U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL L. STEWART and DEPARTMENT OF THE NAVY, ALAMEDA NAVAL AIR STATION, Alameda, CA

Docket No. 03-1107; Submitted on the Record;
Issued September 23, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for an emotional condition; and (2) whether appellant met his burden of proof, following the Office's rescission of acceptance, to establish that he had sustained an emotional condition in the performance of duty.

On February 18, 1987 appellant, then a 33-year-old pneudraulic mechanic, filed a claim for occupational disease alleging that he sustained an emotional condition due to constant worry about his job. In narrative statements submitted in support of his claim, he alleged that on December 10, 1986 his supervisor, Linda Collins, instructed him to wear safety shoes while on the job, pursuant to a new Occupational Safety and Health Administration (OSHA) requirement. When appellant explained that his safety shoes were on back order, his supervisor instructed him to wear safety shields over his shoes. When he told his supervisor that he could not wear safety shields, as they caused blisters and calluses on his feet, he was informed that if he did not wear safety shields, he would have to be sent home. An altercation ensued, during which appellant slammed his fist down on the desk and shouted at his supervisor to leave him alone. Shortly thereafter, he was escorted from the premises by a base policeman.

On December 11 and 12, 1986, after providing his supervisor with a note from his physician indicating that he could not wear safety shields over his shoes, appellant was temporarily assigned to work in another area which did not require safety shoes. His duties consisted of sweeping and picking up garbage around the exterior of the building. Appellant was instructed to check in with the supervisor for the area every 30 minutes while performing these duties. He asserted that this assignment was meant to punish and degrade him, that he was forced to work outside in the cold and beyond his medical restrictions of no prolonged standing or walking and that coworkers and others passing by made fun of him while he was performing his sweeping duties. Appellant alleged that the supervisor watched him relentlessly and threatened to send him home for not sweeping fast enough.

On January 13, 1987 appellant was given a notice of proposed removal for failure to follow instructions, disruptive behavior and threatening his supervisor. On February 6, 1987, however, the proposed removal was reduced to a three-day suspension.

On February 11, 1987 appellant told Ms. Collins that he was not feeling well. He went to the base dispensary and returned with a note stating that he was experiencing stress due to work. When Ms. Collins asked him whether something had happened during the previous few days when she was away, he stated that nothing had happened, but that he felt under pressure because management had tried to fire him. Ms. Collins gave appellant a leave slip and told him to have his personal physician certify any periods of disability. Appellant stopped work that day.

On February 17, 1987 appellant informed Ms. Collins that he would be off work for a month and submitted several claim forms for medical disability. On April 23, 1987 he returned to work with a medical release allowing him to work four hours a day if he could be transferred to another department. Appellant returned to full duty on June 1, 1987. On July 31, 1987 when he was asked to sign a letter of definition, he became upset because he disagreed with the content and refused to sign. On August 3, 1987 he stopped work but later returned to work four hours a day.

Subsequently, appellant gave his supervisor a medical report stating that he could work 40 hours a week but could not perform overtime. On December 20, 1988 he was given advanced notice that he was being terminated because he was medically unfit to work and on March 6, 1989 appellant was terminated from the employing establishment for medical reasons.

Appellant filed several complaints against the employing establishment, claiming gender and race-based discrimination.

On April 12, 1988 the Office accepted appellant's claim for employment-related adjustment disorder with mixed emotional features. The Office did not provide any discussion of the grounds for its acceptance of appellant's claim.

In a statement of accepted facts, dated August 16, 1995, the Office addressed appellant's allegations and listed the factors upon which it had based its acceptance of the claim. The Office determined which incidents were compensable factors of employment:

> (1) On December 10, 1986 appellant was instructed by his foreman to wear safety shoes while on the job site, according to a recent OSHA directive.
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> (2) On December 11, 1986 appellant provided medical documentation that he could not work with safety shields on his shoes. He was assigned to work in another area, performing the duties of sweeping and picking up garbage. Appellant performed the same duties on December 12, 1986. He was instructed to check in every 30 minutes with his supervisor in the area. The medical documentation provided by appellant states that he could perform no prolonged walking or standing.
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> (3) On February 11, 1987 appellant informed Ms. Collins that his head hurt and he was not feeling well. Appellant was permitted to go to the dispensary and

returned with a permit stating that he was experiencing stress problems associated with work.

(4) He returned on April 23, 1987 with a release to work four hours per day if he could be transferred out of his department. He returned to full duty on June 1, 1987.

The Office listed which incidents were not compensable factors of employment:

(1) On January 13, 1987 appellant was given a notice of proposed removal for failure to follow instructions, disruptive behavior and threatening his supervisor.

(2) On February 6, 1987 the proposed removal was reduced to a three-day suspension.

(3) He told his supervisor, Ms. Collins, that he felt under pressure because management had tried to fire him.

(4) On February 17, 1987 appellant informed Ms. Collins that he would be off work a month and submitted several claim forms for medical disability.

(5) On July 31, 1987 when he was asked to sign a letter of definition, he became upset because he disagreed with the content and refused to sign.

(6) On January 29, 1987 appellant filed a formal complaint against Supervisor Collins, claiming gender and race-based discrimination. There was no evidence to support a finding that discrimination had occurred.

(7) Upon his return to work on September 6, 1988, he became upset when he was informed that he had been reassigned.

(8) On November 10, 1988 Supervisor Gonzales denied appellant's request for annual leave in order to fix a tire.

(9) On November 22, 1988 appellant had another dispute with his supervisor regarding appellant's request for leave and his supervisor's request that he work overtime.

(10) On November 28, 1988 when Supervisor Gonzales informed everyone that overtime was required due to production demands, appellant became disruptive and said he would not work overtime.

On December 31, 2001 the Office notified appellant that it proposed to terminate his compensation benefits on the grounds that the claim had been erroneously accepted. In a decision dated February 1, 2002, the Office rescinded its acceptance of the claim for an employment-related emotional condition. Following a hearing held at appellant's request, in a decision dated June 5, 2002, an Office hearing representative affirmed the February 1, 2002

rescission. On reconsideration in decisions dated September 18, 2002 and January 10, 2003, the Office denied modification of its prior decisions.

The Board finds that the Office properly rescinded its acceptance of appellant's claim for an emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.[1] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation.[4]

In its decisions rescinding its acceptance of appellant's claim, the Office noted that, at the time the claim was originally accepted, no factors of employment were identified and no analysis provided to indicate on what basis the claim had been accepted. The Office further noted that it was not until August 16, 1995 that the compensable factors of employment were delineated.

With respect to the first factor, the December 10, 1986 dispute over safety shoes, the Office properly noted that this could not be characterized as behavior arising in the performance of duty, because appellant's supervisor gave appellant proper instructions regarding the wearing of required safety equipment. In giving instructions to appellant, his supervisor was performing an administrative function, which, absent evidence of error abuse, is not a compensable factor of employment.[5] In its decisions rescinding acceptance, the Office found that appellant had provided no evidence of error or abuse on the part of Ms. Collins. Rather, it was appellant who became abusive when he slammed his fist on her desk and shouted at her to leave him alone. The Office noted that, at the time appellant was instructed to wear safety shields in lieu of safety shoes, there was no medical documentation on record precluding his use of safety shields.

With respect to the fact that appellant was sent to another work area where safety shoes were not required and assigned to sweeping duties, the Office properly found that the assignment of work duties is also an administrative function of the employer and that there was no evidence

[1] *Linda L. Newbrough*, 52 ECAB 323 (2001).

[2] *Id.*; *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993).

[3] *Linda L. Newbrough*, *supra* note 1.

[4] *Id.*; *Gareth D. Allen*, 48 ECAB 438 (1997).

[5] Administrative and personnel matters are generally related to the employment but they are functions of the employer and not duties of the employee. *Alberta Kinloch-Wright*, 48 ECAB 459 (1997).

of error or abuse with respect to this reassignment.[6] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[7] In this case, Ms. Collins explained that, due to the fact that there was no work in her shop that appellant could perform without safety shoes or safety shields, he was temporarily assigned to another location to perform clean-up work. Ms. Collins stated that her goal in reassigning appellant was to avoid having to send him home and requiring him to use annual leave or leave without pay. She stated that she had gone out of her way to keep appellant in a pay status and that the assignment was in no way intended to be detrimental to appellant. With respect to appellant's allegation that he was made to work in inclement weather and required to check in every 30 minutes, again the Board notes that the assignment of job duties and the monitoring of activities is an administrative function and appellant has not shown any error or abuse on the part of the employing establishment.[8] While the Office was correct in finding that appellant provided no evidence of error or abuse with respect to the administrative assignment of clean-up duty, the Board notes, however, that appellant did not implicate only the demeaning nature of the position and his desire for a different position. Appellant also asserted that, while he was outside performing his clean-up duties, he was made fun of by coworkers and others passing by. The Board finds that appellant's reaction resulted from personal frustration at not being able to work in a particular environment[9] and his self-generated perceptions that people were talking about him.[10] The Board finds that appellant's allegations about being made fun of were vague and pertained to general job dissatisfaction. Appellant did not submit any evidence supporting his allegations or explain the manner in which he was made fun of.[11]

With regard to the fact that appellant asserted that he had a headache due to job stress, the Office properly found that, as appellant specifically stated that his stress was caused by the employing establishment's attempts to fire him, this also was a reaction to a noncompensable administrative function.[12] The Office further properly found that there was no evidence of error or abuse in the Office's January 13, 1987 proposed notice of removal for appellant's documented failure to follow instructions and disruptive, threatening behavior, nor did the fact that the

[6] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties 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. *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] *William T. Abernathy*, 48 ECAB 687 (1997).

[8] *See Janet I. Jones; Jimmy Gilbreath; Apple Gate*; *Joseph C. DeDonato*, *supra* note 6.

[9] Disability is not covered where it results from such factors as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position; *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[10] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994).

[11] *Id.*

[12] The Board has previously held that a claimant's job insecurity is not a compensable factor of employment under the Act; *see Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

proposed removal was later reduced to a suspension constitute evidence of error or abuse. The mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.[13]

With respect to the fact that on April 23, 1987 appellant returned to work with a medical release to work four hours a day, if he was allowed to transfer departments, and then returned to full duty on June 1, 1987, the Office properly found there was no indication in the record as to why appellant's return to the workplace constitutes a compensable factor of employment.

The Board finds that the Office properly rescinded its acceptance of appellant's claim for adjustment disorder with mixed emotional features as the evidence of record at the time of the Office's rescission does not establish that appellant's condition arose from compensable factors of his employment.

The Board further finds that appellant did not meet his burden of proof to modify the Office's decision rescinding its acceptance of his claim.

Subsequent to the Office hearing representative's June 5, 2002 decision affirming the Office's February 1, 2002 rescission of its acceptance of appellant's claim, appellant twice requested reconsideration of the Office's decision and submitted additional evidence. In decisions dated September 18, 2002 and January 10, 2003, the Office conducted merit reviews and found the newly submitted evidence insufficient to warrant modification of the rescission.

Appellant submitted narrative statements which generally focuses on two issues: that the employing establishment had violated OSHA regulations and treated him unfairly by first failing to provide him with safety shoes and then disciplining him for failing to wear them; and that the lack of safety shoes led to his being assigned to perform humiliating sweep-up duty, where he was ridiculed and harassed by coworkers. In support of his allegations, appellant submitted the following: an April 30, 1987 response to a March 19, 1987 congressional letter of inquiry addressing the issue of ordering safety shoes; a June 1, 1987 congressional letter of response to the employing establishment; a dispensary permit dated December 11, 1986 referring appellant for an evaluation, as to his ability to wear safety shields; an affidavit from Supervisor Donald D. McCullough regarding the safety shoe issue and appellant's light-duty sweeping assignment; two pages from an Equal Employment Opportunity (EEO) document discussing appellant's dispute with Supervisor Collins over wearing safety shoes; a notation that an appointment was made for appellant to see a podiatrist for the fitting of safety shoes; a chart representing all of appellant's problems regarding safety shoes; copies of OSHA regulations and OSHA procedure manual pages pertaining to the wearing of safety shoes; and affidavits from five individuals regarding appellant's alleged mistreatment during his light-duty sweeping job.

Although appellant has established that for a period of time he was allowed to wear regular shoes and not safety shoes, he was later required to wear safety shoes. He was reassigned for three days to a light-duty position not requiring safety shoes. The Board finds that appellant has not established that this arose to the level of error or abuse. As noted above, in evaluating error and abuse, the Board looks to whether the employing establishment acted

[13] *Mary L. Brooks*, 46 ECAB 266 (1994).

reasonably. In this case, appellant has not provided any evidence that the employing establishment erred or was abusive regarding the issue of the required safety shoes. The evidence submitted serves to establish the facts regarding the necessity for the safety shoes, the delay in obtaining them for appellant and appellant's short-term reassignment to a light-duty sweeping position. These facts are not in dispute. While appellant also submitted portions of EEO documents, including an EEO settlement agreement, these documents do not contain any finding that the employing establishment erred or acted abusively toward appellant. Appellant was reprimanded because he yelled at his supervisor, not because he did not have safety shoes. While appellant was temporarily reassigned to a light-duty sweeping position because he lacked safety shoes, appellant has not established that this reassignment constituted error or abuse. The affidavit from Mr. McCullough submitted by appellant serves instead to support a finding that no error or abuse was committed. In his statement, Mr. McCullough stated that he was acting general foreman at the time of appellant's safety shoe dispute with Ms. Collins. Mr. McCullough stated that, once it was medically certified that appellant could not comply with safety regulations regarding footwear, he temporarily assigned appellant to clean up outside the buildings until a light-duty spot was available. Mr. McCullough stated that there was no specific department whose job it was to clean up outside the buildings and that virtually all employees had been assigned to such duties in the past. He further stated that, in deference to inclement weather, appellant was instructed to report in every 30 minutes and was further instructed that he could come in anytime he felt the necessity. Mr. McCullough added that he was not aware of any medical reason why appellant could not perform the duties of the position. He noted that appellant was not happy with the reassignment and took it as an insult and he tried to convince appellant that the assignment was necessitated by the circumstances and was not punitive. Mr. McCullough indicated that, despite discussing the reassignment, appellant remained rude and disrespectful during the two- to three-day term of the assignment. The Board has held that an employee's dissatisfaction with holding a position in which he feels underutilized, performing duties for which he feels overqualified or holding a position which he feels to be unchallenging or uninteresting is not a compensable factor under the Act.[14] The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated and resulted from his frustration in not being permitted to work in a particular environment or to hold a particular position.[15] Appellant has presented no evidence that the employing establishment committed error or abuse by requiring him to wear safety shoes or in temporarily reassigning him to a nonsafety shoe area. The employing establishment provided a reasonable explanation for their actions. Appellant has failed to establish that the employing establishment committed error or abuse with respect to these alleged factors.

Finally, with respect to appellant's assertion that he was ridiculed by his coworkers while he was performing his temporary sweeping duties, the Board has held that actions by coworkers or supervisors that are abusive or harassing may constitute compensable employment factors to the extent that the implicated disputes and incidents arise in the performance of duty. To meet his or her burden of proof, a claimant must establish a factual basis for the claim by supporting the harassment allegations with probative and reliable evidence.[16] In support of his allegation

[14] *See Purvis Nettles*, 44 ECAB 623, 628 (1993).

[15] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

[16] *Lillie M. Hood*, 48 ECAB 157 (1996).

that he was made fun of by his coworkers, an allegation which was only generally stated when he submitted his initial claim in 1987, appellant submitted statements from several coworkers. In an undated statement, Mark E. Hayes stated that he worked at appellant's building between 1985 to 1998, that he observed appellant wearing safety shields, which looked like aluminum moon caps, on his tennis shoes and that he overheard Larry, a coworker, joking about appellant's "moon shoes" and saying that he was only good enough to sweep up because his feet were so big. This statement is unclear, however, as to when this incident occurred and whether this comment was addressed to appellant or only to other coworkers. In a statement dated October 9, 2002, Yavette Delahoussaye stated that appellant went without safety shoes for three years, that it became an issue when he began working for Ms. Collins and that, because he did not have safety shoes, he was sent outside to sweep up in the rain. This statement merely supports undisputed facts already in evidence and does not establish appellant's allegation of harassment by his coworkers while he performed his temporary light-duty job. In another undated statement, Leonard G. Johnson stated that he was a union steward during the time appellant was assigned to his light-duty sweeping position and he recalled jokes being made by coworkers, some suggesting that when appellant finished his work he could come to their homes and do some work around the house. Mr. Johnson stated that appellant also became the brunt of jokes when he wore safety shields. Mr. Johnson did not specify when these comments were made, the parties making such comments or whether appellant heard these comments or whether the jokes and comments were only made among the coworkers themselves. In a statement dated October 7, 2002, Helen G. Altheimer stated that she had worked with appellant and confirmed appellant's assertion that, during a meeting, in response to appellant's query as to when he would receive his safety shoes, Division Director Cleo Wilson responded: "As soon as we get enough cows, we do [not] have enough cows to make shoes to fit you. You wear a size 15." Ms. Altheimer further stated that after that, although appellant was a pneudraulic mechanic, he was singled out and put outside in the rain and cold to sweep up and pick up paper outside the building. She added that Supervisors Billy Berry, Jim Low and Mr. McCullough would stand around harassing him and saying "what you say … you are not going to do what" in an effort to provoke him into a fight. Some of the employees, Dave Mello, Rory Nelson and Larry Chapman would yell out "when you finish … come on over to my house … I got yard work for you."

The record does contain a contemporaneous letter dated March 19, 1987 from appellant's Congressman to the employing establishment, noting that appellant had complained to him that he was humiliated by his temporary sweeping position, that coworkers harassed him and that he felt it was demeaning for him to perform sweeping when he was a trained mechanic. The letter notes that appellant indicated that he has never known of a situation where a mechanic was asked to sweep floors and on one occasion when it was raining outside, he was ordered to go inside and sweep the floors in front of others. However, the letter does not contain any specifics as to when the acts of harassment alleged occurred or the identity of parties making any comments. 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.[17] The Board has held that interactions that are not directly related to appellant's job duties, such as the jokes related by Ms. Altheimer regarding the size of appellant's feet, will not be

[17] *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

afforded coverage under the Act.[18] The congressional letter indicates that appellant's feelings of humiliation were self-generated and resulted from his personal frustration with being assigned to sweeping details and his perception that he was too highly qualified to perform sweeping duty. Again, the Board has held that an employee's dissatisfaction with holding a position in which he feels underutilized, performing duties for which he feels overqualified or holding a position which he feels to be unchallenging or uninteresting is not compensable under the Act.[19] The Board finds that appellant has not established that his emotional condition arose from compensable factors of employment.

The decisions of the Office of Workers' Compensation Programs dated January 10, 2003, September 18 and June 5, 2002 are affirmed.

Dated, Washington, DC
September 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] *Compare Alfred Arts*, *supra* note 11.

[19] *Id; Purvis Nettles*, *supra* note 14.