U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK J. PERRY and U.S. POSTAL SERVICE,
DETROIT BULK MAIL CENTER, Detroit, MI

Docket No. 98-2315; Submitted on the Record;
Issued February 4, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On November 3, 1997 appellant, then a 51-year-old laborer/custodial worker, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained depression and a possible psychosis and adjustment disorder due to factors of his federal employment. Appellant stopped work on May 28, 1997 and did not return.

By decision dated January 8, 1998, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish that he sustained an injury in the performance of duty. By decision dated June 18, 1998, the Office denied modification of its prior decision. The Office found that appellant had not established a compensable factor of employment.

The Board has duly reviewed the case record and finds that the case is not in posture for 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 employee's emotional reaction to his or her 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

[1] 5 U.S.C. §§ 8101-8193.

factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

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.[3] 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.[4]

In the instant case, appellant alleged that his coworkers harassed him because he worked undercover for inspectors with the employing establishment. The Board has held that for harassment and discrimination to give rise to a compensable disability, there must be some independent evidence that harassment of discrimination did, in fact, occur.[5] Mere perceptions alone of harassment or discrimination are not compensable.[6] In the present case, appellant's allegations of harassment are not supported by any substantial, reliable or probative factual evidence of record and thus he has not established a compensable factor of employment.

Appellant also alleged that the employing establishment terminated him in 1991 because of his work for the inspectors but that he was reinstated after union intervention. Appellant, however, has not submitted any factual evidence which would support his allegation. Additionally, regarding appellant's alleged termination from employment, while the handing of disciplinary actions is generally related to employment, it is an administration function of the employer and not a duty of the employee.[7] However, the Board has held that an administrative or personnel matter will be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[8] In the instant case, the record contains no evidence which establishes that the employing establishment erred in its action.[9] The mere fact

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

[3] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[4] *Id.*

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

[6] *Id*.

[7] *Michael Thomas Plante*, 44 ECAB 510 (1993).

[8] *Id*.

[9] The settlement agreement is not in the record.

that personnel actions were later modified or rescinded does not, in and of itself, establish error or abuse.[10]

Appellant further attributed his emotional condition to his work undercover for inspectors with the employing establishment beginning in 1971 and continuing into 1996. Appellant maintained that he experienced stress "trying to keep an eye on everything and being responsible to report the wrongdoings to the [employing establishment's] investigative [s]ervice." As appellant has attributed stress to the day-to-day performance of his regular or specially assigned duties, it would, if established as factual, constitute a compensable factor of employment.[11] By letter dated April 1, 1998, the Office requested that the employing establishment provide information regarding appellant's undercover assignment. In a report of a telephone call dated April 6, 1998, an official with the employing establishment related that its investigative service "does not have [appellant] on the payroll or acting in any way for their agency" and further stated that appellant told people he was a "secret agent." The record, however, contains a grievance status letter from appellant's union advocate dated October 26, 1990, relevant to the employing establishment's suspension and removal of appellant. In the letter, the advocate quoted an arbitrator's findings as follows:

> "The arbitrator sustained the [e]mergency [s]uspension, however, he reinstated [appellant] but without back pay. He stated: 'Management, however, is responsible for significant underlying conditions affecting [appellant's] employment situation, which may have influenced his interaction with other employees and with his supervisors. These factors include using the employee as an undercover informant, and transferring him to the crew of a new supervisor without his personnel file or any other information indicating that he was handicapped and acting as an informant.'"

Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[12]

In the instant case, the Office should further develop the issue of whether appellant performed undercover work at any time from 1971 onward for the employing establishment.[13] The evidence from the employing establishment currently of record is insufficient as it consists only of a transcript of a telephone call and addresses only appellant's current employment status.

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[10] *Joe E. Hendricks*, 43 ECAB 850 (1992).

[11] *See Lillian Cutler*, *supra* note 2.

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

[13] In a letter dated April 14, 1998, appellant's representative noted that the employing establishment would not release "restricted" information to her and requested that the Office contact Inspector Robert M. Lane for information regarding appellant's undercover employment.

After such development as it deems necessary, the Office should make factual findings, supported by reasons, regarding appellant's allegation that he worked as an undercover informant. If the evidence substantiates appellant's contention, the Office must base its decision on an analysis of the medical evidence.[14] The Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate specialist for an opinion on whether appellant sustained an emotional condition in the performance of duty, causally related to factors of his federal employment.[15]

The decisions of the Office of Workers' Compensation Programs dated June 18 and January 8, 1998 are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
February 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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

[15] In a fitness-for-duty examination dated September 8, 1997, Dr. Edward A. Nol stated, "There does appear to be a delusional content of thought in terms of [appellant] considering himself and his wife to have been employed as 'undercover postal employees.'"