U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN E. SHELTON and U.S. POSTAL SERVICE,
CINCINNATI AIRPORT MAIL FACILITY, Cincinnati, OH

Docket No. 02-827; Submitted on the Record;
Issued July 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition within the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely filed.

On June 7, 2001 appellant, then a 45-year-old custodian, filed a claim for an emotional condition. He claimed that, on that day, his supervisor harassed him, by telling appellant that he was the boss. Appellant indicated that he had post-traumatic stress disorder, diabetes and other complications.

Appellant's supervisor submitted his statement from the June 7, 2001 incident. He stated that at 2:00 a.m. he noticed appellant talking to mailhandlers who were trying to process mail. When approached, appellant stated that he had finished his sweeping duties on the workroom floor. The supervisor instructed him to assist another custodian in cleaning offices, restrooms and the break room. The supervisor walked away but looked back and saw appellant shuffling paperwork at a stand-up desk at the loading dock. He walked to appellant and asked what he was doing. The supervisor related that appellant accused him of harassment. The supervisor denied it and stated he was giving appellant an official order to go help the other custodian. He turned away and indicated that appellant cursed at him. He returned to appellant and told him that, although appellant was acting as the maintenance supervisor of the tour, he was the supervisor of the tour, not appellant, and that he was ordering appellant to help the other custodian as instructed. The supervisor reported that five minutes later appellant showed him two pills and indicated that the pills were for his anxiety. An hour later, appellant came to his office with a witness, interrupted a meeting, and began cursing and accusing him of harassment. Appellant demanded that he be sent to a hospital. The supervisor called for an emergency medical team which escorted appellant to a hospital. A male nurse from the hospital called the supervisor and reported that appellant had been given a shot, would not be able to work the rest of the shift, and should not drive for four hours after receiving the medication. The supervisor placed appellant off the clock as of 4:30 p.m. Appellant called the supervisor at approximately 6:25 p.m. and requested that someone pick him up from the hospital and bring him back to the

employing establishment. The supervisor refused, indicating that appellant had been placed off the clock and suggested that appellant follow the medical orders not to drive by getting a taxi to go home. Appellant became upset and requested that the employing establishment pay for a taxi to bring him back to the employing establishment so he could file a claim for compensation. The supervisor was subsequently contacted by a union official who made a similar request. The supervisor arranged for a volunteer to bring appellant back to the employing establishment to file his claim for continuation of pay. Appellant was brought back to the employing establishment. He completed the claim form and then left.

In an October 11, 2001 decision, the Office denied appellant's claim for compensation on the grounds that fact of injury had not been established.

The Board finds that appellant did not sustain an injury in the performance of duty on June 7, 2001.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation 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. On the other hand, the disability is not covered where it results from such factors as an 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Federal Employees' Compensation Act.[2] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[3]

Appellant made a general allegation that his emotional condition was due to harassment by his supervisor. The actions of a supervisor which an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant

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

[2] *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

[3] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[4] In this case, the incident was triggered when appellant's supervisor instructed appellant to assist another custodian in cleanup duties. Appellant resisted the instructions, leading to a statement by the supervisor that he, not appellant, was the supervisor and directed him to carry out the instructions. The incident therefore did not involve the performance of appellant's assigned duties, but appellant's disobeying (insubordination in following) his supervisor's instructions to carry out duties as assigned. The assignment of duties in this situation was an administrative action by appellant's supervisor and therefore did not occur within the performance of duty as defined by *Cutler* and *McEuen*. There is no evidence that the supervisor erred in his actions, was abusive of appellant, or was harassing appellant at the time he assigned the duties to appellant. The decision to take appellant off the clock after information from the hospital indicated he could not return that day was also an administrative action. The initial refusal to bring appellant back to the employing establishment after being released by the hospital was also an administrative decision. Neither action involved the performance of appellant's assigned duties. There is no evidence that either action was in error or abusive. Appellant, therefore, did not sustain a compensable injury in the performance of duty on June 7, 2001.[5]

The Board also finds that the Office properly denied appellant's request for an oral hearing as untimely.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[6] Section 10.616 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[7]

In the present case, appellant requested an oral hearing in an undated letter postmarked December 4, 2001. Section 10.616(a) of the federal regulations provides: "A claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of the issuance of the decision as determined by the postmark of the request." As the postmark date of the request was more than 30 days after issuance of the October 11, 2001 Office decision, appellant's request for an oral hearing was untimely.

While the Office also has the discretionary power to grant a review request when a claimant is not entitled to a review as a matter of right, in its October 11, 2001 decision, the Office properly exercised its discretion in its January 28, 2002 decision by stating that it had

[4] *Joan Juanita Greene*, 41 ECAB 760 (1990).

[5] With his appeal, appellant submitted additional medical evidence. As this evidence was not before the Office at the time of its final decision, it may not be reviewed by the Board for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[6] 5 U.S.C. § 8124(b)(1).

[7] 20 C.F.R. § 10.616.

considered the matter in relation to the issue involved and had denied appellant's request on the basis that appellant's claim could be addressed through a reconsideration application.

The decisions of the Office of Workers' Compensation Programs, dated January 28, 2002 and October 11, 2001, are hereby affirmed.

Dated, Washington, DC
July 24, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member