U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDON A. DANIEL and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, JEAN LAFITTE NATIONAL HISTORIC PARK & RESERVE, New Orleans, LA

Docket No. 00-1770; Submitted on the Record;
Issued April 16, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition causally related to factors of his federal employment.

On September 15, 1996 appellant, then a 42-year-old maintenance worker, filed an occupational disease claim, alleging that he developed neurotic depression causally related to his receipt of abusive treatment by management. Appellant stopped work on August 30, 1996 and returned to work on September 4, 1996. Appellant was removed from the agency rolls effective November 19, 1996.

In a decision dated January 29, 1997, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of record did not establish that he sustained an injury within the performance of duty. Subsequent to a hearing, held at appellant's request, in a decision issued April 21, 1998, an Office hearing representative affirmed the Office's prior decision. By letter dated April 21, 1999, appellant requested reconsideration of the Office's decision. In a decision dated May 26, 1999, the Office found the additional evidence and arguments submitted to be insufficient to warrant modification of the prior decision.

In a supplemental statement and in his hearing testimony, appellant listed numerous incidents as causative factors of his claimed emotional condition. He stated that his work problems began in approximately 1992 while stationed at Chalmette, Louisiana, where an Equal Employment Opportunity Commission (EEOC) claim was filed against him. Appellant stated that the employing establishment jumped to accuse him and as a result he counter filed against the agency and the claim was later settled in 1997. He was then transferred at his request and was sent to Thibodeaux, Louisiana where he worked without incident until approximately 1994, when he tried for a promotion and the employing establishment started having people write memorandums containing false statements against him and he was investigated, reprimanded, placed on two years probation, suspended for one week and finally, on October 20, 1994 he was

escorted from the employing establishment premises by his supervisors and the park service police. Appellant was then transferred to Marrero, Louisiana, his final duty station, where he was subjected to low performance appraisals, accused of causing two accidents, unfairly positioned into a performance improvement plan (PIP) and his accomplishments were not recognized. In addition, he was restricted from using his annual leave and was required to support any requests for sick leave with medical documentation, he received unfair letters of warning, he was taunted, watched and closely monitored by both his supervisors and other employees and effective November 19, 1996, he was terminated from his employment for unacceptable performance. Appellant further testified that he appealed his termination from the employing establishment and that his claim was eventually heard by the Merit Systems Protection Board on March 18, 1997. Prior to the issuance of the decision, the parties reached a settlement.

In a response dated received October 30, 1996, the employing establishment stated that on December 15, 1995 appellant was issued a letter of warning for repeated tardiness to work and abuse of sick leave. The sick leave restriction required him to submit a physician's statement for all sick leave taken for one year from the date of the warning. In addition, appellant was subsequently placed on the PIP, designed to assist him in improving his work performance, because he did not achieve two of the critical results of his PIP during a mid-season review. The employing establishment further explained that an element of a PIP, which lasts for 90 days, is that an employee may not take annual leave, except in an emergency, while on a PIP. Appellant's PIP started July 1, 1996 and was designated to end September 28, 1996. Both the letter of warning and PIP were in effect on August 30, 1996, when appellant stopped work due to having been denied leave.

The Board has duly reviewed the entire case record on appeal and finds that appellant did not establish that he sustained an emotional condition while in the performance of duty.[1]

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment contributing to his condition. Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[2] When the evidence demonstrates feelings of job insecurity and nothing more, coverage

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on April 24, 2000 the only decision before the Board is the Office's May 26, 1999 decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[3] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[4]

In this case, appellant has not substantiated any compensable factors of employment under the Act. Appellant initially asserted that as a result of an EEOC claim filed against him while stationed at Chalmette, Louisiana, he was subjected to harassment by the employing establishment. Actions by coworkers or supervisors that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.[5] Mere perceptions or feelings of harassment, however, are not compensable. To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.[6] Appellant failed to provide any such probative and reliable evidence in the instant case.

With respect to appellant's allegations that while at Thibodeaux, Louisiana, he was unfairly reprimanded, put on probation, suspended, issued letters of warning, investigated and eventually humiliated by his forcible removal from the employing establishment property, the Board has held that reactions to disciplinary actions taken by the employing establishment are not considered compensable factors of employment.[7] The Board has found that while administrative or personnel matters, such as disciplinary proceedings and investigations into conduct, are not generally related to the duties of the employee, they 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.[8] In support of his claim that the employing establishment acted unreasonably, appellant submitted a copy of the settlement agreement connected to his EEOC claim. The settlement agreement provides that all documents referencing the letter of reprimand and the suspension be expunged from appellant's official file and that the employing establishment agrees to pay appellant $25,000. The Board notes, however, that the settlement agreement was mutual and indicated that the employing establishment did not concede any wrongdoing.

[3] *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985).

[4] *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

[5] *See Marie Boylan*, 45 ECAB 338 (1944); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[7] *Daryl R. Davis*, 45 ECAB 907 (1994).

[8] *See Richard Dube*, 42 ECAB 916 (1991).

With respect to appellant's assertions that, while at Marrero, Louisiana, he received unfair low performance appraisals, was unfairly placed on a PIP and received an unfair letter of warning, the Board has held that performance evaluations and similar actions, while generally related to employment, are administrative functions of the employer and not duties of the employee. 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. 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.[9] While appellant submitted a copy of an MSPB settlement directing that his performance ratings be changed to satisfactory, that appellant's termination be attributed to medical reasons rather than unsatisfactory performance and that appellant receive $25,000, the settlement agreement was mutual and the terms of the settlement advised that the employing establishment did not concede any wrongdoing.[10] The Board finds that these instances related to administrative or personnel matters rather than to appellant's regular or specially assigned duties and that there is no persuasive evidence that the employing establishment erred or acted abusively.

Similarly, appellant has not established that the employing establishment erred or acted abusively in denying his requests for annual and sick leave. Generally, actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment because they arise out of administrative or personnel matters and are not considered to be sustained in the performance of duty.[11] The employing establishment explained that, under the terms of the PIP, appellant was not allowed to take annual leave for 90 days, other than for emergency purposes and that, under the terms of a separate letter of warning, issued for appellant's abuse of sick leave and tardiness, appellant's use of sick leave had to be supported by medical evidence. In a narrative statement submitted by appellant, he stated that on August 30, 1996 he asked for a few hours of leave in order to pick up some medical reports he needed for his injury claim and confirmed that there was no emergency. Consequently, the Board finds that there is insufficient evidence that the employing establishment erred or acted abusively in denying appellant's requests for leave.[12]

Appellant also asserted that, while employed at Marrero he was taunted, watched, closely monitored and falsely accused of causing accidents. However, appellant has not submitted any corroborative evidence in support of these allegations. As appellant has not substantiated his allegation of harassment with specificity or corroborative evidence, his contention that he was subjected to false accusations and taunts is not supported by probative or reliable evidence and is not compensable.[13] In addition, appellant's complaints concerning the manner in which his supervisor performed his duties as a supervisor or the manner in which he exercised his

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

[10] *Id.*

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

[12] *Dinna M. Ramirez*, 48 ECAB 308 (1997).

[13] *Ruthie M. Evans*, *supra* note 6.

supervisory discretion fall, as a rule, outside of compensable factors of employment.[14] His complaints are analogous to frustration over not being allowed to work in a particular job environment and are, therefore, not compensable. As appellant has not identified any compensable factors of employment, he has not established that he sustained an emotional condition while in the performance of duty.[15]

The May 26, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 16, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Donald E. Ewals*, 45 ECAB 111 (1993); *see also David W. Shirey*, 42 ECAB 783 (1991).

[15] Appellant attempted to submit additional evidence on appeal. The Board's review is limited to the evidence that was before the Office at the time of its final decision. The Board therefore cannot consider this evidence. 20 C.F.R. § 501.2(c).