U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN H. DERRICK and DEPARTMENT OF THE AIR FORCE, AUDIT AGENCY, Washington, DC

Docket No. 98-119; Submitted on the Record;
Issued March 29, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition 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]

The claimant 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]

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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).

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 of Workers' Compensation Programs, 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]

On June 15, 1995 appellant, then a 63-year-old auditor, filed an occupational disease claim form alleging that he sustained an emotional condition as a result of a number of employment incidents and conditions.[7] Appellant stopped work on February 19, 1995 and retired from the employing establishment effective September 30, 1995. By decision dated July 8, 1996, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors and, by decision dated August 18, 1997, the Office denied modification of its July 8, 1996 decision.[8] The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. He claimed that a supervisor, Cephas Bryan, tried to force him into retirement due to the fact that he was older than the other auditors.[9] Appellant alleged that after the death of Mr. Bechtold's father, Mr. Bryan stated to him on August 11, 1993, "Jerry's dad kicked off from a heart attack at 61, Brian. You're 61; you should think about retiring." He asserted that two coworkers, Dan Schuettpelz and Marc Gustafson, also tried to force him to retire. Appellant claimed that Mr. Bryan gave him auditing assignments, which were beneath his level of experience and attempted to humiliate him in front of the younger auditors by telling him, "that's all you're capable of doing." He asserted that Mr. Bryan gave him these assignments so that he would get mediocre performance evaluations and be forced into retirement. Appellant claimed that Mr. Bryan told him in 1993 that he would never be rated higher than "fully successful." He claimed that Mr. Bryan required audit reports to be submitted on computer discs as a means to place him at a disadvantage and that he

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

[6] *Id.*

[7] In August 1992 appellant began working at a military installation in Great Britain.

[8] The record contains another decision dated August 18, 1997 in which the Office approved a fee for services rendered by appellant's attorney. Appellant has not appealed this decision before the Board and the matter is not currently before the Board.

[9] Appellant claimed that Mr. Bryan also tried to force other coworkers, including Jerry Bechtold, into retirement and told him the details of these matters in order to intimidate him.

attempted to "sabotage" a briefing he made in 1994 by withholding work papers and altering his work product.

Appellant alleged that Mr. Bryan made numerous derogatory remarks regarding the ethnic backgrounds and gender of several coworkers and spoke disparagingly in general about older people, women and members of various minority groups. He alleged that Mr. Bryan made an obscene and sexist remark about a female coworker in front of another coworker and the coworker's wife. Appellant claimed that Mr. Bryan wrongly accused him of placing misleading statements in his audit report and of being "secretive" with audit clients. He claimed that Mr. Bryan had an "aversion to military officers" and that on August 13, 1993 he mockingly referred to him as "sir" and saluted him. Appellant alleged that Mr. Bryan made disparaging remarks about his former work unit and that at a meeting on August 8, 1994 he attempted to humiliate him by disparaging the work product of some of the auditors. Appellant claimed that Mr. Bryan's "favorite" employees received more favorable treatment with respect to travel duty assignments, leave usage and other matters.

Appellant indicated that another supervisor, Randy Coneby, subjected him to a "barrage of right-wing Christian fundamentalist views" and then retaliated against him for not holding the same views. He asserted that Mr. Coneby failed to give him adequate assignments during the first month he worked in Great Britain and then unfairly criticized him and issued him a mediocre performance evaluation for not doing enough work. Appellant claimed that on August 2, 1994 Mr. Schuettpelz and Mr. Gustafson abusively questioned him regarding the whereabouts of certain computer equipment and wrongfully accused him of damaging computer equipment. He asserted that in 1994 Mr. Schuettpelz accused him of being a "liar" when he attempted to rebut false charges, which had been leveled against him. Appellant also claimed that Mr. Gustafson also made a number of bigoted remarks and stated to him during a conversation regarding the political situation in Northern Ireland, "What are you going to do, bring in a gun and kill us all?" He asserted that a supervisor did paperwork while he was supposed to be participating in sensitivity training and that his coworkers laughed and treated the training as a joke.

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.[10] 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.[11]

As noted above, appellant alleged that on August 11, 1993 Mr. Bryan stated to him, "Jerry's dad kicked off from a heart attack at 61, Brian. You're 61; you should think about retiring." Although Mr. Bryan denied making the statement, the record contains a May 3, 1995 statement in which Dennis Taverna, a coworker, confirmed that Mr. Bryan made essentially the

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

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

same statement to appellant.[12] In a grievance decision dated December 18, 1995, the employing establishment determined that Mr. Bryan made the comment attributed to him, but that the comment was not sufficient in itself to create a hostile work environment.

Although it is established that on August 11, 1993 Mr. Bryan made the comment attributed to him by appellant, the Board finds that Mr. Bryan's comment does not constitute harassment or discrimination within the meaning of the Act. The Board has recognized the compensability of verbal abuse in certain circumstances, but this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[13] In the absence of other evidence, the comment of Mr. Bryan does not constitute verbal abuse of appellant.[14]

With respect to appellant's other claims that he was harassed and discriminated against, the employing establishment denied that appellant was subjected to such harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.[15] Appellant alleged that supervisors and coworkers made statements to him and engaged in actions affecting him, which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that

[12] Mr. Taverna stated that Mr. Bryan had identified the age of Mr. Bechtold's father as being 58 or 59.

[13] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994).

[14] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor). The record contains a statement in which Mr. Bechtold indicated that in October 1994 Mr. Bryan told a coworker that he tried to "pressure" appellant to retire. However, the record does not establish that Mr. Bryan made any comments to appellant or committed any acts which could be interpreted as an abusive attempt to compel appellant to retire.

[15] *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).

the actions actually occurred.[16] Thus, appellant has not established a compensable employment factor under the Act with regard to the claimed harassment and discrimination.

Appellant also asserted that Mr. Bryan unfairly wrote numerous "cryptic" and "hypercritical" comments on his audit reports and refused to answer his questions regarding the comments. He alleged that Mr. Bryan denied his requests to gain additional computer training and to obtain well-maintained computer equipment. Appellant generally claimed that Mr. Bryan overly scrutinized his activities at work. He further alleged that Paul Rolfe, another supervisor, issued unfair performance evaluations and wrongly withheld counseling session records.

Regarding appellant's allegations that the employing establishment issued unfair evaluations, provided inadequate training and equipment and unreasonably monitored his activities at work, 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.[17] Although the handling of evaluations, the provision of training and equipment and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[18] 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.[19] Appellant did not submit sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Act with regard to these administrative matters.

Appellant alleged that, when he was sick, the employing establishment refused to extend his tour of employment in England or to allow him to return to his former position in Albuquerque. However, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his regular or specially assigned work duties but rather constitute his desire to work in a different position.[20] Appellant claimed that Mr. Bryan had a "belligerent auditing style," which offended some of the audit clients and

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[16] *See William P. George*, 43 ECAB 1159, 1167 (1992). In his April 27, 1995 statement, Mr. Bechtold noted that Mr. Bryan made a vulgar comment to a coworker regarding another female coworker; he also stated that Mr. Bryan made a religiously insensitive remark to another coworker. However, Mr. Bechtold did not indicate that these comments were made in appellant's presence.

[17] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[18] *Id.*

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

[20] *Michael Thomas Plante*, 44 ECAB 510, 516-17 (1993). Moreover, appellant asserted that the employing establishment refused his requests because it was retaliating against him for filing an Equal Employment Opportunity complaint and a grievance with the employing establishment. Appellant did not, however, submit sufficient evidence to establish such a discriminatory intent.

asserted that he mocked an employing establishment program, which was intended to improve management techniques. However, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[21]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[22]

The decision of the Office of Workers' Compensation Programs dated August 18, 1997 is affirmed.

Dated, Washington, D.C.
March 29, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[21] *See Michael Thomas Plante*, *supra* note 20.

[22] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).