U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY BURTON and U.S. POSTAL SERVICE,
TULSA PLANT, Tulsa, OK

Docket No. 02-256; Submitted on the Record;
Issued June 24, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

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 denied appellant's request for an oral hearing.

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 September 1, 2000 appellant, then a 44-year-old supervisor, filed an occupational disease claim alleging that he sustained an emotional condition as a result of a number of employment incidents and conditions. Appellant stopped work on August 29, 2000. By decision dated October 27, 2000, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. Appellant requested an oral hearing. By decision dated June 17, 2001, the Office found that appellant's request for an oral hearing was untimely filed and he was, therefore, not entitled to a hearing as a matter of right. The Office considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issues could be addressed through the reconsideration process by submitting additional evidence.

The Board must, thus, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of the Federal Employees' Compensation Act.

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 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 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.[3]

Regarding appellant's allegations that between 1995 and 2000 the employing establishment improperly denied his requests for transfers and denied his applications for promotion in favor of less qualified applicants, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[4] Thus, appellant has not established a compensable employment factor under the Act in this respect.

With respect to appellant's allegations that between 1995 and 2000 the employing establishment improperly suspended him, issued unfair performance evaluations, wrongly denied his requests for leave and unfairly investigated him in response to a sexual harassment claim, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[5] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[6] Similarly, 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.[7] However, the Board has also found that an administrative

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

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

[3] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[5] *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).

[6] *Id.*

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

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.[8] The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[9] Appellant has provided insufficient evidence to support his allegations that the employing establishment erred or acted abusively in any of the named administrative actions and has not established a compensable employment factor under the Act with respect to these administrative matters.

Regarding appellant's assertion that his supervisors improperly overturned his management decisions involving his workers, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[10]

Appellant has also alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. To 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.[11] 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.[12] In this case, appellant alleged that supervisors and coworkers made statements and engaged in actions, which he believed constituted harassment, threats and discrimination, but he provided insufficient evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[13] Appellant did submit a statement from a coworker who recounted a September 9, 2000 incident, in which appellant asked a worker to stop socializing and return to his work area, in response to which the worker allegedly asked appellant what time he got off work, which appellant interpreted as a threat. Although the Board has recognized the compensability of physical threats and verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[14] In this case, it is unclear whether the witness actually heard the statement made, or merely heard about it later and there is no other evidence in the record that the worker's alleged response constituted a threat, towards appellant. Thus, appellant

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

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

[10] *Id.*

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

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

[13] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[14] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

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 to establish that he sustained an emotional condition in the performance of duty. Consequently, as appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record.[15]

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

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.[16] 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, or other carrier's date marking, of the request.[17] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[18] In this case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[19]

In this case, because appellant's November 30, 2000 request for a hearing was dated more than 30 days after the Office's October 27, 2000 decision, he is not entitled to a hearing as a matter of right. 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.[20]

[15] *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[16] 5 U.S.C. § 8124(b)(1).

[17] 20 C.F.R. § 10.616(a).

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

[19] *Id.*

[20] 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).

The June 17, 2001 and October 27, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 24, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member