U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN H. MARCH and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 01-1342; Submitted on the Record;
Issued May 28, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On November 20, 1997 appellant, a 50-year-old letter carrier, filed an occupational disease claim alleging that he developed an emotional condition caused by factors of his employment. He submitted a November 21, 1997 statement noting that he had a congenital eye condition known as nystagmus. Appellant stated that this condition required visual correction in the form of glasses or contact lenses, without which his visual acuity would be 20/200+. He began working for the employing establishment, in its handicapped program, in 1986 and alleged that the employing establishment management had behaved in an abusive and unfair manner. Appellant alleged that he was required to work beyond medical restrictions provided for his congenital eye disorder. Appellant stated that beginning on October 23, 1997 he experienced heart palpitations, cried uncontrollably, slept only two to three hours a night, lost weight, was short tempered and had a knot in his stomach. He stopped work on November 1, 1997.

In a report dated November 11, 1997, Dr. Christine A. Seeger, Board-certified in psychiatry and neurology, diagnosed major depression, severe, with a generalized anxiety disorder as well as an adjustment disorder with mixed emotional features. She stated:

> "It is my opinion that [appellant's] emotional illness is due entirely to the stress, harassment and inconsistent communication with his supervisors at [the employing establishment] and their unwillingness to accommodate his visual impairment and restrictions. He has no previous history of psychiatric symptoms.... [Appellant] has tried repeatedly to comply with the demands and requirements of the [employing establishment] in order to continue to earn a living for his family.... His mental state is solely due to the severe occupational stress he has suffered over the past several months."

Appellant alleged that the following factors contributed to the development of his emotional condition: he became a union steward for several years because he felt the employing establishment acted in an abusive manner toward employees. While working as a trainee supervisor, upper management ordered him to treat craft people in a manner which violated the collective bargaining agreement and he refused to comply with these orders. Appellant made several suggestions to the employing establishment which resulted in economic savings and greater efficiency in his division; however, people in management took credit for his suggestions. The employing establishment allegedly told him he could use as much leave as needed after his nephew was murdered on August 20, 1995, but he was given a letter of warning for excessive unscheduled absences on August 30, 1995 after returning to work. He stated that managers did not recognize his excellent performance, running pieces of mail. Appellant filed a claim based on a degenerative eye condition and indicated his displeasure with the way the employing establishment handled this claim. In May 1997, he advised management that he could not drive in the dark due to his eye condition and that he would either need to ride with his wife or walk to work from his home. He was provided work at the Pino Station, located less than a mile from his home. On September 18, 1997 appellant filed a grievance claiming harassment and discrimination against the employing establishment, contending that it refused to allow him to work within his medical restrictions. Management acted improperly in failing to promptly supply him with goggles for his eye condition. Appellant claimed that his treating optometrist, Dr. Kent Schauer, was never asked about the goggles. He stated that he agreed to work at the Air Mail Center under protest and that Dr. Schauer informed the employing establishment on September 22, 1997 that no one had contacted him regarding appellant's work restrictions.

Appellant alleged that he received a "very poor" performance evaluation on October 23, 1997 and that he was again charged with being absent without official leave. On October 28, 1997 Dr. Schauer wrote him and advised him that a suitable job offer was not within his medical restrictions but he was capable of performing mail processing duties at his former job. Appellant forwarded this letter to two of his supervisors. On October 29, 1997 he received a letter from Mr. Stout, his immediate supervisor, advising him that he had failed to report for work and had failed to follow instructions. On October 30, 1997 appellant received another letter from Mr. Stout concerning his failure to report to work and to follow instructions. The letter advised him to report for "fact finding" on October 31, 1997. He attended the fact-finding meeting on November 1, 1997 with Mr. Stout and the union president. Mr. Stout advised appellant and the union president that he would write a letter reversing the absent without leave status on October 31, 1997. Mr. Stout advised appellant to begin work at the Air Mail Center within his medical restrictions. Appellant stated that he reported to work at the Air Mail Center on November 1, 1997, but was unable to perform 99 percent of the work due to back problems and/or his lack of visual acuity. He noted that he was unable to read the small print on the priority mail packages unless he actually put the packages up to his face, which prompted derogatory comments and insults from coworkers. Appellant stopped work and did not return. On November 12, 1997 he filed a grievance, requesting that Mr. Stout stop harassing him and charging Mr. Stout with unprofessional conduct. Appellant sought to have his status changed from absent without leave to leave without pay for the period from November 1 through December 5, 1997. The grievance was settled informally and the employing establishment agreed to change his status for that period, to leave without pay. On November 12, 1997 appellant received a letter of warning from Mr. Stout finding him absent without official leave

from October 18 through October 27, 1997. On November 13, 1997 appellant filed a grievance seeking to have the letter of warning rescinded and to be paid for all the hours of missed work from October 18 through October 31, 1997. The grievance was denied.

By letter dated November 26, 1997, the employing establishment responded to appellant's allegations.[1] With regard to his allegation that the employing establishment forced him to work at a job -- the Pino Station -- where he was required to ride his motorcycle to work in the dark at 5:00 a.m., the employing establishment noted that this contradicted appellant's statement that he was unable to drive, especially in the dark. With regard to appellant's frustration at being unable to transfer to another station, the employing establishment stated that the location in which he wanted to work was in the category of city operations and had a city postmaster, which required him to engage in a bidding process in accordance with union procedure. With regard to his allegation that the employing establishment failed to accommodate his need for goggles, the employing establishment indicated that appellant received a letter from his supervisor, notifying him that he needed to return to the plant and to his regular assignment. The employing establishment noted that both supervisors, appellant's physician and the employing establishment's physician agreed that "it was all right for him to work at the plant with the use of protective goggles."

The employing establishment denied appellant's claim that it ignored his request to obtain goggles. On September 17, 1997 his supervisor wrote appellant and gave him notice that the employing establishment had purchased special goggles for him, that he was to report to work and pick them up, show them to his physician and then be responsible for them thereafter. Instead, appellant paid $35.00 for his own goggles, indicating that he paid the overnight shipping fee because he did not want to wait any longer for the goggles. This is corroborated by Dr. Schauer in his October 1, 1997 letter, in which he advised that he examined appellant along with a pair of goggles that he provided, which were an exact model of the type of goggles the employing establishment had intended to provide him. Dr. Schauer opined that these goggles were unusable, that they would restrict his temporal and nasal visual fields to the extent that they would be dangerous for his health and safety.

By letter dated October 22, 1997, the employing establishment advised appellant that a position was available at the Air Mail Center within Dr. Schauer's limitations, which it had previously offered him in a letter dated October 17, 1997. Because of appellant's failure to report to work at the offered position, the employing establishment scheduled the fact-finding meeting, allowing for the presence of his union steward. A meeting was held on October 31, 1997, at which appellant agreed that if the job at the Air Mail Center was as described, he should be able to perform the duties. Appellant reported for work at the Air Mail Center on November 1, 1997. However, according to a December 2, 1997 letter from his supervisor, he reported for work late on that date, left early for medical reasons and never returned to work. Appellant filed a grievance on November 28, 1997 in which he contested being charged with absence without official leave.

[1] Accompanying this statement were 13 documents which supported the employing establishment's position.

By decision dated March 25, 1998, the Office found that fact of injury was not established, as the evidence of record did not establish that an emotional condition was sustained in the performance of duty.

By letter dated September 9, 1998, appellant's attorney requested reconsideration.

By decision dated January 19, 1999, the Office denied modification of the March 25, 1998 decision.

By letter dated January 14, 2000, appellant requested reconsideration. He submitted a March 1, 1999 report from Dr. Seeger in which she essentially reiterated her previous findings and conclusions; a March 7, 1999 letter from appellant's union vice-president; and an April 20, 1999 letter from the employing establishment's senior plant manager.

By decision dated February 7, 2001, the Office denied modification of its prior decisions.

The Board finds that the case is not in posture for a decision.

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 emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

The Board, however, has also found that an administrative 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.[4] The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[5] In this case, the employing establishment did not accommodate appellant's medical restrictions regarding his eye condition in 1997. Appellant was restricted by his treating optometrist, Dr. Schauer, from working at the Air Mail Center without the proper eye lens and he had previously indicated the nature of the eye lens required by appellant. Appellant was subsequently directed to report to work by supervisor Stout and was told that the employing

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

[3] *Clara T. Norga*, 46 ECAB 473 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

[5] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

establishment would provide "goggles." Dr. Schauer, however, specifically stated that he found the goggles provided to appellant were inadequate, restricted his vision and would be dangerous. The physician found that appellant was not able to work under these circumstances.[6] Although the employing establishment asserted that the job to which appellant was assigned at the Air Mail Center conformed with his medical restrictions, the reports of Dr. Schauer do not support this assertion. He stated in his September 22, 1997 report that "No one from the employing establishment has contacted me and my restrictions from the CA-17 of September 2, 1997 still stand…." Therefore, the record establishes that the employing establishment committed error by requiring appellant to perform a job which did not accommodate his medical restrictions. The Board finds that appellant has established a factor of employment.

As to other allegations raised, the Board finds that appellant has submitted insufficient evidence to establish compensable factors of employment. With regard to his allegations of harassment, the Board finds that he has failed to provide evidence to substantiate his allegations. Appellant alleged harassment in general terms, but has not provided a description of specific incidents or sufficient supporting evidence to substantiate the allegations.[7] He has not submitted sufficient evidence to support his allegations that he was harassed, mistreated or treated in a discriminatory manner by his supervisors. Appellant has failed to provide support for his allegations that upper management ordered him to treat craft people in a manner which violated the collective bargaining agreement and that he experienced emotional stress because he refused to comply with these orders. In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and he has not submitted any evidence to establish that he was harassed or discriminated against by the employing establishment, with regard to promotions, assignments or disciplinary actions.[8] Appellant provided no factual support for his allegations that his supervisors or coworkers created a hostile work environment.[9]

The Office reviewed all of appellant's specific allegations of harassment, abuse and mistreatment and found that they were not substantiated or corroborated. The Board finds that the incidents of harassment alleged by appellant did not factually occur, as alleged. Appellant has not substantiated that such incidents actually occurred.[10] As such, appellant's allegations constitute mere perceptions or generall-stated assertions of dissatisfaction with a certain superior at work which do not support his claim for an emotional disability.[11] For this reason, the Office

[6] The employing establishment found that appellant was absent without leave in its letter of October 27, 1997 and placed him in a nonpay status for the period of October 18 to 31, 1997. There was an agreement by the employing establishment, in which appellant's absent without leave status was rescinded and he was paid for this period.

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

[8] *Id*.

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

[10] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative reliable evidence. *Ruthie M. Evans*, 41 ECAB 416 (1990).

[11] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

properly determined that these incidents constituted mere perceptions of appellant and were not factually established.

With regard to appellant's allegation that he did not receive adequate recognition for his suggestions to the employing establishment, which purportedly resulted in economic savings and greater efficiency in his division, the suggestion program constituted an administrative action which is not compensable absent a showing of error or abuse. Appellant has submitted no evidence of such error or abuse. Additionally, neither his contention that the employing establishment failed to recognize his "excellent" performance running pieces of mail, nor his contention that the employing establishment's October 23, 1997 poor performance evaluation was unfair constitutes a factor of employment. Such determinations by the employing establishment are administrative in nature. The evaluation of appellant's performance does not give rise to a compensable disability absent error or abuse in these administrative matters.[12]

With regard to appellant's allegation that he was not allowed to transfer to the area in which he desired to work, the employing establishment refuted this allegation, noting that it would have been improper for appellant to unilaterally transfer from plant operations to city operations, as he was required to bid on the position. The Board finds that this amounts to frustration at not being permitted to work in a particular environment and is not a compensable factor under the circumstances of this case.

The Board notes that matters pertaining to use of leave are generally not covered under the Federal Employees' Compensation Act, as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.[13] However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In this case, appellant has failed to establish error or abuse with regard to his allegation that the employing establishment acted improperly in issuing him letters of warning for excessive unscheduled absences on August 30, 1995[14] and on November 12, 1997 for being absent without official leave. He has submitted no evidence indicating that the employing establishment committed error or abuse or that its actions in these instances were unreasonable. Appellant has similarly failed to establish that the employing establishment committed error or abuse with regard to other instances involving the issuance of leave; thus these episodes, as alleged, are not compensable.

Although appellant has established a factor of employment, his burden of proof is not discharged by the fact that the employment factor gave rise to a compensable disability under the Act. He also has the burden of submitting sufficient medical evidence to support his claim that the failure to accommodate his work restrictions resulted in an employment-related emotional condition.[15] In the instant case, appellant submitted the November 11, 1997 report from

[12] *See Helen Casillas*, 46 ECAB 1044 (1995).

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

[14] The August 30, 1995 letter of warning indicates that appellant had previously been informally counseled about his unscheduled absences on July 20, 1995.

[15] *Chester R. Henderson*, 42 ECAB 352 (1991).

Dr. Seeger, who diagnosed depression, an anxiety disorder and an adjustment disorder. She attributed these conditions of appellant's to work-related stress, poor communication with supervisors and their unwillingness to accommodate his visual impairment and restrictions. Although the medical evidence submitted by appellant is insufficient to meet his burden of proof, it is sufficient to raise an uncontroverted inference that the factor of his federal employment may have contributed to his alleged emotional condition or disability and is sufficient to require further development of the record.[16]

On remand the Office should further develop the medical evidence as is appropriate. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated February 7, 2001 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, DC
May 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[16] *John J. Carlone*, 41 ECAB 354 (1989).