U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES E. MUNSON and DEPARTMENT OF THE NAVY, MARINE CORPS STATION BASE, Barstow, CA

Docket No. 02-1796; Submitted on the Record;
Issued February 13, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant met his burden of proof in establishing that employment-related stress aggravated his preexisting diabetes and related conditions; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On October 5, 2000 appellant, then a 52-year-old forklift driver, filed an occupational disease claim alleging that on August 24, 2000[1] he first realized that his diabetes, stress and depression were due to his hostile work environment.[2] Appellant stopped work on August 24, 2000 and has not returned.[3]

On November 27, 2000 the employing establishment issued a proposed removal letter regarding appellant's behavior on August 24, 2000 when he refused to comply with his supervisor's order to return work.

A December 26, 2000 note from Northeastern Occupational Medicine diagnosed work-related stress, anxiety and depression.

In a December 26, 2000 report, Dr. Paul W. Holmes, a Board-certified family practitioner, related that appellant stated that, prior to August 1999, he had been "harassed by another employee who called him names, followed him, threatened him and he feels tried to run him over when he was on his forklift, with his vehicle" and that, after he filed a Equal

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[1] Appellant indicated that he first became aware of his disease or illness in 1985. The employing establishment noted that appellant began work at the employing establishment on April 26, 1999.

[2] Appellant had filed a traumatic injury claim on July 14, 1999 alleging that his that his heart attack was due to his employment.

[3] Appellant's claim was approved by the Social Security Administration for disability retirement.

Employment Opportunity (EEO) complaint, his supervisor started to harass him. Dr. Holmes related that appellant had been "trying to straighten out some paperwork for his transfer" on August 24, 2000 when he "passed out and was shaking and evidently was hospitalized for a couple of days." Dr. Holmes stated that appellant has been off work since August 24, 2000 he "has absolutely refused to go back to work and claims that he has medical illness and that the stress of going back to work prevents him from going back." Dr. Holmes further noted that he had no records relating to the facts related by appellant and that appellant further stated:

> "When he was trying to file a transfer to Sierra Army Depot on August 24, 2000 his supervisor came in and told him to get back to work and they had a confrontation. That day he passed out at work."

Regarding the cause of appellant's disability, Dr. Holmes opined that he was "dubious as to whether this is a legitimate work-related stress claim" and that he needed to "get all of his records, certainly his diabetes complicates this issue and then the question of whether he can work at all is a separate issue."

By letter dated January 4, 2001, the Office informed appellant that the information received was insufficient to support his claim and advised him as to the type of evidence required to support his claim.

Dr. Holmes diagnosed work-related stress with threatening behavior in a January 16, 2001 report. He indicated that he had received some of appellant's medical records, that "there is no evidence that he was supposed to be taken off work due to his diabetes" and that appellant "absolutely says he will not go back to work at that place."

In a January 22, 2001 letter, appellant attributed his condition to his filing an EEO complaint against Ed Kenworthy, a coworker, and harassment by Robert Nelson, his supervisor, for filing the complaint. Appellant also alleged a hostile work environment and alleged that he had been called "a racial epithet" by Mr. Kenworthy. Appellant alleged retaliation for filing his EEO complaint by Mr. Kenworthy, who would follow him and scrutinize his work. He indicated that he reported these incidents to Pete Delgado, his lead, and to Mr. Nelson, his supervisor and neither man did anything about his complaints. Appellant alleged that Mr. Kenworthy tried to injure him by running him "over with a tractor mule." As to the incident on August 24, 2000, appellant indicated that he requested and received permission from Mr. Delgado to go to the Support Business Center Office for personal business. He sustained a diabetic attack due to Mr. Nelson "screaming and yelling" and saying he was to call the military police, to have appellant removed from the base.

On February 5, 2001 the employing establishment responded to appellant's allegations. Mr. Nelson stated that he discussed the name calling incident with appellant, who acknowledged that he did not hear Mr. Kenworthy say the racial epithet, but was told this by another employee. Mr. Nelson noted that Mr. Kenworthy had been disciplined over the hearsay name calling and had been transferred to another shop on September 7, 1999. Mr. Nelson denied that appellant was subjected to a hostile work environment, and denied appellant's allegation that Mr. Kenworthy attempted to run over him with a forklift. Mr. Nelson stated that appellant "left

his job without mine or Mr. Delgado's permission to conduct personal business" and that appellant became hostile when he discovered appellant in the Support Business Center Office.

By decision dated July 17, 2001, the Office denied appellant's claim on the basis that he failed to establish any compensable factors of employment.

Appellant requested a hearing which was held on January 16, 2002.

By decision dated March 19, 2002, the hearing representative affirmed the denial of appellant's claim on the basis that he failed to establish any compensable factors of employment.

Appellant requested reconsideration by letter dated May 31, 2002 and enclosed evidence in support of his request. The evidence included a Department of Defense memorandum dated July 5, 2000 regarding an investigation into appellant's discrimination complaint; a bill from the Lassen County Department of Health and Human Mental Health Services and a Social Security Administration disability decision.

By decision dated September 9, 2002, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was irrelevant and immaterial.

The Board finds that appellant has not established that his aggravation of his diabetes or emotional condition arose in the performance of duty

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[4] 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.[5]

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 employment factors.[6] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[7] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[8] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[9]

Appellant alleged harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. He also stated that he was subjected to retaliation and harassment by Mr. Nelson, his supervisor. 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.[10] 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.[11] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[12] Appellant alleged that supervisors and a coworker engaged in actions which he believed constituted harassment 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 has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that Mr. Kenworthy tried to run him down with a tractor mule. The employing establishment denied his allegations and stated that Mr. Kenworthy was transferred to another shop and worked a different schedule than appellant. Appellant did not submit any evidence in support of this allegation and has not substantiated a factor of employment.

Appellant alleged that Mr. Kenworthy called him a "racial epithet." However, appellant presented no evidence, in the form of witness statements, a settlement agreement or written documentation other than his statement to support his allegation regarding any remark by

[8] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[9] *Id.*

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

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

[12] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

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

Mr. Kenworthy. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The EEO complaint submitted by appellant only alleges harassment; it does not establish that it occurred. A claimant must substantiate such allegations with probative and reliable evidence.[14] Thus, appellant has failed to substantiate a compensable factor of employment with regard to this allegation.

For the foregoing reasons, as appellant has not established any compensable factors of employment, he has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[15]

The Board finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provides 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 evidence not previously considered by the Office.[17] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[18]

In this case, appellant's allegations included that he was subjected to harassment, name calling and retaliation at work including an attempt by Mr. Kenworthy to run him over with a tractor mule. The Office denied the claim on the grounds that compensable work factors had not been established as factual or arising in the performance of duty. The Board finds that the evidence submitted after the March 19, 2002 merit decision, however, does not constitute new and relevant evidence.

In emotional condition cases, the Board has long held that only after an employee has met his burden of proof to establish compensable factors of employment will the medical evidence in his case be considered to determine if those factors caused his condition.[19] As the Office explained, in its July 17, 2001 and March 19, 2002 decisions, appellant has yet to establish a compensable factor, mainly because he has provided no corroborating evidence of his allegations

[14] *Donna Faye Cardwell*, 41 ECAB 730 (1990) for harassment to give rise to a compensable disability there must be some evidence that harassment or discrimination did in fact occur); *Ruthie M. Evans*, 41 ECAB 416 (1990); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[15] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[16] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[17] 20 C.F.R. § 10.606(b)(2).

[18] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[19] *John Polito*, 50 ECAB 347, 350 n. 18 (1999).

of harassment and error or abuse on the part of the employing establishment. In this decision, the Office noted that such evidence could consist of witness statements or an administrative decision in his favor that showed harassment or retaliation, but that the record contained no such documents.

The Board finds that the evidence submitted by appellant with his request for reconsideration is immaterial to the issue of whether he established a compensable factor of employment and, therefore, he has not met the requirement of subsection (iii) of section 10.606(b)(2). Also, appellant has presented no new legal argument nor has he shown that the Office misapplied the law. Inasmuch as appellant has failed to meet any of the requirements for reopening his claim for merit review, the Board finds that the Office acted within its discretion in denying his request for reconsideration.[20]

Appellant submitted a statement, a Department of Defense memorandum dated July 5, 2000 regarding an investigation into appellant's discrimination complaint; a bill from Lassen County Department of Health and Human Mental Health Services and a Social Security Administration disability decision in support of her allegation. Although this agency found him to be disabled and entitled to benefits, its decision is of limited probative value in this case as the findings of an administrative agency with respect to entitlement to benefits under a specific statutory authority is not determinative of disability and entitlement to compensation under the Act.[21] Similarly the July 25, 2000 investigation memorandum is insufficient as it failed to contain a decision or administrative ruling. Lastly, the bill from Lassen County is irrelevant as it does not address the issue in this matter, *i.e.*, whether appellant has established a compensable factor of employment. None of the evidence submitted by appellant substantiate his allegations.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, nor did he submit new and relevant evidence with respect to compensable work factors. Accordingly, the Office properly refused to reopen the claim for merit review.

[20] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that evidence submitted on reconsideration regarding the occurrence of several industrial accidents was irrelevant to appellant's burden of proof to establish the timely filing of his claim and was therefore, insufficient to warrant merit review by the Office).

[21] *Daniel Deparini*, 44 ECAB 657 (1993) (findings of the Social Security Administration are not determinative of disability under the Act).

The decisions of the Office of Workers' Compensation Programs dated March 19 and September 9, 2002 are hereby affirmed.

Dated, Washington, DC
February 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member