U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEITH P. WHITE and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

Docket No. 03-1363; Submitted on the Record;
Issued November 20, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On January 9, 2002 appellant, then a 38-year-old mail handler, filed a claim, alleging that he sustained a stress-related condition as a result of being harassed and intimidated by his supervisors. Appellant stopped work on January 8, 2002 and worked intermittently thereafter.

In a letter dated January 9, 2002 appellant's supervisor, Kenneth Lacroix, noted that on January 8, 2002, he held a predisciplinary meeting with appellant regarding his irregular attendance. Mr. Lacroix advised appellant that he was required to be regular in attendance and indicated that he had four occurrences of unscheduled absences and that the next step in the disciplinary process was a 14-day suspension. Mr. Lacroix noted that after the meeting appellant filed a stress claim and stopped work. He requested that appellant submit medical documentation to support his claim.

In a letter dated January 16, 2002, the Office of Workers' Compensation Programs informed appellant that the evidence submitted was insufficient to establish his claim, advised him of the type of evidence needed and requested that he submit such evidence.

Appellant submitted a statement dated February 10, 2002, in which he indicated that during a predisciplinary hearing with his supervisor Robert Helm, he was verbally abused, harassed and intimidated because he had filed an Equal Employment Opportunity (EEO) Commission complaint. Appellant further noted that Mr. Helm used micro-managing and selective managing to intimidate him. Appellant responded to the Office's questionnaire noting that he was unable to return to his work duties after the disciplinary meeting because of stress and anxiety. Appellant also submitted an attending physician's report, prepared by Dr. Jay M. Ungar, a Board-certified internist, who diagnosed appellant with anxiety and depression, which was related to his work and noted with a checkmark "yes" that his condition was caused or aggravated by an employment activity. In a duty-status report dated February 8, 2002, Dr. Ungar

noted that appellant was treated for anxiety and depression. Also submitted was a letter from Dr. Moris Pardo, a psychiatrist, who advised that appellant was being treated for emotional problems arising from his work, was on medication and would remain off work for one additional week.

In a letter dated March 19, 2002, Mr. Lacroix informed appellant that his grievance was denied and that the 14-day suspension for irregular attendance would be effective March 23, 2002.

In a decision dated March 12, 2002, the Office denied appellant's claim for compensation on the basis that he failed to establish that the injury occurred in the performance of duty. By letter dated April 6, 2002, appellant requested a hearing before an Office hearing representative. The hearing was held on October 25, 2002.

In statements dated September 11 and October 18, 2002, appellant raised the following allegations: (1) that he was wrongfully issued a 14-day suspension for irregular attendance noting that his attendance was irregular because he sustained a work-related shoulder condition, which caused him to miss work; (2) that on October 15, 2001 there was anthrax contamination at the employing establishment when a white powder substance was discovered on the premises and that he believed that proper safety precautions were not undertaken by management to ensure his health; (3) that on September 11, 2002 his supervisor, Mr. Helm, refused to meet with him; (4) that his supervisor Mr. Lacroix verbally abused him, spoke to him like a child and generally harassed him; (5) that management frequently used profanity during the period of October 2001 to January 7, 2002; and (6) and that on September 11, 2002 Mr. Lacroix threatened to fire him.

In an undated letter, the employing establishment noted that on October 15, 2001 an employee discovered a white powder substance on a mail belt, which was suspected of being anthrax. The Hazmat team cordoned off the area, the building was evacuated and the employee who was working on the mail belt was sent to the hospital. The employing establishment indicated that another employee who reported to work later in the evening and who worked on the by-pass belt also requested to go to the hospital and this request was granted. The employing establishment advised that appellant subsequently filed an EEO complaint asserting that he was discriminated against because two Caucasian employees were sent to the hospital after the anthrax incident, but his request for hospitalization was denied because he was African American.

In a memorandum, William J. Boughton, employing establishment plant manager, advised appellant that he had investigated the anthrax incident of October 15, 2001 and determined that the situation was handled properly by the employing establishment. Mr. Boughton indicated that appellant did not come into direct contact with the powder and that it was controlled upon discovery to prevent airborne release. He determined that appellant's health was not at risk and the need for medical attention did not exist.

Appellant submitted a report from Dr. Ungar dated February 8, 2002, in which he noted that appellant would be off work from February 8 to 14, 2002. In an attending physician's report dated April 12, 2002, Dr. Pardo diagnosed appellant with adjustment disorder and noted with a

checkmark "yes" that appellant's condition was caused or aggravated by harassment and interaction with his supervisors. In his reports of August 8 and November 22, 2002, he diagnosed appellant with adjustment disorder and alcohol abuse and noted that appellant's symptoms had improved. Dr. Richard H. Brody's fitness-for-duty examination of September 16, 2002 and his report of December 16, 2002, advised that appellant was not fit for duty as he had felt increasing stress, which he attributed to harassment at work. Dr. Brody advised that there was a possibility of violence in the workplace and that appellant required ongoing treatment.

In a decision dated January 17, 2003, the hearing representative affirmed the decision of the Office, finding that appellant failed to establish that the claimed injury occurred in the performance of duty.

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

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1] Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.

In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] 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 under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5] 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 under the Act. 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 Act. On the other hand the disability is not covered where it results from such factors as an employee's fear of a reduction-

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

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler*, *supra* note 2.

in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[6]

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.[7] 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.[8]

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.[9] 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.[10]

In the present case, appellant alleged that he was wrongfully issued a 14-day suspension for irregular attendance. In his letter of October 28, 2001, appellant made a passing reference that he sustained a work-related shoulder injury on June 29, 2001, which caused him pain and resulted in his absence from work. However, appellant did not attribute his emotional condition to chronic pain and limitations, resulting from an employment injury. Rather, he indicated that his shoulder injury caused him to miss work.[11] The medical evidence submitted by appellant including reports from Drs. Ungar, Pardo and Brody, failed to mention a shoulder injury nor do they support that appellant's emotional condition was caused or aggravated by a prior work injury. The record is void of any evidence that appellant filed a claim for compensation for a work-related shoulder injury or that the Office accepted such condition. Additionally, there is no evidence to suggest that appellant could not work. Therefore, the Board finds that this does not constitute a compensable employment factor.[12]

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[6] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Clarence D. Ross* 42 ECAB 556 (1991); *Id*.

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

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

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

[10] *Id.*

[11] *See James E. Norris*, 52 ECAB 93 (2000).

[12] *See Clara T. Norga*, 46 ECAB 473 (1995) (an emotional condition due to chronic pain and other limitations resulting from an employment injury is covered under the Act).

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, 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.[13] Although the handling of disciplinary actions are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[14] However, the Board 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.[15] Mr. Lacroix, appellant's supervisor, noted that he held a predisciplinary meeting with appellant regarding his irregular attendance and advised him that he had four occurrences of unscheduled absences and that he needed to be regular in attendance. He warned appellant that the next step in the disciplinary process was a 14-day suspension. The Board finds that the employing establishment did not err or act abusively in this matter and acted reasonably in informing appellant of the consequences of irregular attendance. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged that he sustained an emotional condition as a result possible exposure to anthrax, which was found on a mail belt in the employing establishment. Appellant alleged that he was informed that it could be anthrax. The Board initially notes that appellant's regular or specially assigned duties did not require him to work on the mail belt in question.[16] Additionally, the record is void of any evidence that appellant ingested, inhaled or in any manner came into direct physical contact with the substance while in the performance of duty. In fact, the record reflects that appellant did not come into direct contact with the powder and it was controlled upon discovery to prevent airborne release, as the Hazmat team cordoned off the area and the building was evacuated. This case can, therefore, be distinguished from those, in which the claimant is exposed to an unknown and potentially dangerous substance.[17] The Board thus finds that appellant's reaction was self-generated and was based on his mere perception of events and perceptions and feelings alone are not compensable factors.[18] Appellant further alleged that he was discriminated against as two coworkers were sent to the hospital for evaluation after their exposure to the white powder substance, yet his request for hospital treatment was denied. However, the record reflects that two of the employees who were sent to the hospital for evaluation worked on the mail belt and by-pass belt where the white powder was discovered.

[13] *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).

[14] *Id.*

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

[16] Where the disability does not result from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability would not come within the coverage of the Act. *See Lillian Cutler*, *supra* note 2.

[17] *See Judy C. Rogers*, 54 ECAB ___ (Docket No. 03-565, issued July 9, 2003).

[18] *Effie O. Morris*, *supra* note 8.

There is no evidence in the record to support that appellant worked on the mail belt in question. Therefore, the employing establishment properly determined that the need for referral to a hospital did not exist and that evaluation at the medical unit was adequate.[19]

Appellant's allegation that his supervisor, Mr. Helm refused to meet with him, falls into the category of administrative or personnel actions[20] and in this case, the Board finds that the employing establishment acted reasonably in this administrative matter. Appellant has presented no corroborating evidence to support that the employing establishment erred or acted abusively with regard to this allegation. Thus, he has not established administrative error or abuse in regard to the notification by Mr. Helm.

Appellant further alleged that on September 11, 2002 his manager, Mr. Lacroix, verbally abused him, spoke to him like a child, tried to intimidate him and frequently used profanity at the workplace.[21] To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[22] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[23] The Board notes that vague allegations of a supervisor berating and taunting appellant are insufficient to establish appellant's claim that he was harassed. A claimant's own feeling or perception that a form of criticism by or disagreement with a supervisor 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, erroneous or abusive. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and that, in performing such duties, employees will at times dislike actions taken.[24] General allegations of harassment are not sufficient[25] and in this case appellant has not submitted sufficient evidence to establish that he was harassed by his supervisor.[26]

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[19] *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).

[20] *See Marguerite J. Toland*, 52 ECAB 294 (2001). (An employee's complaints concerning the manner, in which a supervisor performs his duties as a supervisor or the manner, in which a supervisor exercises his supervisory discretion fall, as a rule, is outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse).

[21] *See Kim Nguyen*, 53 ECAB ___ (Docket No. 01-505, issued October 1, 2001) (where appellant alleged that her supervisor verbally abused her by stating she was not her babysitter, appellant's supervisor denied that she made this remark and, even if it were proven, appellant did not show how such an isolated remark would rise to the level of verbal abuse).

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

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

[24] *Michael A. Deas*, 53 ECAB ___ (Docket No. 00-1090, issued November 14, 2001).

[25] *See Paul Trotman-Hall*,45 ECAB 229 (1993).

[26] *See Joel Parker, Sr.*, *supra* note 19.

Appellant provided no corroborating evidence, such as witness statements, to establish that he was harassed or intimidated by Mr. Lacroix on September 11, 2002. Appellant also indicated that he filed an EEO claim for harassment and discrimination. The Board further notes that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred[27] and the record does not contain a final decision in this EEO matter. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Finally, appellant alleged that on September 11, 2002, Mr. Lacroix threatened to fire him.[28] While the Board has recognized the compensability of threats in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to compensability. In this case, appellant did not submit evidence or witness statements in support of his allegation.

In conclusion, the Board finds that appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.[29]

The decisions of the Office of Workers' Compensation Programs dated March 8, 2001 and August 10, 2000 are hereby affirmed.

Dated, Washington, DC
November 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[27] *James E. Norris*, 52 ECAB 93 (2000).

[28] *See Michael A. Deas*, *supra* note 24.

[29] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).