U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES H. WILSON and U.S. POSTAL SERVICE,
TRAINING OFFICE, Dallas, Tex.

Docket No. 97-2409; Submitted on the Record;
Issued July 7, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

On September 3, 1996 appellant, then a human resources associate, filed a traumatic injury claim (Form CA-1) alleging that he sustained accelerated hypertension, anxiety and job-related stress on August 8, 1996. Appellant stopped work on August 8, 1996.[1]

By letter dated October 10, 1996, the Office of Workers' Compensation Programs advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant to submit additional factual and medical evidence supportive of his claim.

By letter dated October 29, 1996, the Office advised appellant to submit additional factual and medical evidence supportive of his claim after reviewing the evidence he submitted. By letter of the same date, the Office requested that the employing establishment submit additional factual evidence regarding appellant's allegations.

By decision dated December 11, 1996, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. In a December 16, 1996 letter, appellant requested a review of the written record by an Office representative.

[1] Appellant returned to work for four hours on August 19, 1996.

By decision dated March 14, 1997, the hearing representative affirmed the Office's decision. In an April 14, 1997 letter, appellant requested reconsideration of the hearing representative's decision.

By decision dated June 26, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and thus, insufficient to warrant review of its prior 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 illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[2]

Perceptions and feelings alone are not compensable. 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 factors of his federal employment.[3] To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[4]

In this case, appellant has alleged that he sustained an emotional condition because he was sexually harassed by Richard Ladd Kelley, his coworker. Appellant has further alleged that he was harassed by Kay Vinson, his supervisor. The Board has held that actions of an employee's supervisor and coworkers constituting harassment may constitute factors of employment giving rise to coverage under the Act.[5] Mere perceptions alone of harassment and discrimination are not compensable under the Act.[6] To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with

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

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

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

[5] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603 (1991); *Donna Faye Cardwell*, *supra* note 4; *Pamela R. Rice*, *supra* note 3.

[6] *Wanda G. Bailey*, 45 ECAB 835 (1994); *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

probative and reliable evidence.[7] Appellant failed to provide any such probative and reliable evidence in this case.

Specifically, in a September 6, 1996 narrative statement, appellant alleged that while sitting at his desk on July 19, 1996, Mr. Kelley put his left hand around his chin and asked him about his goatee. Appellant stated that he responded the hair had been there all of the time. In response to appellant's allegation, Mr. Kelley submitted a November 14, 1996 narrative statement revealing that in retrospect, appellant appeared depressed on July 19, 1996 and that his intention was to lighten appellant's day with good-natured kidding. Mr. Kelley further stated that was the first day he had noticed appellant's goatee. He explained that as he returned from lunch:

> "I stopped at [appellant's] desk, motioned to his chin or mine, since I have a beard and asked in a good-humored tone, "What's this?" [Appellant] gave me a blank response and my first thought was that [he] was playing with me by not acknowledging his goatee. At that point, I motioned toward and might have touched his chin (I do not specifically recall) and asked again, "What's this? [Appellant] gave me a straight response -- saying that it was hair or whiskers -- and remained serious. When I recognized that [appellant] did not or chose not to recognize and respond to my action as kidding, I said, "I [am] sorry, [appellant], I was only playing with you." I expected some conciliatory word or gesture, but none was forthcoming. [Appellant] maintained a sullen expression and did not respond. I walked away. I found [appellant's] behavior to be totally out of character in view of our friendly relationship dating to approximately 1991."

Mr. Kelley further explained that he had only expressed concern for appellant's health especially since he also suffered from hypertension.

In response to Mr. Kelley's statement, appellant alleged that Mr. Kelley was gay and that he was aware of his goatee in that he had been wearing it for five years.[8] Further, appellant alleged that he was not a homosexual and that he did not have a friendly relationship with Mr. Kelley, rather, he stated that he was the type of person who stayed to himself.

In a November 14, 1996 narrative statement, Robert L. Sherman, an employing establishment employee, merely stated that appellant had told him about the July 19, 1996 incident. Similarly, in a narrative statement of the same date, Johnny Hogg, an employing establishment employee, indicated that he did not witness the incident involving appellant and Mr. Kelley, but that appellant came into his office after it occurred and explained it to him. In response to appellant's statement that he thought Mr. Kelley was flirting with him, Mr. Hogg stated that he told appellant that this was not the case and that maybe he had misinterpreted Mr. Kelley's action. Mr. Hogg then stated that he explained to appellant what he should do when someone does something that he does not appreciate. Further, in a November 14, 1996

[7] *Ruthie M. Evans*, *supra* note 6.

[8] Appellant submitted a picture identification card revealing that he had a goatee. However, the identification card does not reveal a date of issuance.

narrative statement, Caroline M. Gabbert, an employing establishment human resources specialist, indicated that she could vaguely recall Mr. Kelley remarking about appellant's goatee. Ms. Gabbert stated that she could not remember any physical contact between Mr. Kelley and appellant. Ms. Gabbert also stated that she vaguely remembered appellant appearing upset about Mr. Kelley's remark. Linda Lowrey, an employing establishment human resources associate, indicated in a November 14, 1996 narrative statement that she did not see any contact between Mr. Kelley and appellant. She further indicated that if any contact had been made, it was not one that caused her to think anything had been done out of the ordinary or offensively. Appellant has submitted no corroborating evidence, such as witness statements, to establish that he was sexually harassed by Mr. Kelley. Inasmuch as appellant has not submitted sufficient evidence to establish that he was sexually harassed by Mr. Kelley in the manner alleged, he has not established a compensable employment factor under the Act.

Appellant has further alleged that during a weekly meeting on August 8, 1996, he was verbally attacked by Ms. Vinson. He stated that when Ms. Vinson announced the names of those individuals who were planning to be on annual leave on Friday, August 16, 1996, she stated that appellant was going to be "playing hooky." Appellant further stated that Ms. Vinson asked him in a loud angry tactless voice why he was looking at her. Appellant then stated that he responded that he told her and everyone else that he needed to take off because his sister was undergoing heart surgery. Appellant explained that after that exchange, he became nervous, his hands began to tremble and his heart beat out of rhythm. He also explained that after the meeting, he returned to his desk and tried to finish his work. Appellant noted that while he was sitting at his desk, Ms. Vinson began to walk around the office, she stormed in and out of the doors and afterwards, she began to stand around the copy room looking at him through a window with a threatening look. He then noted that Ms. Vinson walked up to his desk and apologized for her comment at the meeting. Appellant further noted that when he stood up from his desk, Ms. Vinson kept looking at his hands as if he were going to do something to her. He finally noted that Ms. Vinson reached over and touched his arm with her hand trying to provoke him into touching her.

In response to appellant's allegation, Ms. Vinson acknowledged in a November 14, 1996 narrative statement that she made the comment that appellant would be "playing hooky" on his day off. Ms. Vinson, however, stated that she had used this terminology when referring to the use of annual leave for years and that no one had expressed any concern about it. She further stated that after appellant informed her that his sister was having surgery on the date in question, she told him that she had no knowledge of this situation and offered her concerns and prayers for his sister. Ms. Vinson also stated that she never spoke in a loud or tactless voice and that she was extremely surprised at the manner in which appellant spoke to her. Ms. Vinson then stated that after the meeting she reviewed appellant's "PS Form 3971" that she had previously approved and determined that appellant had not given any information about his sister's surgery. After considering appellant's behavior, which he had never exhibited before, Ms. Vinson stated that she went to appellant's work area and apologized to him about her comments and explained again that she had no knowledge of his sister's surgery. Ms. Vinson noted that appellant seemed to understand after she told him that he had neither put any details in his leave slip nor did he tell her anything about the surgery. She explained that she thought everything was all right between them at that point and that appellant thanked her in a very sincere manner for talking to him.

Ms. Vinson admitted to touching appellant's arm and stated that some may consider such action inappropriate, but that it was not unusual for her to touch all of her staff members in this way on occasion. She noted that it was not unusual for many of her staff to touch her in the same way. While touching appellant, Ms. Vinson stated that she told him that she was glad they had talked and that he was too important to her for that kind of a misunderstanding to cause a problem for them. She then noted that appellant smiled at her and thanked her again as she walked away. Ms. Vinson further noted that obviously she was neither fearful of appellant nor was she trying to provoke him in any way. She denied walking around the office storming in and out of the doors and staring at appellant through a glass window.

Regarding appellant's behavior, Ms. Vinson stated that according to several of appellant's coworkers, he had been talking for several weeks prior to the August 8, 1996 incident about concerns, including, a change in his relationship with his girlfriend, frustration about a recent national salary package that affected him and distress over his sister's pending surgery. Ms. Vinson also stated that prior to the August 8, 1996 incident, she and appellant had a pleasant working relationship, that appellant was relaxed with herself and the staff, and that he participated in their work as well as their sharing of fun stories and/or humor. Ms. Vinson noted appellant's professional growth and his positive reaction to her comment about his development. She further noted that if appellant was suffering from job-related hypertension, anxiety and/or stress caused by herself or their work environment, she was never aware of it. Ms. Vinson explained that the one disagreement they had prior to August 8, 1996 was discussed and resolved by them in a calm and professional manner. She further explained that she assisted appellant in obtaining two detail assignments which were intended to increase his work experiences so that he could better compete for future positions. Ms. Vinson concluded that she did see signs of appellant's hypertension in that he had to have his blood pressure checked on numerous occasions in the employing establishment medical unit and sometimes he had to leave work to go home and/or to see his personal physician due to his elevated blood pressure. In addition, Ms. Vinson concluded that she never saw any evidence of appellant having anxiety attacks, but that appellant did appear to be preoccupied and solemn at times prior to August 8, 1996.

In response to Ms. Vinson's statement, appellant stated that she was aware of his reason for taking off on Friday when she made the comment that he would be "playing hooky" because he told her the reason in accordance with her request to do so. Appellant also stated that the August 8, 1996 incident took place because Ms. Vinson was still upset with him when her denial of his request to be detailed to another assignment was overrided by a human resources manager. Further, appellant agreed that Ms. Vinson apologized to him for her comment. Additionally, appellant stated that Ms. Vinson's touching of his arm was inappropriate. Regarding Ms. Vinson's statement that she offered prayers for his sister, appellant stated that this was not well received inasmuch as Ms. Vinson was not acting in accordance to the Bible by harassing him.

The narrative statements of Mr. Kelley, Ms. Gabbert and Ms. Lowrey corroborate Ms. Vinson's statements regarding the manner in which she stated that appellant was going to be "playing hooky." Further, Ms. Gabbert indicated that Ms. Vinson asked her to see appellant's leave slip to determine whether appellant had indicated that his sister was having surgery and that she overheard Ms. Vinson apologizing to appellant for her comment. Ms. Gabbert

concluded that prior to the August 8, 1996 meeting, appellant was not himself in that he had been acting strangely, he was constantly listening to preaching on his radio which he rarely did, he had ceased discussing his girlfriend and he was upset about a settlement wherein he did not get a raise. Mr. Hogg's November 14, 1996 narrative statement revealed that during the August 8, 1996 meeting, Ms. Vinson did not at any time speak in a loud, rude, angry or inappropriate tone. Mr. Hogg's statement also revealed that Ms. Vinson did not storm in and out of the doors. Appellant has failed to submit any corroborating evidence that he was being harassed by Ms. Vinson during and after the August 8, 1996 meeting. Rather, appellant has merely presented his perception that Ms. Vinson was harassing him and has not established that harassment did, in fact, occur. Consequently, the truth or validity of the allegations of harassment are not established by the record and they are not, therefore, found to be compensable factors of employment.

Additionally, appellant alleged that he had anxiety attacks due to different things that had been happening to him in the training office. Appellant has made a general allegation without providing specific details about the "different things" that he experienced at the employing establishment which caused his anxiety attacks. Thus, appellant has failed to establish a compensable employment factor under the Act.

Further, appellant has alleged in November 6, 1996 narrative statement that the employing establishment initiated an investigation regarding the comment he made in his September 6, 1996 narrative statement that "I feel like going over to the [employing establishment] and killing everybody over there because, I can[not] trust nobody now." The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[9] Appellant has failed to submit the findings of the investigation or other documents to establish error or abuse on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Inasmuch as appellant has failed to submit sufficient evidence to establish a compensable employment factor under the Act, he has not satisfied his burden of proof.

[9] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

The June 26 and March 14, 1997, and December 11, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 7, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member