U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGEL L. MERCADO and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, San Juan, PR

Docket No. 03-904; Submitted on the Record;
Issued August 28, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition or an aggravation of his hypertension while in the performance of duty.

On September 3, 1998 appellant, then a 44-year-old technician, filed an occupational disease claim alleging that on September 27, 1997 he first became aware of a major depression with psychotic symptoms and paranoid traits. Appellant alleged that on November 16, 1997 he first realized that his condition was caused or aggravated by his federal employment. He stated that he realized that the majority of his symptoms and condition manifested themselves while he was working and his symptoms did not occur when he was away from work.

Appellant filed another occupational disease claim on September 3, 1998 alleging that on July 1, 1994 he first realized that his hypertension was aggravated by stressful conditions and harassment in the workplace.[1]

By decision dated May 14, 1999, the Office of Workers' Compensation Programs denied appellant's claim that he sustained an employment-related emotional condition.

In a July 23, 1999 decision, the Office denied appellant's claim for hypertension causally related to his federal employment

In letters dated June 14 and August 5, 1999, appellant, through his attorney, requested an oral hearing before an Office representative regarding the Office's May 14 and July 23, 1999 decisions.

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[1] The record reveals that appellant last worked for the employing establishment on July 25, 1997 and that he subsequently retired on disability.

In a May 15, 2000 decision, an Office hearing representative affirmed the Office's decisions, finding that appellant failed to establish that his claimed condition arose in the performance of duty. Appellant appealed to the Board.

By decision dated June 14, 2001, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record to be followed by a *de novo* decision.[2]

On remand the Office issued an August 9, 2001 decision, finding that appellant had failed to establish that his emotional condition and hypertension were caused by compensable factors of his employment.[3] On August 28, 2001 appellant, through his attorney, requested an oral hearing.

By decision dated November 21, 2002, an Office hearing representative affirmed the Office's August 9, 2001 decision.

The Board finds that appellant has failed to establish that he sustained an emotional condition or an aggravation of his hypertension causally related to 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 coverage of the Federal Employees' Compensation 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.[4]

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.[5] 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.[6]

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[2] Docket No. 00-2688 (issued June 14, 2001).

[3] The Office combined appellant's claims into a master claim assigned number 02-0750640.

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

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

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

Appellant has alleged that several work incidents caused his emotional condition and hypertension. He contended that he was overworked while working as a health nursing escort in the x-ray department from January 16, 1990 until the last quarter of 1993. Appellant stated that there were only five employees including him, who transferred patients in the hospital. He indicated that he had to work with no less than 100 patients daily and had to carry 3 beepers to receive requests from doctors for the transfer of patients. Appellant noted that within the first two years he had two episodes of hypertension, which required emergency medical treatment. He became stressed because he pushed himself to the limit to perform excellent work, which resulted in many patients asking for him to transfer them to their x-ray examination. Appellant alleged that in 1994 there were only 3 employees on the floor and their workload included 40 patients. He stated that they worked with the nursery division and had disagreements with this division.

The Board has held that overwork can be a compensable factor of employment if substantiated by the record since it relates to assigned work duties.[7] In this case, Dr. Hilario Guzman, a retired employing establishment physician, testified at the August 30, 2002 hearing that the situation at the employing establishment was stressful because appellant had to deal with paraplegic and quadriplegic patients. He noted the physical problems experienced by these types of patients and stated that this was stressful in and of itself for employees. Dr. Guzman testified that appellant worked three shifts, which included a 3:30 p.m. to 11:00 p.m. or 12:00 a.m. shift and a 12:00 a.m. to 8:00 a.m. shift. He stated that this caused appellant to be stressed.

In an October 29, 2002 letter, Dr. Guzman stated that appellant was a good employee and he was liked by the patients. He reviewed appellant's case file and reiterated that the incidents alleged by appellant took place after he left the employing establishment. Dr. Guzman stated that sometimes there were personality encounters between the spinal cord injury technicians. He concluded that strenuous working conditions may have caused appellant's health problems.

Dr. Guzman's testimony and letter is insufficient to establish appellant's burden because he failed to identify specific incidents of appellant's dealings with paraplegic and quadriplegic patients and did not describe how appellant's work shift or other alleged working conditions were responsible for appellant's emotional condition and hypertension. Thus, appellant has failed to establish a compensable factor in regards to his allegation of overwork.

Appellant has further alleged that he was harassed by his coworkers and supervisors on a continuing basis beginning January 16, 1993, when he was promoted to the spinal cord injury service (SCIS). He stated that he was falsely accused of using obscene language, sexual harassment, falling asleep on his shift and waving a knife at a coworker. During his first week in his new position, appellant stated that his coworkers called him a hypocrite who was trying to impress his supervisor, Dr. Rafael Martinez Cayere, by moving his office records and furniture to his new office when the movers were late for the job. Appellant contended that on May 1, 1994 Ms. Baudilia, Ms. Alomar, Ms. Carmona and Carmen Diaz, employing establishment nurses, filed a report falsely accusing him of using obscene language and sexually harassing Ms. Diaz. He alleged that on January 15, 1996 Rossana L. Curras, an employing establishment

[7] *See Robert W. Weisenberger*, 47 ECAB 406 (1996).

nurse, falsely accused him of waving a knife in her face. Appellant also alleged that Michael Cruiz Lopez, Ms. Alomar and Maggie Flores, a coworker, falsely accused him of not carrying out an order on June 9, 1998. He stated that he was required to report to his supervisor every time an accusation was made against him.

The Board has held that actions of an employee's supervisor or coworker, which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. For harassment to give rise to a compensable disability there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment are not compensable.[8] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment occurred.[9]

At the August 30, 2002 hearing, Dr. Guzman testified that appellant complained to him about the behavior of his coworkers, but that he did not know about specific problems because he retired in 1997. As previously noted, Dr. Guzman reiterated, in an October 29, 2002 letter, that he was not aware of the incidents alleged by appellant because they took place after he retired from the employing establishment. His hearing testimony and letter is insufficient to support appellant's allegation of harassment as he failed to provide any specific incidents of harassment by appellant's coworkers and supervisors that were responsible for appellant's emotional condition and hypertension.[10]

Ramon A. Gracteroly, appellant's coworker, replied in response to appellant's question whether he heard him use profane language on June 9, 1998, that it was impossible for him to hear anything because he was reading and quoting the Bible to Diane Cruz.[11] He stated that the intensity of the lesson made them focus only on the Bible for about 45 minutes. This statement establishes that Mr. Gracteroly did not witness the June 9, 1998 incident.

In response to appellant's allegation that he was harassed, Ms. Alomar stated that on April 30, 1994 during the 12:00 a.m. to 8:00 a.m. shift, she made the comment that they had to find a way to work together to achieve a common goal. She also stated that the unit would be better if everyone worked together in harmony. Appellant responded that he was already united with Ms. Sierra and he explained that they did not have an affair because of the comments that would be made since they worked on the same floor. He stated that they were going to get married. Ms. Alomar considered appellant's statement inappropriate and told him that she was going to tell Ms. Sierra about it. Appellant replied that there was a letter in her file indicating that she was removed from ward 8A due to a conflict. Ms. Alomar offered to give appellant $100.00 if he could show her the letter because she knew he needed the money. He laughed and sarcastically stated that he was going to do his dressings.

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

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

[10] *See Merriett J. Kauffmann,* 45 ECAB 696 (1994).

[11] The record does not indicate whether Ms. Cruz is an employing establishment employee or a patient of the employing establishment.

Ms. Alomar stated that at 1:00 a.m. on May 1, 1994 Ms. Diaz noted that appellant had turned off the lights in the SCIS technician room. Ms. Diaz informed appellant to keep the lights on to avoid any problems. Appellant responded that if he was going to sleep there he would keep the lights on or off. In an angry manner, appellant got up, turned on the lights and left the room. He walked towards the nurses' station where he called Ms. Alomar and Ms. Diaz gossips. Ms. Alomar replied that they were not gossiping, but rather talking about problems people experience because of other people. Appellant responded that Ms. Alomar did not have anyone at home to talk to and that she did not bring him anything to eat. Ms. Alomar answered that she was not appellant's wife and he should marry someone who would prepare his meals. Appellant insisted that Ms. Sierra was going to be his next wife despite Ms. Diaz telling him that Ms. Sierra was planning to marry someone else soon. Ms. Alomar noted appellant's disbelief about Ms. Sierra's impending marriage and his comment that Ms. Sierra would explain the situation. She also noted that appellant became agitated and he used obscene language in Spanish after she told him that she was going to inform Ms. Sierra about his inappropriate comments. Ms. Alomar stated that appellant punched a stretcher before leaving the ward.

Ms. Diaz stated that, during the weekend of April 30 and May 1, 1994, appellant made inappropriate sexual comments about Ms. Sierra. She related that he became upset and violent when she told him that Ms. Sierra was engaged.

Regarding the January 15, 1996 incident, Ms. Curras stated that on that date she saw appellant in the ladies' room and asked him to leave so that she could use the facility. She indicated that appellant waved a knife and fork in her face and screamed at the top of his lungs that she was "looking for it." Ms. Curras stated that she stepped back and asked appellant to please leave the area. She noted that he left and she called security because he was extremely agitated and out of control and she was not going to allow him to continue working on the ward.

Ramon L. Pabon, appellant's supervisor, stated that Ms. Curras called him at home and explained that appellant's behavior was very threatening to her personally, she could not have him working on the shift and that she had to call the police. When he arrived at the office, Mr. Pabon stated that William Blanco, an employing establishment security officer, and Ms. Curras explained the problem to him and he sent appellant home taking into account the safety of patients and appellant's coworkers.

As part of his investigation of the matter, Mr. Blanco interviewed Ms. Curras and he prepared a report reiterating her previous statements about the January 15, 1996 incident, including being physically threatened by appellant.

Mr. Lopez stated that on June 9, 1998 appellant reacted with an outburst of anger and used excessive foul language in the presence of employing establishment personnel, which included Ms. Alomar, Ms. Flores and patients, when he asked appellant about a patient's care.

Diana Ortiz, an employing establishment patient, stated that she was in her room on June 9, 1998 and she heard appellant use offensive language while he was arguing with Mr. Lopez. She indicated that she became nervous and started to shake. Ms. Ortiz stated that she did not want appellant to have anything to do with her medical treatment and she felt threatened by him.

Manuel Raimundi, a nurse manager, indicated that he met with appellant on June 10, 1998 at his request so that he could explain the June 9, 1998 incident. Instead, appellant decided to write a detailed statement. Mr. Raimundi stated that he was concerned about appellant's statement that Ms. Alomar was responsible for the incident and that his anger manifested to the degree that he felt like punching her face. Mr. Raimundi perceived him to be anxious and irritated while speaking. He considered appellant's statement a threat to Ms. Alomar and expressed his concern about her welfare.

Dr. Larregoity stated that on June 18, 1998 appellant did not report to work and he did not call the nurse in charge regarding his absence. As a result, he was placed on absent without leave status. He reported to work the following day with a medical certificate placing him on sick leave from June 22 through 29, 1998. When appellant learned that he had been placed on absent without leave status, Dr. Larregoity stated that he had an outburst of anger. On June 22, 1998 Dr. Larregoity related that appellant told him that he had been misinformed about his absence and wished to have a meeting with the informants, Mr. Gomez and Ana L. Santiago. During the meeting with appellant, Mr. Gomez, Ms. Santiago and Mr. Raimundi, an employing establishment employee, Dr. Larregoity stated that appellant, in a loud, aggressive and offensive tone, insulted Mr. Gomez, pointed his fist and thrust himself forward. Dr. Larregoity further stated that the meeting then focused on appellant's aggressive outbursts which had been the subject of numerous complaints filed against him by patients and his coworkers. Appellant denied such outbursts and then agreed to be taped whenever such behavior occurred before patients or other staff members.

Mr. Gomez stated that on June 17, 1998 appellant informed him that he could not come to work on June 18, 1998. He advised appellant to call the next day to inform him that he was not coming to work. Mr. Gomez stated that appellant returned to work on June 19, 1998 and noticed that he had been placed on absent without leave status. He denied appellant's request to be removed from this status. Mr. Gomez described the nature of the June 22, 1998 meeting and stated that appellant raised his voice, called him a liar and used foul language.

Job E. Andujar, appellant's supervisor, stated that based on his review of appellant's file and input from his previous supervisor, Dr. Larregoity, it was unlikely that appellant's emotional condition deteriorated while working in the SCIS. He further stated that appellant showed disrespectful behavior towards his peers and patients and several incident reports were filed regarding these incidents. Dr. Larregoity also stated that appellant had attendance and behavioral problems and he used frequent foul language to the staff.

The statements of Ms. Alomar, Ms. Diaz, Ms. Curras, Mr. Pabon, Mr. Blanco, Mr. Lopez, Ms. Ortiz, Mr. Raimundi, Dr. Larregoity, Mr. Gomez and Mr. Andujar establish that appellant had some conduct issues that may have created a difficult environment at the employing establishment. As he has not substantiated his allegation that he was harassed by his coworkers and supervisors, he has failed to establish a compensable factor of employment under the Act.

Appellant's allegations that being required to report to his supervisor every time an accusation was made against him,[12] the issuance of letters of reprimand, admonishment and suspension issued by the employing establishment for using obscene language, being insubordinate, making slanderous or defamatory statements, unauthorized absences, failing to follow leave request procedures,[13] the investigation of the January 15, 1996 incident,[14] the denial of promotions,[15] use of leave,[16] the filing of grievances against the employing establishment for taking disciplinary actions against him and denying his promotions[17] caused his emotional condition and hypertension involve administrative or personnel matters. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the handling of administrative matters, coverage may be afforded.[18] Appellant has not submitted any evidence establishing that the employing establishment committed error or abuse in handling the above administrative matters.

Appellant did not submit any evidence establishing that his supervisor was being unreasonable in requiring him to report to him after accusations had been made against him. Thus, he has failed to establish a compensable factor of employment under the Act.

Regarding the disciplinary actions and leave matters, the statements of Ms. Alomar, Ms. Diaz, Ms. Curras, Mr. Pabon, Mr. Blanco, Mr. Lopez, Ms. Ortiz, Mr. Raimundi, Dr. Larregoity, Mr. Gomez and Mr. Andujar establish that appellant used obscene language, made offensive sexual comments, failed to follow orders and leave procedures and physically threatened coworkers. There is no evidence of record establishing that the employing establishment committed error or abuse in handling the above matters. Appellant has failed to establish a compensable factor of employment under the Act.

The employing establishment denied appellant's request for a promotion to the GS-6 level in April and June 1994. In a September 12, 1995 memorandum, the employing establishment advised him that a new determination would be made on March 12, 1996 so that he could continue to develop his abilities needed at the next higher level. An April 9, 1996 letter indicated that appellant was promoted to the GS-6 grade level. However, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establishes error or abuse.[19] Similarly, the employing establishment denied appellant's April 1998 request to be promoted to the GS-7 grade level because he did not have the skills necessary to perform the job,

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[12] *Sandra Davis*, 50 ECAB 450 (1999).

[13] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[14] *Sammy N. Cash*, 46 ECAB 419, 423-24 (1995).

[15] *See Donna Faye Cardwell*, *supra* note 6.

[16] *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993).

[17] *Diane C. Bernard*, 45 ECAB 223 (1993).

[18] *James W. Griffin*, 45 ECAB 774 (1994).

[19] *Michael Thomas Plante*, *supra* note 16 at 516.

but encouraged him to participate in continuing education activities to broaden his knowledge and skills in the required areas. There is nothing in the record to establish that the employing establishment acted abusively or unreasonably in denying appellant's requests for promotion to the GS-6 and GS-7 grade levels. As he has not submitted any evidence establishing that the employing establishment committed error or abuse in handling his requests for a promotion, he has failed to establish a compensable factor of employment.

The record does not contain a decision on appellant's grievances finding that the employing establishment committed error or abuse in taking disciplinary actions against him or in denying his requests for promotions. Thus, he has failed to establish a compensable factor of employment.

As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment under the Act, the medical evidence of record need not be addressed.[20]

The November 21, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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[20] *Garry M. Carlo*, 47 ECAB 299, 305 (1996).