U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SEAN MARCHETTI and U.S. POSTAL SERVICE,
POST OFFICE, Burlingame, CA

Docket No. 99-2544; Submitted on the Record;
Issued October 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty causally related to the factors of his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On September 11, 1997 appellant, then a 33-year-old mail carrier, filed a claim alleging that a supervisor's harassment and intimidation caused him to sustain depression and stress.[1] The employing establishment controverted the claim.

The following documents were submitted with regard to the claim: a notice of suspension dated July 3, 1997 for unsatisfactory attendance; a notice of suspension dated September 10, 1997 for "Unsatisfactory Conduct [--] Failure to Follow a Direct Order;" a denial of appellant's grievance regarding the suspension due to unsatisfactory attendance; a medical excuse slip from a nurse dated September 12, 1997; and reports dated September 13 and 26, 1997 from a social worker which noted that appellant suffered from "stress." In notes from Dr. James E. Storm, a Board-certified psychiatrist, dated from October 3, 1997 to January 8, 1998, it was indicated that appellant was suffering stress due to conflicts with a supervisor

By decision dated April 6, 1998, the Office denied appellant's claim finding that the evidence failed to establish that appellant's condition arose out of the performance of duty. The Office found that appellant had failed to substantiate his allegations of harassment.

By letter dated April 13, 1998, appellant requested reconsideration of his claim. Appellant alleged that his contact with a certain supervisor had caused him emotional problems. He alleged that this supervisor talked to him in an unprofessional manner, yelled at him, was

[1] The Office determined that as the claim was for incidents on more than one shift, it constituted a claim for occupational disease.

rude and harassed him, gave him assignments without checking with appellant's own supervisor, gave him assignments which he objected to because he did not "want to pick up slack for other mail handlers who went home on low volume," took revenge on him when he won a complaint he filed against her, improperly accused him of talking with other mailhandlers, had gone to the men's locker room to get him and had timed his trips to the rest room. Appellant also submitted statements by coworkers. One coworker stated that, on August 26, 1997, while they were in the break room, the supervisor came in and informed appellant that there was mail to be pulled in the tour offices. Two other witnesses state that they did not converse with appellant on August 28, 1997 at the 940 belt. Appellant also submitted a letter from the employing establishment to the union stating, "As a result of the internal investigation, [the supervisor in question] was reassigned away form PMA for the best interest of the Postal Service." Appellant also submitted two reports from Dr. Storm, indicating that he had been treating appellant.

In response to an October 22, 1997 request by the Office for further information, appellant submitted a February 18, 1998 report from Dr. Storm who stated that he had no doubt that appellant's stress and outbreaks of anger were due to conflicts with his supervisor.

In a decision dated August 25, 1998, the Office found that appellant had failed to establish that his emotional condition occurred while in the performance of his regular or specially assigned duties. Specifically, the Office found that the incidents described were administrative/personnel matters not covered under the Federal Employees' Compensation Act and that the evidence was insufficient to establish that the employing establishment erred, abused its authority or acted unreasonably in these matters.

In a letter dated April 27, 1999, appellant again requested reconsideration. In a decision dated May 11, 1999, the Office denied appellant's request, noting that his request did not raise pertinent new issues or provide new evidence.

The Board finds that appellant has failed to meet his burden of proof in establishing that he developed an emotional condition 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 of 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 Act.[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

[2] 5 U.S.C. §§ 8101-8193.

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]

Furthermore, appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[5] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[6]

Appellant alleged harassment and discrimination on the part of a supervisor. His allegations, however, are not sufficiently substantiated. Although appellant did submit statements from coworkers, these statements fail to show that the supervisor harassed appellant or erred in directing appellant back to work. All these statements address whether appellant talked to two employees on August 28, 1997 at the belt and describe an incident wherein appellant was approached in the break room by a supervisor. This evidence is insufficient to establish harassment. Mere perceptions of harassment are not compensable under the Act.[7]

All of the remaining allegations relate to administrative or personnel matters not directly related to appellant's regular or specially assigned work duties. Therefore, they do not fall within the coverage of the Act.[8] However, the Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence establishes error or abuse on the part of the employing establishment.[9] Appellant has not submitted evidence sufficient to establish that management erred or acted abusively in a specific instance relating to the grievances regarding his irregular attendance or his failure to follow a direct order. Appellant's allegations that he did not like the way management handled these issues, without evidence establishing error or abuse, is not sufficient to establish compensability under the Act.[10]

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[3] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[4] *Id*.

[5] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[6] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[7] *Parley A. Clement*, 48 ECAB 302, 304 (1997).

[8] *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).

[9] *See Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

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

The Board also notes that an employee's emotional reactions to a disciplinary action are generally not covered by the Act.[11]

For the foregoing reasons, appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[12]

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

Under section 8128(a) of the Act[13] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[14] which provides that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a specific point of law, or
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> "(ii) Advancing a relevant legal argument not previously considered by the Office, or
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> "(iii) Constituting relevant and pertinent new evidence not previously considered by the Office."

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without reopening the case for a review of the merits.[15]

In the instant case, appellant submitted no new relevant and pertinent evidence in support of his April 27, 1999 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. Accordingly, the Office properly denied appellant's request for review on the merits.

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[11] *Diane C. Bernard*, 45 ECAB 223, 228 (1993).

[12] As appellant has failed to allege a compensable factor of employment substantiated by the record, the medical evidence need not be discussed; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[13] 5U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(2) (1999).

[15] 20 C.F.R. § 10.608(b) (1999).

The decisions of the Office of Workers' Compensation Programs dated May 11, 1999 and August 25, 1998 are hereby affirmed.

Dated, Washington, DC
October 4, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member