

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN LEE McCLENIC and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, Mich.

*Docket No. 96-660; Submitted on the Record;
Issued January 5, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden in establishing that his stress was due to factors of his employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act.

On July 7, 1994 appellant, then a 47-year-old motor vehicle operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging a stress incident due to a verbal altercation with another employee on June 20, 1994.

In a letter dated June 21, 1994, Dr. Mamoun Dabbagh, appellant's treating physician, noted that he saw appellant for stress and recommended that appellant be off work for approximately three weeks.

In a letter to the postal inspector dated June 30, 1994, appellant stated that a coworker asked appellant why he had run him and his family off the road on Jefferson on Thursday morning. Appellant indicated that he had not run the coworker off the road. Appellant stated that the coworker swore at him, then picked up a chair and threatened to hit him in the head with the chair. Appellant indicated that he disagreed with the way the situation was handled by his supervisor and that he had gone to the Equal Employment Opportunity office to seek an alternative means of handling the incident. Lastly, appellant indicated that he felt "very apprehensive about the situation and went to seek private counseling."

The record also contains witness statements indicating there was a verbal altercation between appellant and another employee, but that no physical contact or threat of physical contact was made. The statements also indicate that the altercation was not related to employment factors or the employing establishment.

In a letter dated August 10, 1994, the Office informed appellant that additional information was needed and advised him to submit details regarding work-related stress, history of prior stress problems and a detailed medical report explaining how appellant's stress was employment related.

By decision dated September 21, 1994, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found the evidence of record insufficient to establish that appellant sustained an injury at work.

In a letter dated May 8, 1995, appellant requested reconsideration of the denial of his claim and submitted a November 28, 1994 report from Dr. Dabbagh, and a Merit Systems Protection Board (MSPB) decision dated March 7, 1995, reversing the removal of appellant from the employing establishment.

In the report dated November 28, 1994, Dr. Dabbagh noted that he had been treating appellant since September 13, 1993 when he was initially seen at the request of the employee assistance program. Dr. Dabbagh stated that he had been treating appellant for depression and that appellant "seemed to be doing quite well, mentally and physically, until June 20, 1994, when there was an incident at work, which tipped the whole psychological equilibrium." Dr. Dabbagh also noted:

"[Appellant] has been feeling quite angry in relation to the job situation, feeling quite distressed and feeling persecuted. It seemed to be this situation has contributed quite significantly for the relapse in the patient's condition in terms of his depression and what has made the situation worse, is that the whole situation has not resolved quite satisfactorily, at least in [appellant's] mind."

Dr. Dabbagh opined that appellant's "psychological condition has been precipitated, and also contributed quite significantly with his job situation from the first episode, which happened last year, and his current episode."

By decision dated June 13, 1995, the Office denied appellant's request for modification of the prior decision. The Office noted that Dr. Dabbagh's opinion failed to give any details of the June 20, 1994 incident at work. The Office found that Dr. Dabbagh's opinion did not have an accurate history of the incident and contained several distortions regarding the event.

In a letter faxed on September 25, 1995, appellant requested reconsideration of the denial of his claim and submitted a November 28, 1994 report from Dr. Dabbagh and a letter from the employing establishment disallowing back pay.

In a decision dated October 4, 1995, the Office denied appellant's request for modification of the prior decision. The Office found the evidence submitted insufficient to warrant modification of the denial of his claim.

In a letter faxed on October 13, 1995, appellant requested reconsideration of the denial of his claim. In support of his request for reconsideration, appellant submitted an October 9, 1995 report from Dr. Dabbagh, an MSPB decision dated March 7, 1995, the June 13, 1995 decision

denying his claim, his September 30, 1995 request for reconsideration, records from his EAP counselor-on-call regarding a September 23, 1993 incident, the employing establishment's letter denying appellant back pay, an October 10, 1995 memorandum from appellant to the Office, a statement of disability dated October 9, 1995 and completed by Dr. Dabbagh, and medical record treatment from an unknown facility for admission from September 14, 1995 through his discharge on October 5, 1995.

In the October 9, 1995 report, Dr. Dabbagh noted that appellant had been under his care for stress and depression since September 10, 1993. Regarding the June 20, 1994 incident, Dr. Dabbagh noted:

“However, in 1994, another incident happened in which [appellant] became involved in a conflict in which he felt one of the other employees had threatened him, and he was quite afraid about his life. He complained to his supervisor regarding this issue. However, it seemed to be, again, he felt people did not treat him fairly and he was blamed for the incident. At that time, he became quite depressed again. There was significant recurrence of his depression, it was more severe and he was almost suicidal. It seemed that the stress was quite significant, and his condition had deteriorated to such a degree that hospitalization was required.”

Dr. Dabbagh noted that appellant was experiencing stress because of his financial situation due to a cut in his employment. Finally, Dr. Dabbagh noted that “I think it seems to be there is some correlation between his physical condition and the amount of stress he has been experiencing in the last two years.” Dr. Dabbagh diagnosed “job-related stress related to his job, feeling of unfair treatment.”

In a claim form signed by Dr. Dabbagh on October 9, 1995, he diagnosed major depression and interim heat explosive disorder and that appellant became disabled on June 20, 1994.

The record contains a medical record noting appellant was admitted on September 14, 1995 and discharged on October 5, 1995. A diagnosis of adjustment disorder is noted, but there is no physician's signature on the document.

In a decision dated November 30, 1995, the Office denied reconsideration of appellant's claim. The Office found the evidence submitted by appellant to be repetitious and/or cumulative and/or irrelevant and immaterial.

The Board finds that appellant has not met his burden in establishing that he sustained an emotional condition due to factors of his employment.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that the

¹ 5 U.S.C. §§ 8101-8193.

individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² Causal relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

Appellant has the burden of establishing that his claimed stress was caused by the alleged June 20, 1994 incidents or other factors of his federal employment. In this case, the Office found that appellant did not establish fact of injury.

In support of his claim, appellant submitted reports from Dr. Dabbagh, an attending physician, a copy of the Office’s June 13, 1995 decision, a copy of a March 3, 1995 MSPB decision, a copy of an May 19, 1995 letter from the employing establishment, notes from EAP counselors and a record of appellant’s hospitalization on September 14, 1995.

Dr. Dabbagh’s statements in both his reports noted that there was an incident in June 1994. Dr. Dabbagh, in neither report, states what happened on June 20, 1994 nor provides explanation as to how the work incident caused appellant’s stress. Dr. Dabbagh lacks sufficient

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

⁴ *Id.* The Office’s regulations clarify that a traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas occupational disease refers to injury produced by employment factors which occur or are present over a period longer than a single workday or shift; *see* 20 C.F.R. §§ 10.5(a)(15), (16).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Id.* For a definition of the term “injury,” *see* 20 C.F.R. § 110.5(a)(14).

documentation and detail to substantiate that he was aware of the circumstances of the incident on June 20, 1994. Dr. Dabbagh also refers to appellant being under stress due to his financial situation and his treatment of appellant for depression and stress since September 1993. As Dr. Dabbagh's statements regarding the June 20, 1994 incident lack adequate detail, they are of diminished probative value in establishing fact of injury in this case.⁷

The Office's June 13, 1995 decision, the March 3, 1995 MSPB decision and May 19, 1995 letter from the employing establishment denying his back claim award was previously submitted by appellant and is therefore repetitious. In addition, the notes appellant submitted from EAP counselors, Ms. Valasco and Mr. Evans, are unrelated to the June 20, 1994 incident. This evidence is irrelevant and immaterial to the issue of whether or not appellant was threatened by a coworker on June 20, 1994 which caused him stress.

None of the evidence submitted by appellant affirmatively establishes that his stress was causally related to the June 20, 1994 incident with a coworker. Consequently, appellant has failed to meet his burden of proof, as he submitted insufficient evidence indicating that the June 20, 1994 incident or other factors of his federal employment caused his stress.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹¹

By fax dated October 13, 1995, appellant requested reconsideration of the Office's October 4, 1995 merit decision and submitted an October 9, 1995 report from Dr. Dabbagh, an MSPB decision dated March 7, 1995, the June 13, 1995 decision denying his claim, his September 30, 1995 request for reconsideration, records from his EAP counselor-on-call regarding a September 23, 1993 incident, the employing establishment's letter denying appellant

⁷ See *Elaine Pendleton*, *supra* note 2.

⁸ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. §§ 10.138(b)(1)-(2).

¹⁰ 20 C.F.R. § 10.138(b)(2).

¹¹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

back pay, an October 10, 1995 memorandum from appellant to the Office, a statement of disability dated October 9, 1995 and completed by Dr. Dabbagh, and medical record treatment from an unknown facility for admission from September 14, 1995 through his discharge on October 5, 1995 in support thereof. The evidence appellant submitted was repetitious or irrelevant to the issue of whether appellant's stress was due to the June 20, 1994 incident. Appellant has not established that the Office abused its discretion in its November 30, 1995 decision by denying his request for a review on the merits of its October 4, 1995 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 30, October 4 and June 13, 1995 are affirmed.

Dated, Washington, D.C.
January 5, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member