

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIO A. OLIVENCIA and U.S. POSTAL SERVICE,
POST OFFICE, Boqueron, PR

*Docket No. 01-2003; Submitted on the Record;
Issued January 15, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On December 20, 2000 appellant, then a 48-year-old postal clerk, filed a claim for compensation alleging that he suffered a nervous breakdown as a result of events that occurred on December 2, 7 and 12, 2000.¹

By letter dated January 26, 2001, the Office advised appellant of the type of medical and factual evidence necessary to establish his claim.

In response, appellant submitted additional medical and factual evidence, including a narrative statement in which he stated that, on December 2, 2000, a coworker, Elda Abreau, asked that he assist her by going to the platform and bringing in the incoming mail cages. Appellant stated that, when he declined to assist her because he was too busy with his own duties, she called another coworker, Dixon Vargas, who became very upset, went out to the platform and began crashing mail cages around, repeatedly stating in a loud tone of voice, "If he does n[o]t want to work he go to hell, he better get the hell out here because today I [will not] take shit from no one." Appellant stated that, while Mr. Vargas was speaking to Mrs. Abreau, he felt the comments were directed at himself, as there was no one else around. Appellant stated that, on December 7, 2000, he requested a meeting between the postmaster, himself and Mr. Vargas, in order to clear the tension in the air. He stated that, during the meeting, Mr. Vargas repeatedly threatened him, saying in a defiant tone of voice, "I will tell you again, and I will tell you in your face, you do n[o]t know who your dealing with." Appellant alleged

¹ Appellant filed a claim for a traumatic injury, Form CA-1, however, as appellant asserted that his condition was triggered by incidents which occurred over more than one work shift, his claim was adjudicated as one for occupational disease.

that, despite Mr. Vargas' obvious attitude of violence, the postmaster did nothing. Finally, on December 12, 2000, he overheard Mr. Vargas and another employee discussing the incident and began to feel nervous and depressed. He went to the postmaster, and as he was telling her what happened, he began to tremble and had a breakdown and was advised to go home. Appellant stated that he was subsequently hospitalized for psychiatric treatment.

By decision dated March 1, 2001, the Office denied appellant's claim on the grounds that he failed to provide sufficient medical evidence to establish that he sustained a medical condition as a result of the alleged employment incidents.

Appellant requested an oral hearing and by decision dated July 10, 2001, an Office hearing representative denied appellant's request for a hearing as untimely.

The Board finds that appellant has failed to establish that he sustained an emotional condition while 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.² 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.³

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.⁴ 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.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

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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

In the present case, the employing establishment noted that, on December 7, 2000, during a meeting between appellant, Postmaster Olga N. Orta and Mr. Vargas, an incident ensued between appellant and Mr. Vargas. Appellant stated that he could make Mr. Vargas lose his job, and Mr. Vargas replied, “Do n[o]t mess with me, do n[o]t mess with me, and I repeat myself and I will repeat it to you.” The meeting was called to an end, and appellant summoned the police and filed a complaint against Mr. Vargas.

An altercation between coworkers which arises out of a claimant’s regularly or specially assigned duties may be considered an employment factor, but an altercation which arises from nonemployment factors, *i.e.*, a purely personal dispute, would not be considered an employment factor.⁸ This does not imply, however, that every statement uttered in the workplace will rise to coverage under the Act.⁹ The Board has reviewed the evidence pertaining to the December 7, 2000 meeting and finds there is insufficient evidence to establish mental abuse. Appellant stated that he could make Mr. Vargas lose his job. Mr. Vargas responded, telling appellant not to mess with him. These comments do not contain any epithet nor were they derogatory in any manner. With respect to the alleged December 2 and December 12, 2000 incidents, the employing establishment stated that nothing unusual happened on December 2, 2000. While it acknowledged that on December 12, 2000 appellant became very upset, saying that he could n[o]t work anymore and that he did n[o]t want to have any more problems with anyone, no specific cause for his breakdown is mentioned. To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant’s performance of his regular duties, these could constitute employment factors.¹⁰ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹¹ In the present case, appellant alleged that his coworker made statements and engaged in actions which he believed constituted harassment, but he provided insufficient evidence to establish that the statements constituted verbal abuse.¹² Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment on December 2 and December 12, 2000.

⁷ *Id.*

⁸ See *Irene Bouldin*, 41 ECAB 506, 514 (1990); *Lester O. Rich*, 32 ECAB 1178, 1180 (1981).

⁹ See *Harriet J. Landry*, 47 ECAB 543 (1996).

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² 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).

The Board further finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Following the issuance of the Office's March 1, 2001 decision, by letter dated March 12, 2001, appellant requested copies of various documents contained in the record and further requested "an extension to the time limite [sic] because I just got out of the Hospital." By letter dated April 10, 2001, appellant noted that he had not received a response from the Office and repeated his earlier requests both for the documents and for the extension of time. In neither letter did appellant mention for what purpose he required an extension of time. By letter dated May 31, 2001, and received by the Office on June 4, 2001, appellant submitted additional factual and medical evidence in support of his claim, and stated:

"Please understand that this is a psychiatric matter and for that reason I was not able to comply sooner. If it is necessary I respectfully request an oral hearing before an OWCP representative."

By letter dated July 3, 2001, appellant submitted more medical evidence and repeated his request for "an oral hearing if necessary."

In a decision dated July 10, 2001, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's initial request was dated May 31, 2001, which was more than 30 days after the issuance of the Office's March 1, 2001 decision, and that he was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issues could be addressed through the reconsideration process by submitting additional evidence.

In response to the Office's July 10, 2001 decision, by letter dated July 22, 2001, appellant noted that he had requested an extension of time, and asked that the Office consider his claim.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office's final decision.¹³ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.¹⁴ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁵ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹⁶

The case record does not contain the envelope, or a copy thereof, that accompanied appellant's request for an oral hearing. Therefore, the Board will use the date of the letter itself

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ 20 C.F.R. § 10.131(a)(b); *Maxwell L. Harvey*, 46 ECAB 993 (1995).

¹⁵ *William E. Seare*, 47 ECAB 663 (1996).

¹⁶ *Id.*

to determine the timeliness of the request.¹⁷ The 30-day period for determining the timeliness of appellant's hearing request commenced on March 2, 2001, the date following the issuance of the Office's March 1, 2001 decision denying his claim. As appellant's letter was dated May 31, 2001, after the expiration of the 30-day period, appellant's request was untimely.

In his May 31, 2001 letter requesting an oral hearing, appellant stated that he was unable to comply sooner due to his psychiatric condition. However, while appellant submitted medical reports indicating that he was hospitalized and treated by a psychiatrist, he did not submit evidence establishing incompetence at any time. Therefore, the medical reports do not establish that appellant was incapable of requesting an oral hearing in a timely manner.

Therefore, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.¹⁸

The July 10 and March 1, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed as modified.¹⁹

Dated, Washington, DC
January 15, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁷ *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990).

¹⁸ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

¹⁹ The Board notes that while appellant did submit additional evidence to the Office together with his request for an oral hearing, as this evidence was not reviewed by the Office, it cannot be considered by the Board. 20 C.F.R. § 501.2 (c). Similarly, on appeal, appellant submitted an audiotape to the Board and asked that it be considered in support of his claim. As this constitutes new evidence that was not before the Office at the time it issued its final decision, it cannot be considered by the Board. *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997); *Robert D. Clark*, 48 ECAB 422 (1997). However, appellant can submit a written request for reconsideration to the Office, and ask that his additional medical evidence be considered.