U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. TAYLOR and U.S. POSTAL SERVICE,
Nashville, TN

Docket No. 02-2339; Submitted on the Record;
Issued May 23, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On November 20, 1998 appellant, then a 40-year-old human resources associate, filed an occupational disease claim, alleging that factors of employment caused a major depressive disorder. He stopped work on August 3, 1998. In support of his claim, appellant submitted medical evidence including reports from Dr. Jon W. Draud, a Board-certified psychiatrist, who diagnosed a major depressive disorder. Appellant's attorney submitted statements alleging that he suffered direct retaliation for refusal to engage in illegal hiring practices, was denied promotions, overtime and detail assignments, improperly underwent unannounced desk audits and discipline, was improperly removed from detail assignments and investigated and was improperly required to undergo supervisory training. Appellant further alleged that he was subject to oral admonishments and public humiliation and, generally, received "cold shoulder" treatment by management and was subject to constant racial and derogatory comments regarding African Americans and disabled veterans.

By letter dated December 22, 1998, the Office informed appellant of the type of evidence needed to support his claim. In a letter dated December 23, 1998, the Office requested that the employing establishment provide a response to appellant's allegations.

The employing establishment submitted a number of statements with supporting material in which it countered appellant's allegations. Appellant also submitted numerous statements, additional medical evidence and other materials in support of his claim, including that he had filed a claim with the Equal Employment Opportunity (EEO) Commission. By decision dated June 15, 1999, the Office denied his claim, finding that appellant failed to establish that he sustained an emotional condition in the performance of duty.

On July 13, 1999 appellant, through his attorney, requested a hearing that was held on March 14, 2000. At the hearing, appellant testified regarding his allegations. He stated that he had begun private employment in October 1999 and that his EEO claim was pending. Appellant also submitted further statements and evidence. After the hearing, both the employing establishment and appellant submitted additional evidence. In a decision dated June 5, 2000, an Office hearing representative affirmed the prior decision.

On May 31, 2001 appellant requested reconsideration and submitted additional evidence. In response to an Office inquiry, the employing establishment also submitted additional evidence. By decision dated January 16, 2002, the Office referred appellant to Dr. Heintz 16, 2002, the Office denied modification of the prior decision. On April 15, 2002 appellant again requested reconsideration and submitted additional evidence. In a decision dated May 31, 2002, the Office denied appellant's reconsideration request on the grounds that the evidence he submitted was repetitious. The instant appeal follows.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[1]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true, when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5]

In the instant case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions as well as harassment on the part of the

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

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler*, *supra* note 2.

employing establishment. The Office denied his claim on the grounds that he did not establish any compensable employment factors. The Board must, therefore, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant is specifically alleging that he suffered direct retaliation for refusal to engage in illegal hiring practices, was denied promotions, overtime and detail assignments, improperly underwent unannounced desk audits and discipline, was improperly removed from detail assignments and investigated and was improperly required to undergo supervisory training.

The Board finds that, in the instant case, appellant's allegations regarding the above relate to administrative or personnel matters, unrelated to his regular or specially assigned work duties and do not fall within the coverage of the Act.[6] The Board has long held that, although the handling of the assignment of work duties are generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[7] Likewise, the desire to work overtime,[8] matters pertaining to investigations[9] and disciplinary actions,[10] the monitoring of work activities[11] and the provision of training and equipment,[12] relate to administrative or personnel matters. Furthermore, a disagreement of supervisory or management action,[13] frustration with the policies and procedures of the employing establishment[14] and frustration from not being permitted to work in a particular environment or to hold a particular position,[15] are administrative matters. The Board has found, however, 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.[16]

While appellant submitted a number of statements from union stewards, coworkers, family members and job applicants who generally advised that there was tension and difficult

[6] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[7] *Id.*

[8] *Peggy R. Lee*, 46 ECAB 527 (1995).

[9] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[10] *Anne L. Livermore*, 46 ECAB 425 (1995).

[11] *John Polito*, 50 ECAB 347 (1999).

[12] *Brian H. Derrick*, 51 ECAB 417 (2000).

[13] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

[14] *William Karl Hansen*, 49 ECAB 140 (1997).

[15] *Clara T. Norga*, 46 ECAB 473 (1995).

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

relationships within the human resources section at the employing establishment, the Board finds that these statements were general in nature, do not refer to specific incidents relating to appellant and thus do not rise to a level that indicates that the employing establishment acted in an abusive manner. Furthermore, the employing establishment submitted a number of statements that countered appellant's many complaints.

Regarding appellant's specific allegation that he was improperly disciplined with a letter of warning, the employing establishment submitted evidence that it was given due to his failure to follow instructions and because a desk audit revealed inadequate job performance on his part. Furthermore, contrary to appellant's contention, the entire department underwent a desk audit in June 1998. Regarding appellant's claim that he suffered direct retaliation for questioning illegal hiring practices, the record indicates that an inquiry was conducted regarding a hiring in Cookeville, Tennessee, but there is nothing to indicate that illegal hiring practices took place.

Appellant has submitted evidence that he filed an EEO claim. While the Office may look to evidence from an EEO claim or grievances in determining whether incidents or harassment occurred as alleged, the Office must make its own independent findings. The standard for "harassment" or "discrimination" as defined by EEO statutory or case law is not the applicable standard for a claim under the Act and grievances and EEO complaints, by themselves, do not establish workplace harassment or that unfair treatment occurred.[17] Moreover, the record in this case contains a final EEO decision,[18] which made a finding that appellant did not satisfy his burden of proof to establish that he was subjected to discrimination or retaliation. Appellant, thus, has not established a compensable employment factor under the Act with respect to these administrative matters.

Appellant further alleged that he was subject to oral admonishments and public humiliation, generally, received "cold shoulder" treatment by management and was subject to constant racial and derogatory comments regarding African Americans and disabled veterans.[19] He has also generally alleged that harassment and discrimination on the part of the employing establishment contributed to his claimed stress-related condition. Appellant alleged that he was called "boy" by his supervisor, Deborah Whaley, who contradicted this contention and the record contains other statements that support her claim and appellant provided no corroboration that this in fact occurred.

To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from the performance of regular or specially assigned duties, these could constitute compensable employment factors. For harassment to give rise to a compensable disability under the Act, there must be some evidence alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[20] An employee's charges that he or she was harassed or discriminated against is

[17] *Constance I. Galbreath*, 49 ECAB 401 (1998).

[18] Appellant, however, advised that the EEO decision was pending in Federal District Court.

[19] The Board notes that the record contains contradictory evidence in the many statements regarding favoritism for or against blacks.

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

not determinative of whether or not harassment or discrimination occurred.[21] Supporting statements from coworkers that are general in nature and do not refer to specific incidents are insufficient to substantiate allegations of harassment.[22] Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, then the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[23]

In the instant case, appellant has provided no corroboration that he was harassed by the employing establishment's management other than the general statements discussed previously. Here, the employing establishment denied that appellant was subjected to harassment or discrimination and the EEO Commission made a finding of no discrimination or retaliation. The Board, therefore, finds that appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by employing establishment's management.[24] Appellant thus did not meet his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.[25]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for review.

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[26] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[27] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[28]

[21] *O. Paul Gregg*, 46 ECAB 624 (1995).

[22] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[23] *Michael Ewanichak*, 48 ECAB 364 (1997).

[24] *See Joel Parker, Sr.*, 43 ECAB 220 (1991).

[25] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[26] 20 C.F.R. § 10.608(a) (1999).

[27] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[28] 20 C.F.R. § 10.608(b) (1999).

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[29]

In the April 15, 2002 request for reconsideration, appellant merely submitted personal statements in which he reiterated his allegations, duplicates of evidence previously of record is evidence irrelevant to the issue in the instant case or evidence concerning policies of the employing establishment regarding threat assessment.

The Board has long held that the submission of evidence or legal argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case for merit review.[30] Likewise, the inclusion of irrelevant evidence, including employing establishment policies regarding threat assessment,[31] do not constitute a basis for reopening the case. The Board thus finds that the evidence submitted with appellant's April 15, 2002 reconsideration request was insufficient to warrant merit review and the Office properly denied appellant's request.

The decisions of the Office of Workers' Compensation Programs dated May 31 and January 16, 2002 are hereby affirmed.

Dated, Washington, DC
May 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[29] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[30] *Saundra B. Williams*, 46 ECAB 546 (1995).

[31] Appellant submitted no probative evidence to indicate that he was threatened at the employing establishment.