

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of IVAN C. REEDER and U.S. POSTAL SERVICE,  
POST OFFICE, Salt Lake City, UT

*Docket No. 03-17; Submitted on the Record;  
Issued November 25, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On December 7, 1999 appellant, a 53-year-old human resources specialist, filed a claim for benefits, alleging that he sustained an emotional condition in the performance of duty. In a statement accompanying the form, appellant asserted that he developed an emotional condition after he received a proposed letter of warning for a substandard performance. The employing establishment submitted the letter, despite the fact that it had allegedly overburdened him with extra duties and responsibilities for several months. Appellant stated that, in addition to performing his usual duties as a full-time injury compensation specialist, he was also performing the duties of reviewing, input and coordination of the accident report system and flash reports, which had previously been considered a full-time job for one of the rehabilitation employees. Appellant claimed that he had initially shared these added responsibilities with the other two specialists in his division but, had assumed all of them when these two coworkers complained about the assignment. Although appellant accepted these additional added duties, he claimed that he never received the extra assistance that his supervisor had promised him. He stated that, despite the fact he had been working seven days a week for several months, for more than nine hours per day, the employing establishment sent him the proposed letter of warning regarding his work performance; this caused him to become extremely upset and depressed.

Appellant submitted reports dated January 27 and March 16, 2000 from Dr. Michael A. Kalm, Board-certified in psychiatry and neurology, who opined, in his January 27, 2000 report, that appellant was incapable of working at the present time but, that he might eventually be able to work. Dr. Kalm stated, however, that appellant probably would be unable to return to his place of former employment because of the perceived pattern of harassment and hostility.

In his March 16, 2000 report, Dr. Kalm diagnosed mixed anxiety-depressive disorder and post-traumatic stress disorder which allegedly had prevented appellant from working since

November 1999. Appellant related a worsening pattern of harassment and discrimination at his job site, which caused symptoms of nervousness, panic, memory loss, anxiety and loss of physical coordination. Dr. Kalm reiterated his previous finding that appellant was unable to work and would never be able to return to his previous job with the employing establishment.

By decision dated February 24, 2000, the Office found that fact of injury was not established. The Office found that appellant had submitted factual evidence sufficient to implicate a compensable factor of employment but, failed to submit sufficient medical evidence to establish that his accepted employment factor caused or contributed to his emotional condition.

By letter dated March 10, 2000, appellant requested a review of the written record.

By decision dated June 15, 2001, an Office hearing representative affirmed the denial of benefits based on an emotional condition, as determined by the Office, in its February 24, 2000 decision, but found, in contrast to that decision, that appellant failed to implicate any compensable factors of his federal employment.

By letter dated June 12, 2002, appellant requested reconsideration. In support of his claim, appellant submitted an August 1, 2001 letter from a former coworker who worked with him during the summer of 1997. She remembered appellant as someone who, not only was an honest and very hard worker but, was the only person in the department who had behaved in a friendly manner toward her. The coworker indicated that, when she arrived at work at 9:00 a.m., appellant was invariably the only specialist who was already there; the other two injury compensation specialists typically did not arrive at work until 10:00 a.m. She further indicated that he tended to remain on the job all day long, unlike his fellow employees, who usually took extended lunch breaks and frequently left work early. According to this employee, appellant had to go to the counter a lot and help employees who should have been helped by his two coworkers because they were out of the office so much.

Appellant also submitted a May 23, 2002 report from Dr. Kalm, who essentially reiterated his previous findings and conclusions.

By decision dated August 9, 2002, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board has duly reviewed the case record and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decision before the Board on this appeal is the Office's August 9, 2002 decision denying appellant's request for a review on the merits of its June 15, 2001 decision. Because more than one year has elapsed between the issuance of the Office's June 15, 2001 decision and

September 30, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 15, 2001 decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> 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 relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> 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.<sup>5</sup>

In the present case, appellant submitted, with his request for reconsideration, the August 1, 2001 letter from his former coworker, who worked with him during the summer of 1997. The letter indicated that appellant was an honest and hard worker; that appellant was invariably the only specialist already on the job working when she arrived at work at 9:00 a.m., unlike the other two injury compensation specialists who usually did not appear for work until 10:00 a.m. The coworker further stated that appellant, in contrast to his fellow employees who took long lunch breaks and frequently left work early, customarily remained at his worksite for the entire workday. Due to the frequent absence of these coworkers, appellant often had to go to the counter and assist employees who should have been helped by his two coworkers. The Office found that this report was inconsistent with evidence previously submitted and was therefore irrelevant. This finding is erroneous, however. The Board finds that this evidence constitutes new and pertinent evidence relevant to the issue of whether appellant experienced emotional stress as a result of administrative or agency error, thereby, implicating a specific factor of federal employment.<sup>6</sup> For these reasons, appellant has submitted relevant and pertinent evidence not previously considered by the Office. Therefore, the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim constituted an abuse of discretion.<sup>7</sup> This case must, therefore, be remanded for the Office to exercise its discretion pursuant to 5 U.S.C. § 8128 to reopen appellant's claim for merit review.

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193. 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).

<sup>3</sup> 20 C.F.R. §§ 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984); 20 C.F.R. § 10.608(a).

<sup>6</sup> The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable. These include situations where the employee is being pressured to manage an unusually heavy workload or perform his regular or specially assigned work duties. See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

<sup>7</sup> *Gregory Apicos*, 51 ECAB 272 (2000); *Carol Cherry (Donald Cherry)* 47 ECAB 658 (1996).

The decision of the Office of Workers' Compensation Programs dated August 9, 2002 is therefore set aside and the case is remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary by the Office, to be followed by an appropriate decision.

Dated, Washington, DC  
November 25, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member