

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of ROBERT BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 96-2320; Submitted on the Record;
Issued December 2, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues 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 hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that appellant did not meet his burden of proof to establish that he sustained 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 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 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

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.³ This burden includes the submission of a detailed

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

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁴

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.⁵ 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.⁶

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated October 21, 1993, the Office denied appellant's emotional condition claim in the grounds that he did not establish any compensable employment factors and, by decisions dated November 15, 1994 and July 18, 1996, the Office affirmed its October 21, 1993 decision.⁷ The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that the employing establishment wrongly disciplined him in November 1987 and June 1991 for threatening coworkers and improperly removed him from his job in September 1991. He also alleged that the employing establishment wrongly placed him under surveillance during the first half of 1991. Regarding appellant's allegations that the employing establishment wrongly handled disciplinary matters and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁸ Although the handling of disciplinary actions and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.⁹ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ By decision dated May 16, 1995, the Office approved the fee request of appellant's attorney and, by decision dated June 20, 1996, the Office denied as untimely appellant's request for a hearing in connection with the Office's May 16, 1995 decision.

⁸ *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁹ *Id.*

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.¹⁰ Regarding the above noted disciplinary actions, appellant did not submit sufficient evidence to show that the employing establishment committed error or abuse with respect to these matter. Although a settlement agreement resulted in the rescission of the disciplinary action which removed appellant from his job, the settlement agreement clearly indicated that it was made without prejudice to the employing establishment. Moreover, appellant did not submit any evidence to corroborate his claim that he was under surveillance during the first half of 1991.¹¹ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment and discrimination on the part of his coworkers contributed to his claimed stress-related condition. He alleged that, between the late 1980s and the early 1990s, several coworkers made vulgar comments to him and wrongly accused him of being a homosexual. Appellant claimed that in 1987 a coworker threatened him with bodily harm and made vulgar comments.¹² To the extent that disputes and incidents alleged as constituting harassment and discrimination by coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹³ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁴ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his coworkers.¹⁵ Appellant alleged that coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁶ Thus, appellant has not established a compensable employment factor under the Act in this respect.

¹⁰ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹¹ The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

¹² He also alleged that in 1990 a worker in a catering truck parked near the employing establishment threatened to injure him.

¹³ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁴ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁵ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁶ See *William P. George*, 43 ECAB 1159, 1167 (1992).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹⁷

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

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁸ 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.¹⁹

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.²⁰ 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,²¹ when the request is made after the 30-day period for requesting a hearing,²² and when the request is for a second hearing on the same issue.²³

In the present case, appellant's July 10, 1996 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated May 16, 1995 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its June 20, 1996 decision that appellant was not entitled to a hearing as a matter of right because his July 10, 1996 hearing request was not made within 30 days of the Office's May 16, 1995 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 June 20, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue

¹⁷ 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).

¹⁸ 5 U.S.C. § 8124(b)(1).

¹⁹ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

²⁰ *Henry Moreno*, 39 ECAB 475, 482 (1988).

²¹ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

²² *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²³ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence in support of a reconsideration. 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.²⁴ 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.

The decisions of the Office of Workers' Compensation Programs dated July 18 and June 20, 1996 are affirmed.

Dated, Washington, D.C.
December 2, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

²⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).