U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILIP BRADY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, While River Junction, VT

Docket No. 03-433; Submitted on the Record;
Issued April 17, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On November 8, 2000 appellant filed a notice of occupational disease alleging that he suffered from depression and an anxiety disorder as a result of harassment from his supervisor and other work factors. He indicated that his emotional condition developed on or prior to August 6, 1999. The record indicates that appellant stopped work from September 28 to November 6, 2000.

Appellant alleged in a personal statement that he had been singled out to obtain a physical prior to starting a new job at "FMS." He alleged that he had to prove that he could lift 70 pounds and was forced to pay for the medical examination on his own. Appellant related that when his grief was getting out of hand, the employing establishment put more pressure on him to tell them "in advance when he was going to be sick." He alleges that he was denied the opportunity for overtime work. It is appellant's contention that he was threatened by his supervisor and a coworker but he does not provide the details of the incident.

In support of his claim for compensation, appellant submitted an October 31, 2000 report from Dr. Deborah Glazer, a family practitioner, who diagnosed appellant with adjustment reaction, work-related stress, depression and grief reaction. Dr. Glazer noted that appellant had been under increased stress at work because his performance had been questioned. She further noted that appellant had been under stress following the death of his wife in August 1999 of breast cancer.

In a December 13, 2000 letter, appellant was advised of the factual and medical evidence required to establish his claim for an emotional condition.

In a May 8, 2001 decision, the Office denied appellant's claim for compensation on the grounds that he failed to identify any compensable work factors to which he attributed his emotional condition and therefore was unable to demonstrate that he sustained an emotional condition in the performance of duty.

In a July 24, 2001 letter, appellant's supervisor, William Conners, indicated that appellant had been selected to operate a motor vehicle but was required to undergo a physical examination to show that he could lift greater than 45 pounds. Mr. Conners noted that appellant had not been singled out for the medical request. He related that appellant had refused to show up for the "Snow List" and that reports had been made about his driving ability so he was taken off the road. Mr. Conners further indicated that "reports of contact had stated that he was suicidal." This was confirmed by a disability slip from appellant's doctor dated September 28, 2000 indicating that appellant should not work until November 6, 2000 due to depression. Appellant was permitted to drive once the employing establishment received written medical clearance on December 5, 2000.[1] Finally, the supervisor denied having threatened appellant, stating that appellant misunderstood a phrase "I [wi]ll take care of him" for a threat. Mr. Conners stated that he only meant he would accommodate appellant in his job if necessary.

Appellant requested a hearing, which was held on April 16, 2002. He testified that he completed his CA-2 application on November 8, 2000 after he had been "grounded" by the employing establishment and was not permitted to operate his work vehicle based on medical preclusion. Appellant stated that he was harassed by his supervisor but did not explain this allegation in any detail. He further testified that he had been reprimanded by the employing establishment for sexual harassment of a coworker. The reprimand was issued December 1, 2000 and appellant filed an Equal Employment Opportunity Commission (EEOC) complaint. The reprimand was later removed from appellant's record on November 9, 2001 based on a settlement agreement reached by appellant and the employing establishment. The settlement agreement did not constitute an admission of guilt on the part of appellant or liability on part of the employing establishment.

In a decision dated June 26, 2002, an Office hearing representative affirmed the Office's May 8, 2001 decision.

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

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2] Rationalized

[1] Mr. Connors also indicated that appellant had left work on several occasions without prior approval. He stated that appellant got the same amount of overtime as other employees.

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

medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[3]

Workers' compensation law is not applicable 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 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 comes within coverage of the Federal Employees' Compensation Act.[4] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[5]

As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[6] However the Board has also held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[7] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[8]

In this case, appellant attributes his emotional condition to having been "grounded" by the employing establishment and not permitted to operate his work-related motor vehicle. As discussed above, the assignment of job duties is an administrative duty of the employing establishment. The Board finds nothing in the record from which to conclude that the employing establishment acted unreasonably or abusively in grounding appellant from using his vehicle. It appears that appellant's supervisor acted within his authority to determine that appellant was not emotionally or physically capable of driving, and in the absence of error of abuse the decision to ground appellant on several occasions is not a compensable factor of appellant's employment.

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

[6] *See Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

[7] *See Elizabeth Pinero*, 46 ECAB 123 (1994).

[8] *Ruth S. Johnson*, 46 ECAB 237 (1994).

Appellant's general allegation that he was harassed by his supervisor likewise has no factual support in the record. A claimant's own feeling or perception that a form of criticism or disagreement is unjustified, inconvenient or embarrassing is self-generated and does not give rise to coverage under the Act absent evidence that the interaction was, in fact abusive. This recognizes that a supervisor in general must be allowed to perform his or her duty and that, in the performance of such duties, employees will at times dislike actions taken. However, mere disagreement or dislike of a supervisor's management style or actions taken by the supervisor will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[9]

Lastly, the Board does not consider the employing establishment's decision to remove the sexual harassment reprimand from appellant's record to be an admission of error or abuse by the employing establishment. The mere fact that an employer lessens a disciplinary action taken towards an employee does not in and of itself establish that the employing establishment acted in error or with abusive intent.[10] Although appellant filed an EEOC complaint against the employing establishment for the reprimand order, both parties signed a settlement agreement to the effect that the matter would be settled without an admission or wrongdoing on either side. The Board notes that the employer has the right to conduct investigations if wrongdoing is suspected and, as appellant provided no evidence that the employing establishment acted abusively or unreasonably in investigating sexual harassment claims made against appellant, no compensable work factor has been established.[11] Because appellant has failed to allege a compensable factor or his employment, he is unable to establish that he sustained an emotional condition in the performance of duty.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. §8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[12] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[13] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[14] Evidence that does not address the particular issue involved also

[9] *Constance I. Galbreath*, 49 ECAB 401 (1998).

[10] *See Garry M. Carlo*, 47 ECAB 299 (1996).

[11] *Bernard Snowden*, 49 ECAB 144 (1997).

[12] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[13] 20 C.F.R. § 10.606(b) (1999).

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

does not constitute a basis for reopening a case.[15] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[16]

In conjunction with his reconsideration request, appellant submitted additional medical evidence. However, the issue of the case which served as the basis for denial was whether or not appellant alleged a compensable factor of employment. Appellant did not submit any relevant or pertinent new evidence with respect to employment factors. Until such time as a compensable work factor is alleged, the medical evidence is not to be considered.[17]

Appellant did not show that the Office erroneously applied the law, nor did he advance a legal argument not previously considered by the Office. Because appellant failed to satisfy the requirements of section 8128, the Office properly denied his request for reconsideration on the merits.

The decisions of the Office of Workers' Compensation Programs dated October 23 and June 26, 2002 are hereby affirmed.

Dated, Washington, D.C.
April 17, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Edward Matthew Diekemper*, 31 ECAB 224 (1979)

[16] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[17] *See generally Elizabeth Pinero*, *supra* note 7.