U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. HAMILTON and DEPARTMENT OF THE NAVY, NAVAL AMPHIBIOUS BASE LITTLE CREEK, Norfolk, VA

Docket No. 00-1693; Submitted on the Record;
Issued July 23, 2003

DECISION and ORDER

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

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition and/or stress-related aggravation of his hypertension and coronary condition in the performance of duty.

On July 6, 1998 appellant, then a 59-year-old supervisory detective, filed an occupational disease claim alleging that he sustained "depression and associated illness" due to factors of his federal employment. Appellant stopped work on June 28, 1998 and did not return.

By decision dated March 17, 1999, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that he did not establish an injury in the performance of duty. The Office found that appellant had not alleged any compensable employment factors.

Appellant requested a hearing, which was held on September 22, 1999. In a decision dated January 5, 2000, the hearing representative affirmed the Office's March 17, 1999 decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional condition and/or aggravation of his hypertension and coronary 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

[1] 5 U.S.C. §§ 8101-8193.

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 related that his depression began in January 1998 when Deputy Chief of Police Weinberger told him during his performance evaluation that he was a "dissentionist." Appellant further related that Mr. Weinberger told him that he could lose his retirement. The Board notes that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. However, for harassment to give rise to a compensable factor of employment there must be evidence that the harassment did, in fact, occur.[7] Mere perceptions of harassment are not compensable. Additionally, while the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[8] The employing establishment, in response to appellant's allegation, stated:

> "Mr. Weinberger told [appellant] that he was a dissentionist because of his repeated attacks against management, and his unwillingness to work

[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] *Helen P. Allen*, 47 ECAB 141 (1995).

[8] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

harmoniously within the organization. [Appellant] was told that considering the recent downsizing in the federal workplace that he should be happy to be in his position."

While appellant may have disagreed with Mr. Weinberger's remarks in January 1998, not every statement uttered in the workplace will give rise to coverage under the Act. In this case, appellant has submitted no evidence showing harassment on behalf of Mr. Weinberger or demonstrated how the term "dissentionist" would rise to the level of verbal abuse.[9] Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and verbal abuse.[10]

Appellant also attributed his stress to preaction investigations of him by the employing establishment in February and March 1998. 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.[11] 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.[12] In this case, appellant related that on February 2, 1998 Mr. Weinberger investigated him for making "malicious statements about him procuring a mail order bride." In response, the employing establishment indicated that Mr. Weinberger ordered the investigation because appellant told subordinates that he was "in his office fantasizing over his girlfriend, and playing with himself." The employing establishment further stated that appellant made his remarks about Mr. Weinberger with descriptive physical gestures. Appellant related that he originally received a five-day suspension as a result of the investigation but that it was later reduced to a three-day suspension. However, the mere fact that personnel actions were later modified or rescinded does not in and of itself establish error or abuse.[13] Appellant has not submitted any evidence which would indicate that the employing establishment erred and acted abusively in conducting its investigation. Thus, appellant has not established a compensable employment factor under the Act in this respect.

[9] *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).

[10] Further, a performance appraisal is an administrative action of the employing establishment and is not compensable absent a showing of error or abuse. *Sammy N. Cash*, 46 ECAB 419 (1995). In this case, appellant has submitted no evidence establishing error or abuse in the assessment of his performance.

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

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

[13] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

Regarding the March 24, 1998 preaction investigation, appellant related "A preaction investigation was conducted predicated on allegations by Lt. (Lieutenant) Oakley that I had threatened his life. The findings of the preaction investigation found that these charges were totally unfounded and on May 6, [1998] I was ordered to return to work."[14] Appellant stated:

> "I had placed an article that appeared in the local paper on the bulletin board in the detective division (which is isolated from the public and general police population). This article told of an incident of a person working for the Connecticut State Lottery that felt his supervisor had passed him over for promotions and felt he was treated unfairly. I made a comment to Detective Austin, that this is a prime example of what a hostile work environment can create."

In response, the employing establishment reported that the investigation arose out of a complaint to management that appellant "was on the verge of a violent act, predicated upon [appellant's] obvious aggressive state of mind, and the newspaper articles regarding workplace related shootings [he] had been placing about his office."[15] As discussed above, the actions of an administrative agency in reviewing and investigating charges and rendering decisions do not relate to appellant's assigned duties and are not compensable factors of employment.[16] While the investigation did not substantiate that appellant had directly threatened his supervisor's life, appellant has not shown that the employing establishment erred or acted abusively when it investigated him for placing a newspaper article depicting workplace violence in a public work location.

Appellant further noted that, on February 25, 1998, when he complained to management about the noise level in his office due to clanging steam pipes, he was told that he would have to change offices. Appellant stated that his new office was inadequate for the performance of his work duties. However, appellant's frustration from having his workstation changed reflects his desire to work in a particular environment and does not, absent evidence of error or abuse, constitute a compensable factor of employment.[17] In this case, appellant did not submit any evidence establishing error or abuse on behalf of the employing establishment in moving him to another office. The employing establishment challenged appellant's assertion that his new office was inadequate for the performance of work. Additionally, appellant stated at the hearing that he did not perform any actual work duties during the two days he was in his office prior to his suspension. Thus, appellant's belief that he could not perform the duties of his position from his new office constitutes a fear of future injury which is not compensable under the Act.[18]

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[14] Appellant noted that he was placed on administrative leave from March 24 to May 6, 1998.

[15] The record indicates that appellant placed a newspaper article about an employee who killed four of his supervisors on a bulletin board at work.

[16] *Blondell Blassingame*, 48 ECAB 130 (1996).

[17] *Anna L. Livermore*, 46 ECAB 425 (1995).

[18] *Louise G. Malloy*, 45 ECAB 613 (1994).

Appellant also attributed his stress to his reassignment to the pass office, where he worked under a former subordinate. However, the assignment of work is an administrative or personnel matter of the employing establishment and not a duty of the employee, and, absent evidence to support a finding of error or abuse by the employing establishment, is not compensable.[19] In this case, the employing establishment stated:

> "[Appellant] was placed in the pass office after his return to duty once the latest preaction investigation was complete. His assignment to the pass office was not done in an effort to degrade [appellant]. Lt. Oakley had lost confidence in [appellant's] ability to efficiently supervise the investigative division for a number of reasons."

In this case, appellant has not submitted sufficient evidence to establish that the employing establishment erred or acted abusively in assigning him to work in the pass office with a former subordinate as his supervisor. Thus, he has not established a compensable factor of employment.

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 or stress-related aggravation of his hypertension or coronary condition in the performance of duty.[20]

The decision of the Office of Workers' Compensation Programs dated January 5, 2000 is affirmed.

Dated, Washington, DC
July 23, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[19] *Janet D. Yates*, 49 ECAB 240 (1997).

[20] 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).