U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS H. SEALES and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

Docket No. 99-2497; Submitted on the Record;
Issued December 7, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a bilateral foot condition caused or aggravated by factors of his federal employment; (2) whether appellant has established that he sustained an aggravation of his preexisting post-traumatic stress disorder in the performance of duty; and (3) whether the Office of Workers' Compensation Programs properly denied his request for a hearing under 5 U.S.C. § 8124.

On September 14, 1998 appellant, then a 46-year-old custodian/laborer, filed an occupational disease claim alleging that he sustained a skeletal condition of both feet and aggravation of his post-traumatic stress disorder in the performance of duty. He attributed his condition to the following:

> "Because of my constant standing [and] walking I realize[d] that my feet were in constant pain and I experience[d] severe cramps and electrical shock waves. Also, I was in constant confrontation[s] with my supervisor because of being out of work and it aggravated my post-traumatic stress disorder. I[t] led me to seek surgery on my right foot on February 13, 1998. Since then I have been out of work."

By decision dated December 10, 1998, the Office denied appellant's claim on the grounds that he did not establish an aggravation of his post-traumatic stress disorder in the performance of duty or an aggravation of the disorder of his feet causally related to factors of his federal employment. The Office noted that appellant had not submitted, as requested, a detailed statement discussing the factors to which he attributed his emotional condition.

In a letter dated January 13, 1999, appellant requested a hearing on his claim. By decision dated March 8, 1999, the Office denied appellant's request for a hearing as untimely.

The Board finds that appellant has not established that he sustained a bilateral foot condition caused or aggravated by factors of his federal employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.[1]

In a report dated October 9, 1998, Dr. Peter Juliano, a podiatrist, indicated that appellant was status post right foot surgery. Dr. Juliano stated:

> "[Appellant] claims the past two years prior to surgery, his job as a postal worker has aggravated his right foot symptoms. As such, [appellant] sought surgical management for his right foot, after conservative attempts to alleviate his right foot pain had failed. [Appellant] has difficulty standing for prolonged periods of time on his right foot and still has discomfort and pain while ambulating."

While Dr. Juliano mentioned appellant's belief that his employment aggravated his right foot condition, the physician did not make a specific causation finding of his own or render a diagnosis and thus his opinion is of diminished probative value.[2] The remaining medical evidence of record does not address the relationship between the condition of appellant's feet and factors of his federal employment.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[3] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and his medical history, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof.

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[1] *Lourdes Harris*, 45 ECAB 545, 547 (1994).

[2] *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[3] *Donald W. Long*, 41 ECAB 142 (1989).

The Board further finds that appellant has not established that he sustained an aggravation of his preexisting post-traumatic stress disorder 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.[4] 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 he frustration from not being permitted to work in a particular environment or to hold a particular position.[5]

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.[6] 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.[7]

Appellant attributed the aggravation of his post-traumatic stress disorder to confrontations with supervisors regarding his time off work for medical treatment. Actions of an employee's supervisor or coworker which the claimant characterizes as harassment or discrimination may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.[8] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[9] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[7] *Id.*

[8] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

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

occurred.[10] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11]

The Board finds that appellant has not supported his allegations of harassment and discrimination with sufficient probative evidence. Appellant did not provide a statement describing specific instances of harassment or any evidence corroborating his allegations. Further, the Board notes that generally actions of the employing establishment in matters involving the use of leave are not considered compensable factors of employment absent evidence of error or abuse.[12] Appellant has not submitted any evidence supporting a finding of error or abuse by the employing establishment in its disposition of leave requests. Thus, he has not established a compensable factor of employment under the Act.[13]

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[14] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[15]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[16] when the request is made after the 30-day period established for requesting a hearing,[17] or when the request is for a second hearing on the same issue.[18] The Office's procedures, which require the Office to exercise its

[10] *William P. George*, 43 ECAB 1159 (1992).

[11] *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

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

[13] 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).

[14] 5 U.S.C. § 8124(b)(1).

[15] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[16] *Rudolph Bermann*, 26 ECAB 354 (1975).

[17] *Herbert C. Holley*, 33 ECAB 140 (1981).

[18] *Johnny S. Henderson*, 34 ECAB 216 (1982).

discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[19]

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated December 10, 1998 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated January 13, 1999.[20] Hence, the Office was correct in stating in its March 8, 1999 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's December 10, 1998 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 8, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that he had a condition causally related to factors of his federal employment. 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.[21] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[19] *Sandra F. Powell*, 45 ECAB 877 (1994).

[20] The date on the letter was January 13, 1998; however, it appears that this was a typographical error.

[21] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated March 8, 1999 and December 10, 1998 are hereby affirmed.[22]

Dated, Washington, DC
December 7, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[22] The Board notes that appellant submitted new evidence with his appeal. The Board may not consider such evidence for the first time on appeal as its jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(a). Appellant may resubmit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a).