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U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR R. RICE and DEPARTMENT OF VETERANS AFFAIRS, NORTHERN CALIFORNIA HEALTH CARE SYSTEM, Pleasant Hill, CA

Docket No. 99-1117; Submitted on the Record;
Issued August 2, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue 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 properly denied appellant's request for a merit review in its January 13, 1999 decision.

On June 5, 1997 appellant, then a 45-year-old purchasing agent, filed a notice of occupational disease alleging that the employing establishment contacted him while he was on emergency family leave to inform him of a presumed error concerning his "credible military service" and leave accrual. He stated that he was told to return to work or he would be placed in no pay status. Appellant noted that he had a child that was hospitalized and near death and that he was being treated for high blood pressure and stress. He indicated that the employing establishment froze his leave and decreased the hours of leave accrued. Appellant stated that this forced him to return to work sick on May 21, 1997 and that this aggravated his diffuse idiopathic skeletal hypertosis and ankylosing spondylitis, his temporomandibular joint problem and his hypertension.

In a separate statement also dated June 5, 1997, appellant indicated that the employing establishment erred in failing to know of its own policies concerning disabled veterans and in causing him to lose accrued vacation time.

On July 20, 1997 appellant stated that the employing establishment credited him with 15 years and 10 months of credible military service when he accepted his present position. He indicated that the employing establishment subsequently reduced the years of military service he was credited with and that this negatively impacted his leave balances. Appellant indicated that because this occurred while his child was critically ill and when he needed to use his accrued leave that this aggravated his condition.

On July 25, 1997 the employing establishment, in a letter signed by Sandy Collins, Chief of Human Resources Management Service, stated that it erroneously credited appellant's military service towards his service computation date for leave accrual purpose. Consequently, it stated that appellant received more annual leave than he was entitled to beginning January 3, 1989. It further stated that appellant had been given the correct leave amount, but that appellant would probably have a negative leave balance. It stated that appellant's leave records needed to be corrected and that any excess leave appellant owed should be considered for waiver because an administrative error occurred.

On September 8, 1997 appellant again indicated that the employing establishment's actions in taking away his accrued annual leave exacerbated his pain and stress. He stated that the employing establishment had ulterior motives in failing to accept doctors notes regarding his daughter's illness. Appellant also stated that the employing establishment failed to inform him of its donated leave program and attempted to hide it by postdating a letter informing him of the program.

By decision dated October 16, 1997, the Office denied appellant's claim on the basis that the evidence of record failed to establish that he sustained an emotional condition while in the performance of duty.

On June 19, 1998 appellant requested reconsideration. He stated that the employing establishment failed to notify him of its voluntary leave transfer program. In support of this argument, appellant submitted a policy statement from the voluntary leave transfer program stating that supervisors were responsible for informing employees of the availability of the leave transfer program. He also indicated that his supervisor, Dave Stockwell, failed to tell him about the leave donation program. Appellant submitted a letter dated June 5, 1997 from Sheila M. Cullen, an employing establishment supervisor, informing appellant of the voluntary leave transfer program. Appellant, however, indicated that he did not receive this letter until July 3, 1997. He also alleged that the employing establishment discriminated against him by rejecting letters from his physicians requesting emergency leave, delaying his attendance in a pain management program, delaying his application for the flexiplace program and discussing whether his Veterans Administration disability was "service-connected" in the open. In support of these assertions, appellant submitted medical notes from physicians stating that he required leave to deal with a family medical emergency, his request to participate in the flexiplace program, a physician's request for a new chair and letters stating that he had a service-related disability.

By decision dated September 23, 1998, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of its prior decision. In an accompanying memorandum, the Office indicated that appellant failed to establish that the employing establishment acted in error or abusively in their administration of adjustment of appellant's leave and time-in service status. It further stated that the record was devoid of any corroborating evidence that the employing establishment treated appellant in a discriminatory matter concerning the leave transfer program, the pain management program or the flexiplace program.

On October 12, 1998 appellant again requested reconsideration. In support, he submitted a policy letter from the employing establishment entitled, "Your Rights Under the Family and Medical Leave Act of 1993." Appellant again indicated that the employing establishment erred in failing to inform him of the leave donation program which negatively affected his rights under the Family Medical Leave Act. He indicated that the employing establishment robbed him of benefits approved upon his discharge from the army and injured him by discrimination concerning military compensation.

By decision dated January 13, 1999, the Office found that the evidence submitted in support of the request for review was cumulative or immaterial and therefore insufficient to warrant review of its prior decision. In an accompanying memorandum, the Office stated that appellant's arguments were cumulative and previously considered. It further stated that the policy letter from the employing establishment was merely informational and failed to establish that the employing establishment acted erred or acted abusively.

The Board finds that this case is not in posture for decision.

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 her 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]

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.[3] 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.[4]

[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] *See Margaret S. Krzycki,* 43 ECAB 496, 502 (1992); *Norma L. Blank,* 43 ECAB 384, 389-90 (1992).

[4] *Id.*

Appellant alleged that the employing establishment engaged in discrimination by failing to accept his physicians' requests for emergency leave to care for his injured daughter, by failing to inform him of the voluntary leave program, by delaying his applications for flexiplace and pain management programs and by talking about whether appellant's Veterans Administration disability was "service-related" in the open. However, for discrimination to give rise to compensable disability under the Act, there must be evidence that the discrimination did in fact occur. Mere perceptions of discrimination are not compensable under the Act.[5] In this case, appellant submitted no corroborating evidence establishing that the employing establishment discriminated against him in taking these actions. The record indicates that the employing establishment gave appellant the option of taking leave without pay to attend to his daughter in response to the physicians' request for emergency leave. Moreover, a letter from the employing establishment indicates that it informed appellant of the voluntary leave program on June 5, 1997, the same date on which he filed his claim. Although appellant alleged this letter was postdated, the record is devoid of any evidence establishing that assertion. Moreover, there is no evidence that the employing establishment delayed appellant's participation in pain management or flexiplace programs or that it violated appellant's privacy by discussing the type of Veterans Administration disability he received in public. Thus, appellant has not established a compensable employment factor with respect to these claimed incidents of discrimination.

Appellant, however, also attributed his emotional condition to the employing establishment's error crediting him with 15 years and 10 months of credible military service when he started his present position in 1989 and then subsequently correcting its mistake in 1997. He stated that the employing establishment's mistake resulted in his losing of accumulated leave that he needed to care for his sick daughter which exacerbated his emotional condition. The employing establishment's calculation, record keeping and approval of appellant's leave constitutes an administrative matter which is not compensable absent evidence of error or abuse.[6] The employing establishment admitted in a July 25, 1997 letter signed by Sandy Collins, Chief of Human Resources Management Service, that it erroneously credited appellant's military service towards his service computation date for leave accrual purposes. It stated that this error initially occurred on January 3, 1989 and resulted in appellant accumulating a negative leave balance over the nine years before the error was discovered. Because the employing establishment erred in this administrative matter, it constitutes a compensable factor of employment.

Appellant therefore identified a compensable factor of employment with respect to the employing establishment's mistake in crediting him with 15 years and 10 months of credible military service and calculating his leave balances from 1989 through 1997. As appellant has implicated a compensable factor of employment, the Office must base its decision on the analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be

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

[6] *Joe L. Wilkerson*, 47 ECAB 604 (1996).

remanded to the Office for this purpose.[7] After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.[8]

The decisions of the Office of Workers' Compensation Programs dated January 13, 1999 and September 23, 1998 are set aside and the case remanded for further action consistent with this decision.

Dated, Washington, D.C.
August 2, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[7] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[8] Inasmuch as this case must be remanded for the Office to issue a *de novo* decision, the Board need not address whether the Office erred in denying appellant's request for a merit review in its January 13, 1999 decision.