

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS TAMAYO and DEPARTMENT OF LABOR, OFFICE OF
FEDERAL CONTRACT COMPLIANCE PROGRAMS, Seattle, Wash.

*Docket No. 96-2438; Submitted on the Record;
Issued April 27, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment; and (2) whether the hearing representative abused his discretion in denying appellant's request for a discretionary second hearing under section 8124 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case on appeal and finds that appellant did not meet his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

Appellant filed a claim for stress on March 25, 1991. The Office of Workers' Compensation Programs denied appellant's claim by decision dated April 1, 1992. Appellant requested an oral hearing and by decision dated February 18, 1993 and finalized February 22, 1993, the hearing representative found that appellant failed to meet his burden of proof. Appellant filed a second claim on May 6, 1993 alleging that in April 1990 he sustained injury to his physical and mental health due to constant harassment, intimidation, interference, coercion, threats, reprisal and discrimination. By decision dated February 23, 1994, the Office denied appellant's claim. Appellant requested an oral hearing on March 22, 1994. By decision dated May 29, 1996, the hearing representative found that appellant had not established that he developed an emotional condition due to factors of his federal employment. The hearing representative further found that appellant was not entitled to a second hearing on his March 25, 1991 claim.

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an

employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.¹

Appellant alleged that his supervisor, Peter Reyes, "micromanaged" his work. Appellant stated that Mr. Reyes required many drafts and did not provide directions regarding specific corrections. In support of his claim, appellant submitted several memoranda from Mr. Reyes criticizing appellant's writing style. The monitoring of work by a supervisor is an administrative function of the employer and is not compensable.²

Appellant attributed his emotional condition to the employing establishment's reaction to his propensity to speak in Spanish to callers. In support of this allegation, appellant submitted a memorandum from Mr. Reyes noting that appellant had difficulty completing his work in a timely manner, that appellant spent "an inordinate amount of time on the [tele]phone," that his conversations were loud and largely in Spanish suggesting to Mr. Reyes that the calls were personal. There is no evidence in the record that Mr. Reyes erred in monitoring appellant's work schedule and telephone usage.³

Appellant attributed his emotional condition to termination of his variable workweek. Assignment of a work schedule or tour-of-duty is recognized as an administrative function of the employing establishment and absent any error or abuse, does not constitute a compensable factor of employment.⁴

He also attributed his condition to Mr. Reyes' allegation that he falsified government records by not correctly reporting his whereabouts. Disciplinary matters concerning an oral reprimand, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity.⁵ Appellant alleged that he was denied promotion⁶ due to his national origin and "whistle blowing" activities and filed an Equal Employment Opportunity Complaint. In a decision dated March 11, 1992, Judge James H. Freet denied appellant's claim finding no relationship between appellant's disclosures and the failure of the employing establishment to extend his temporary position. Determinations by the employing establishment concerning promotions are administrative in nature and not a duty of the employee.⁷ He alleged that he was required to complete special reports. Mr. Reyes requested that appellant correlate his walk-in guests with his weekly activity report. This request apparently related to an investigation of whether appellant was receiving social visits at the employing establishment. The employing

¹ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

² *Daryl R. Davis*, 45 ECAB 907, 911 (1994).

³ *Id.*

⁴ *Helen P. Allen*, 47 ECAB 141, 146 (1995).

⁵ *Jose L. Gonzalez-Garced*, 46 ECAB 559, 564 (1995).

⁶ *Donna J. DiBernardo*, 47 ECAB 700, 702-03 (1996).

⁷ *Garry M. Carlo*, 47 ECAB 299 (1996).

establishment retains the right to conduct investigations if wrongdoing is suspected.⁸ Appellant also attributed his condition to the institution of a performance improvement plan. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹ In the above-mentioned administrative actions, appellant has submitted no evidence that the employing establishment acted unreasonably resulting in error or abuse.

Appellant alleged that he was required to prepare reports but denied the necessary resources. Although this allegation relates to appellant's regular or specially assigned duty, appellant has not submitted the necessary factual evidence to establish the allegation. Mr. Reyes responded to appellant's allegation and stated that management did not prevent appellant from performing his job in accordance with established procedure.

Appellant attributed his emotional condition to harassment. 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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. 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.¹⁰ Appellant did not submit the necessary evidence to establish that the alleged harassment occurred as alleged and has not established this factor of employment.

Appellant stated that he was required to type which was not in his job requirements. He filed a grievance and in a settlement agreement the employing establishment rescinded the requirement. Appellant has established a factor of his federal employment that he was required to type in violation of union agreement. Therefore, the Board will consider whether appellant has submitted sufficient medical evidence to establish a causal relationship between his diagnosed condition and his accepted employment factor.

In support of his claim, appellant submitted reports from Dr. Henry H. Dixon, a Board-certified psychiatrist. Dr. Dixon diagnosed bipolar disorder and generalized anxiety. He submitted three reports listing various alleged employment factors to which he attributed appellant's emotional condition. However, Dr. Dixon did not attribute appellant's condition to the requirement that he type work documents. Therefore, appellant has not submitted the necessary medical evidence to establish a causal relationship between his diagnosed condition and accepted factor of employment.

⁸ *Sandra F. Powell*, 45 ECAB 877, 888 (1994).

⁹ *Martha L. Watson*, 46 ECAB 407 (1995).

¹⁰ *Alice M. Washington*, 46 ECAB 382 (1994).

The Board further finds that the hearing representative did not abuse his discretion in denying appellant's request for a discretionary second hearing under section 8124 of the Act.

Following the April 1, 1992 Office decision, appellant made a timely request for an oral hearing on April 18, 1992. The Office hearing representative conducted the oral hearing on October 29, 1992 and by decision dated February 18, 1993 and finalized February 22, 1993 found that appellant failed to meet his burden of proof. On December 26, 1995 appellant through his attorney argued that appellant's emotional condition claims should be considered together. Furthermore after appellant's second oral hearing, his attorney requested that the hearing representative review both claims. In the May 29, 1996 decision, the hearing representative found that appellant was not entitled to a second hearing on the March 25, 1991 claim and that he could pursue other appellate remedies.

Section 8124(b)(1) of the Act¹¹ which provides the right to a hearing before an Office hearing representative states as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with the 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.”

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 when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant to deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act.¹²

The hearing representative, in his May 29, 1996 decision, properly determined that appellant was not entitled to a hearing as a matter of right since appellant had previously had a hearing on the same issue. The hearing representative also exercised his discretion and further considered the hearing request but concluded that appellant could pursue his claim through other appellate avenues. For these reasons, the hearing representative acted properly in denying appellant's December 26, 1995 request for a hearing.

The decision of the Office of Workers' Compensation Programs dated May 29, 1996 is hereby affirmed.

Dated, Washington, D.C.
April 27, 1999

¹¹ 5 U.S.C. §§ 8101-8193; 8124(b)(1).

¹² *Sandra F. Powell, supra* note 8 at 890.

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member