U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MERRITT G. HUGHES and U.S. POSTAL SERVICE,
POST OFFICE, Portland, OR

Docket No. 03-1451; Submitted on the Record;
Issued October 8, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition in the performance of duty on February 13, 2002.

On February 15, 2002 appellant, then a 53-year-old letter carrier, filed a claim alleging that on February 13, 2002 he sustained "mental stress due to [a] hostile workplace." Appellant stopped work on February 13, 2002.

By decision dated April 4, 2002, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish fact of injury. The Office found that appellant had not submitted sufficient factual evidence to establish a basis for his claim. On May 3, 2002 appellant requested a hearing before an Office hearing representative. A hearing was held on November 19, 2002. At the hearing, appellant specified that he was claiming a stress reaction due solely to events occurring on February 13, 2002. In a decision dated February 14, 2003, the hearing representative affirmed the Office's April 4, 2002 decision, as modified to reflect that appellant had established that the February 13, 2002 incident occurred as alleged but did not establish that he sustained an injury on that date in the performance of duty due to a compensable employment factor.

The Board finds that appellant has not established that he sustained an emotional condition on February 13, 2002 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.[1] 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.[2]

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.[3] 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.[4]

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.[5] 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.[6]

Appellant attributed his emotional condition to harassment by his supervisor, Anthony J. Spina-Denson, on February 13, 2002. 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.[7] 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.[8]

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[1] 5 U.S.C. §§ 8101-8193.

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

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

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

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

[6] *Id.*

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

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

Specifically, appellant related as follows:

> "On February 13, 2002 I was pushed beyond my limits. I had been working hard to adjust to my first new route in over 6 or 7 years. I didn't choose to take a new route. An extremely unusual event had resulted from a station wide route inspection. One of the most senior carriers lost his route because of the changes. So all of us below his seniority had to take new assignments. The route I received was much larger than I had expected. Even the [employing establishment] agreed that it was 10 hrs. long not 8 hrs. I could not do it in 8 hrs. working as hard as I could. My sup couldn't do it in 8 hrs either. I worked at it for one week and then suddenly realized that my supervisor just didn't believe me about my work abilitys."

Appellant stated that he had requested a test on his route to determine the number of hours required for completion. His supervisor scheduled the test for February 13, 2002, but then informed appellant that he was too busy to perform the test. Appellant related that on February 13, 2002 his supervisor kept coming by to see how long it was going to be before appellant left on his route. Appellant stated that on his final visit his supervisor "told me I was taking more time than others on a new route." At the hearing, appellant related that he told his supervisor that each time he visited it took time away from casing mail and slowed appellant down. Appellant related that both he and his supervisor had elevated voices during the February 13, 2002 discussion. Appellant further stated, in response to a question from the hearing representative, that he experienced stress not because he had a new route but because his supervisor did not believe how long it took to complete his route.

In response to appellant's allegations, Mr. Spina-Denson related that on February 13, 2002 he asked appellant whether he would need help to finish his route. Mr. Spina-Denson related:

> "[Appellant] stated to me that he would need 1.5 hours of help to complete delivery for his route today. Based on my observation of his mail left to sort I asked [appellant] why he was going to need 1.5 hours help today to complete deliver. [Appellant] stated, 'If you keep asking me why I need 1.5 hours I will make it two hours.' I told [appellant] that he has a lot less volume than he did on the previous days that he need[ed] two hour's assistance and asked him why he would need 1.5 hours assistance today. He states 'O.K. it's two hours now.' I now asked him why is it two hours now. I informed [appellant] that it is his responsibility to make a reasonable estimate of his workload for the day and this workload should be within 15 minutes. [Appellant] began to yell at me, stating 'This is my 5th day on the route, how can I make an estimate.' I told [appellant] to lower his voice when he is talking to me."

Mr. Spina-Denson related that he spoke to appellant "in a normal voice tone and on February 13th I just explained to him about his responsibilities as a letter carrier."

In this case, appellant has not submitted sufficient evidence to establish that he was harassed by his supervisor.[9] In support of his claim, appellant submitted a copy of a February 28, 2002 settlement of his grievance against the employing establishment arising from the events of February 13, 2002. In the settlement, the parties agree to "cease and desist," treat each other with respect, provide carriers with a reasonable amount of time to learn routes and follow procedures in accordance with the relevant handbooks and manuals. In a statement received by the Office on November 19, 2002, Randy Dickson, appellant's union representative, related that appellant's route was too long and had been reduced by the employing establishment in March 2002. Mr. Dickson indicated that Mr. Spina-Denson's behavior toward appellant was inappropriate and that the term "cease and desist" in the settlement agreement meant that a violation had occurred. At the hearing, the hearing representative noted the settlement agreement did not say who was required to "cease and desist" and requested clarification from Mr. Dickson. Mr. Dickson described the terms of the settlement agreement by stating that the employing establishment performed a 60-day test on appellant's route and found that it was too large. Appellant, however, specifically stated that he was not claiming an emotional condition due to his overburdened route but instead due to the repeated questioning by Mr. Spina-Denson of the time it would take to complete his route and his failure to believe appellant's contention that the route was too large. The evidence does not establish harassment by Mr. Spina-Denson in questioning appellant regarding his route. It appears from the settlement agreement that both parties, appellant's representative and management, agreed to "cease and desist" and treat each other with respect. Appellant, therefore, has not established a compensable employment factor under the Act with respect to the claimed harassment or discrimination.

Regarding appellant's contention that Mr. Spina-Denson erred in repeatedly returning to appellant's workstation on February 13, 2002 and questioning him regarding the time needed to complete his route, the Board has held that an employee's complaints concerning the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.[10] This principle recognizes that a supervisor or manager in general must be allowed to perform their 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.[11] In this case, while the settlement agreement provides that the parties will "cease and desist" and that carrier will be provided reasonable time to learn their routes, it does not contain a finding of fault or otherwise establish error on behalf of Mr. Spina-Denson. Appellant, therefore, has not submitted sufficient evidence of error or abuse to substantiate that his supervisor acted unreasonably in the performance of his duties.

Appellant has not established any compensable employment factors under the Act. Therefore, he has not met his burden of proof to establish that he sustained an emotional

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[9] *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).

[10] *Abe E. Scott*, 45 ECAB 164 (1993).

[11] *Id.*

condition in the performance of duty. As appellant has not established a compensable employment factor, the Board will not consider the medical evidence of record.[12]

The decision of the Office of Workers' Compensation Programs dated February 14, 2003 is hereby affirmed.

Dated, Washington, DC
October 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

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[12] *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).