U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFRED M. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 02-1456; Submitted on the Record;
Issued March 3, 2004

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition while in the performance of duty.

On June 5, 2000 appellant, then a 42-year-old mailhandler, filed an occupational disease claim alleging that on March 28, 2000 he realized his anxiety condition was based on discrimination and harassment by management due to his physical disability. Appellant alleged that other employees with disabilities had been accommodated at the Air Mail Center but his work was not accommodated.[1] In accompanying statements, appellant alleged that management took him from a bid job at the Air Mail Center and gave him more physically demanding work at the Main Post Office. He alleged that his work assignments did not conform to medical restrictions provided by his physician on July 26, 1999. Appellant attributed his September 24, 1999 back injury while at work to his supervisors in not complying with his physical limitations.[2] Upon his return to work on October 12, 1999, appellant alleged that his workload was doubled.[3] Appellant received a letter of warning on October 27, 1999 for insubordination, which he alleged constituted retaliation by management.[4] Appellant noted that he worked at the Air Mail Center until March 2000, when the employing establishment transferred him to the downtown facility

[1] Appellant previously sustained injury on September 24, 1999, accepted by the Office of Workers' Compensation Programs for a lumbar disc displacement.

[2] The record indicates that appellant originally sustained a back injury on December 4, 1994 in an automobile accident and was diagnosed with a herniated disc at L4-5. On December 29, 1999 the Office accepted appellant's September 24, 1999 claim for lumbar disc displacement.

[3] A work restriction completed on October 11, 1999 by Dr. Charles D. Hummer, an attending orthopedic surgeon, indicated that appellant was limited in bending and stooping and lifting over 40 pounds.

[4] In a February 7, 2000 settlement, the letter of warning was expunged from appellant's record and his absence without leave for 56 hours was changed to leave without pay. The parties agreed that the settlement was nonprecedent setting for other forums.

on a limited-duty job offer.[5] Appellant indicated that he worked downtown until May 2, 2000, when he returned to the Air Mail Center working four hours full duty. On May 19, 2000 the employing establishment gave appellant another limited-duty job offer to the downtown facility at night for eight hours, which he contended violated his physical restrictions.

The employing establishment controverted appellant's claim, noting that on March 7, 2000 appellant was first provided a limited-duty position based on his medical restrictions based on his accepted lumbar disc displacement condition. The employing establishment noted that appellant was frustrated from not being permitted to work in a particular place and that full-time limited-duty work remained available.

Appellant noted that on May 19, 2000 he was approached by a union steward and advised that Harold T. Best, his supervisor, and Cordell Thomas, manager of distribution operations at the Air Mail Center, were going to discuss appellant's duty status at the Air Mail Center. Appellant noted that he was presented with a limited-duty job offer, which he alleged was based on old restrictions recommended by his physician. Appellant would be sent downtown for a two- to three-week period, 11:00 p.m. to 7:00 a.m., working four hours driving a tractor and four hours of limited duty.[6] Appellant indicated that his restrictions allowed him to work for four hours a day and four hours of leave without pay. He alleged that Mr. Best and Mr. Thomas refused to accept the new medical restrictions as outlined by his physician. He alleged discrimination based on his preexisting condition and requested Equal Employment Opportunity (EEO) counseling. In a July 11, 2001 letter, the employing establishment noted that, based on interviews with appellant's managers and the injury compensation specialist, it was determined that work at the Air Mail Center could not accommodate his restrictions based on his 1999 back injury claim.[7] Appellant was advised that the work at the 30th Street Station would accommodate his medical limitations and that he had 15 days to file a formal EEO complaint.[8] Appellant subsequently filed an EEO complaint regarding his removal from the Air Mail Center on May 19, 2000.

On a Form CA-20 report dated June 6, 2000, Dr. John Donnelly, a psychiatrist, noted that appellant had a previous history of psychosis with poor concentration, irritability and anxiety. The physician indicated that appellant was disabled from May 19 to June 6, 2000, noting "veteran had a psychotic episode terminating his active duty." A May 23, 2000 clinic note indicated that appellant stated that the employing establishment on May 19, 2000 "wanted him to start working night shift again." Appellant was treated for anxiety and advised Dr. Donnelly that

[5] An April 26, 2000 work restriction from Dr. Paul Vitt, an attending osteopath, noted that appellant could return to his regular duty for four hours a day for six weeks due to a resolving lumbosacral strain.

[6] Appellant declined the job offer on May 19, 2000.

[7] The record contains materials related to appellant's back condition of 1999 and limited-duty job assignments. In a report of a January 4, 2001 telephone conversation, the claims examiner noted that appellant "admitted giving lots of background that may confuse the principal issue … he believes his hospitalization in May directly related to getting letter about returning to 30th Street [eight] hours, as opposed to [four] hours at regular facility…."

[8] The record contains May 17 and 18, 2000 notices from the injury compensation specialist stated that limited duty was available repairing torn mail at the Main Post Office within his medical work restrictions.

he called out sick on that night. He indicated that appellant felt the employing establishment was out to get him and that appellant felt he was about to blow up. A July 10, 2000 note from Dr. Donnelly indicated that appellant was unfit to return to work and remained in treatment.

On August 21, 2000 the Office advised appellant that the information submitted was not sufficient to establish his claim. Appellant was requested to submit additional evidence, including written statements from individuals who had witnessed the alleged acts of discrimination.

On January 24, 2001 the Office wrote to Dr. Donnelly, requesting that he submit a comprehensive medical report pertaining to appellant's diagnosis, causation and opinion as to whether work factors contributed to his condition. In a February 14, 2001 treatment note, Dr. Donnelly indicated that appellant had received treatment at the mental health clinic since April 1999. The physician related that appellant would get angry and felt singled out at work and afraid that he might lose control and hurt himself or others. Dr. Donnelly noted that, while in the Navy, appellant became violent and was hospitalized after hurting himself and others. He was diagnosed with schizophrenia, paranoid type and treated with antipsychotic medications. Appellant was given a 30 percent disability rating for his psychiatric condition. Appellant was recently being treated for situational reactions and incipient schizophrenia, for which he received medication. Dr. Donnelly noted that appellant had made several attempts to return to the workplace, but returned to the clinic in view of his fear of loss of control. He described symptoms of severe anger and stated this was clinically caused by his work situation. Dr. Donnelly stated that the prognosis was currently poor and that he was not able to comment about work factors.

Appellant was treated for his back condition by Dr. Vitt, an osteopath specializing in family medicine. In a May 30, 2000 report, Dr. Vitt noted his treatment of appellant for a severe low back strain and acute exacerbation of lumbar disc disease. He stated that appellant was on a limited-duty work schedule of only four hours a day. Dr. Vitt stated that the employing establishment had changed the work assignment to a night shift, a full work schedule, which was more stressful for appellant. He noted that appellant had become anxious over the past several weeks and was being treated with a psychiatrist at the Veterans Administration (VA). In a June 28, 2000 report, Dr. Vitt noted that appellant was out on disability due to the persistence of low back pain and for treatment of stress and anxiety. Physical examination revealed a range of motion of the back approaching normal limits, intact motor function, symmetrical reflexes and negative straight leg raise bilaterally. Dr. Vitt noted that he would defer to appellant's physicians at the VA with regard to his complaints of stress. In a February 12, 2001 report, Dr. Vitt stated that he examined appellant who requested a letter regarding a four-hour workday. Dr. Vitt stated that appellant experienced chronic back pain, with depression and anxiety. He noted that after several discussions with appellant about his work responsibilities, "it was a mutual decision between he and I to try to work him back to a full duty, full work schedule routine. We thought it best to facilitate this, it would be better to initiate four hours per day of a full duty rather than some attenuated activity on a longer basis…. There was no specific scientific criteria [sic] that I used in this except from knowing the patient and having had several extended discussions about his capabilities…."

In an April 16, 2001 decision, the Office denied appellant's emotional condition claim. The Office found that appellant did not establish that his work assignments were changed as a form of harassment or discrimination based on his disabilities.

On May 10, 2001 appellant, through counsel, requested an oral hearing, which was held on October 23, 2001. Appellant submitted additional treatment records and excerpts from a hearing before and EEO Commission Administrative Judge pertaining to his complaints of discrimination. The employing establishment submitted a response to the hearing transcript. It was noted that, following his return to work after the September 1999 back injury, appellant wanted to work as an equipment operator; however, such a position was not available because other employees with more seniority were working in that position. The employing establishment denied assigning work outside appellant's physical restrictions.

By decision dated February 20, 2002, the Office hearing representative affirmed the denial of appellant's emotional condition claim. The Office found that appellant did not establish any compensable employment factors.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to a claimant's employment with the federal government. When an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his 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. The same result is reached when the emotional disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employment or by the nature of the work.[9] The disability is not covered when it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position. Disability resulting from an employee's feelings of job insecurity or the desire for a different position, promotion or job transfer does not constitute personal injury sustained in the performance of duty within the meaning of the Federal Employees' Compensation Act.[10]

Actions of a claimant's supervisors or coworkers, which are characterized as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment or discrimination alleged did, in fact, occur.[11] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[12] An employee's allegation that he was harassed or discriminated against is not determinative of whether or not the alleged incident of harassment or discrimination occurred.[13] To establish

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

[10] *Id; see also Anthony A. Zarcone*, 44 ECAB 751 (1993).

[11] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[12] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

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

entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.[14]

In the present case, appellant did not attribute his emotional condition to the performance of his regular or specially assigned duties as a limited-duty mailhandler. The record establishes that appellant originally sustained a back injury in 1994 and was diagnosed with a herniated disc. In 1999 he sustained injury at work, accepted for lumbar disc displacement and he returned to limited duty based on physical restrictions as set forth by his treating physicians. Appellant's primary allegation was discrimination and harassment by his supervisors based on his back condition and the failure to accommodate his limited-duty work at the Air Mail Center. The record indicates that, following the September 24, 1999 injury, appellant returned to work on October 12, 1999 and was assigned to work at the downtown mail facility on several occasions. The employing establishment noted that appellant's limited-duty work as provided based on his physical restrictions and his assignments to the downtown mail facility were made when limited-duty work was not available at the Air Mail Center. The employing establishment noted that appellant wanted to work as an equipment operator at the Air Mail Center but that such work was not available because other employee's with greater seniority worked in the position. The Board finds that the evidence of record does not substantiate appellant's allegations of harassment or discrimination by his supervisors in making his limited-duty job assignments. It is well established that the assignment of work is an administrative function of the employing establishment and, as a general rule, is not covered under the Act.[15] Coverage may be afforded, however, where the evidence demonstrates that the employing establishment either erred or acted abusively in assigning appellant a particular work schedule or tour of duty.[16] Appellant has not submitted sufficient evidence to establish that the limited-duty work assignments he received from his supervisors constituted harassment or discrimination based on his back condition and disability. The evidence of record does not substantiate that his workload was doubled during his limited-duty tours at either the Air Mail Facility or the downtown mail facility. Appellant's stated preference to work limited duty at the Air Mail Center constitutes a self-generated frustration at not being able to work in a particular job location or hold a particular position and is not a compensable factor of employment.

On May 19, 2000 appellant met with his supervisors at approximately 9:30 a.m. and was notified of a limited-duty job assignment at the downtown facility for eight hours from 11:00 p.m. to 7:00 a.m. commencing that night. As to this job offer, appellant alleged that it violated the terms of his physical restrictions, which limited him to four hours of regular duty a day. The April 26, 2000 work restriction from Dr. Vitt noted that appellant could return to regular duty for four hours a day for six weeks due to a resolving lumbosacral strain. On May 30, 2000 Dr. Vitt reviewed appellant's treatment for his back condition and stated that appellant was on limited duty of four hours of regular work. He indicated that the employing establishment changed the work assignment to a night shift for a full work schedule. Dr. Vitt subsequently explained that he was trying to work with appellant to return to a full duty, full

[14] *See Frank A. McDowell*, 44 ECAB 522 (1993).

[15] *See Robert W. Johns*, 51 ECAB 137 (1999).

[16] *Id.*

work schedule routine based on several discussions about his capabilities for work. The job offer made by the employing establishment directed appellant to report to work on May 19, 2000 at 11:00 p.m. with his duties described as "regular duties as an equipment operator four hours daily/restricted duties to be provided by 2nd floor limited duty section" for four hours daily repairing torn mail. To the extent that appellant attributes his emotional condition to the requirement that he report for limited duty to the downtown station, it is not compensable factor as it constitutes his desire to perform his duties in a particular work environment. As noted, the evidence of record does not establish that the job assignment was made in a discriminatory manner. However, appellant also alleged that the job offer was not in conformance to the limited duty specified by his physician. The medical evidence from Dr. Vitt is not clear as to appellant's capacity to perform the work proposed in the limited-duty job offer for eight hours a day. The evidence of record does not allow the Board to make a fully informed decision as to whether the job offer conformed to time restriction listed by Dr. Vitt, who indicated that appellant's four-hour regular duty restriction would last for six weeks. The case will be returned to the Office for further development of this issue.

Appellant received a letter of warning on October 27, 1999, which he alleged constituted retaliation by management. The record indicates that, under a February 7, 2000 settlement, the letter of warning was expunged from appellant's record and his absence from work for 56 hours was changed to leave without pay. The parties to the settlement indicated that it was nonprecedent setting for other forums. The Board has held that reactions to disciplinary measures such as letters of warning pertain to actions taken by management in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively.[17] The mere fact that a disciplinary or personnel action is subsequently modified or reduced does not, in and of itself, establish error or abuse.[18] Under the February 7, 2000 settlement, appellant and postal management agreed not to cite the settlement in any other forum as precedent. The evidence of record concerning the letter of warning and the settlement does not establish error or abuse on the part of the employing establishment in the disciplinary action taken.

The Board finds that appellant has not substantiated his allegations of harassment, discrimination or retaliation by personnel at the employing establishment. Appellant has not established that the limited duty, to which he was assigned prior to May 19, 2000, exceeded his work restrictions. The February 20, 2002 decision of the Office will be affirmed with regard to these aspects of the claim. The case is not in posture for decision with regard to whether the May 19, 2000 limited-duty job offer was in error in failing to conform to appellant's limited-duty medical restrictions. The case will be returned to the Office for further development of this issue.

[17] *See Sherry L. McFall*, 51 ECAB 436 (2000).

[18] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

The February 20, 2000 decision of the Office of Workers' Compensation Programs is affirmed, in part and remanded, in part, for further action in conformance with this decision.

Dated, Washington, DC
March 3, 2004

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member