issue to be determined at the hearing was whether appellant met his burden of proof in establishing a compensable factor of employment which caused or contributed to his emotional condition. Appellant requested that coworkers and Mrs. Silverzahn be subpoenaed. The hearing representative properly noted that the record contained statements from each of these persons except Ms. Silverzahn and that her testimony was not necessary given other information contained in the record. The Board finds that the Office hearing representative did not abuse her discretion in denying appellant's requests.

The May 3, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.[6]

Dated, Washington, DC
April 9, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

[4] *Id.*

[5] *Joseph D. Lee*, 42 ECAB 172 (1990).

[6] The Board notes that Priscilla Anne Schwab who participated in the hearing held on January 8, 2002 was not an Alternate Board Member after January 25, 2002 and she did not participate in the preparation of this decision and order.