

**United States Department of Labor
Employees' Compensation Appeals Board**

MARVIN J. VIGIL, Appellant

and

**U.S. POSTAL SERVICE, HIGHLAND
STATION, Albuquerque, NM, Employer**

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**Docket No. 05-1049
Issued: August 19, 2005**

Appearances:
Marvin J. Vigil, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 11, 2005 appellant filed a timely appeal from a September 17, 2004 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition while in the performance of duty; a December 8, 2004 decision, which denied his request for an oral hearing; and a March 3, 2005 decision, which denied his request for reconsideration as untimely found that he failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition while in the performance of duty; (2) whether the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124; and (3) whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On March 6, 2002 appellant, then a 40-year-old letter carrier, filed an occupational disease claim alleging that his stress, paranoia and depression were caused by factors of his federal employment. He stated that on February 26, 2002 Anthony Perez, acting station manager, told him to clock out and go home without pay based on orders from Chris Castro, an injury compensation manager, and Andy Letterhos, acting postmaster, because he refused an offer of a permanent limited-duty position. By letter dated April 3, 2004, the Office advised appellant about the type of factual and medical evidence he needed to submit to establish his claim.

The employing establishment controverted the claim. The employing establishment noted that appellant had previously filed a claim for stress which had been denied. He had been working in a temporary modified-duty assignment for several years based on restrictions stemming from multiple injury claims he had filed. The employing establishment stated that on February 13, 2002 appellant was offered a permanent modified assignment but he refused the job offer and he was sent home.

In rejecting the job offer, appellant stated that he had been working in a limited-duty position based on the restrictions prescribed by two of his treating physicians. He indicated that he was being treated for back problems and an emotional condition and requested that the job offer be reconsidered in light of these conditions. The employing establishment also submitted documents relating to appellant's employment, descriptions of available positions and a March 11, 1986 medical report regarding appellant's preemployment physical condition.

Appellant submitted an April 9, 2002 letter in which he alleged that he was told that Mr. Letterhos had ordered him to stop work. Appellant spoke to Mr. Letterhos who stated that he was placed off work for his own safety and he did not want him to get hurt. Appellant alleged that Mr. Letterhos' action was in retaliation for filing a claim on March 6, 2002 for an unrelated injury he sustained which required him to be off work from February 26 through March 2, 2002 and an Equal Employment Opportunity (EEO) claim for the February 26, 2002 incident. He stated that his emotional condition had progressed as a result of being forced to stop work. Appellant submitted an April 6, 2002 medical report of Dr. Kenneth H. Bull, a psychiatrist, who attributed his severe depression to harassment which was exacerbated by his rejection of the offered position.

Appellant reiterated in an April 24, 2002 letter that his emotional condition was caused by being told by Mr. Perez to stop work based on the orders of Mr. Castro and Mr. Letterhos because he rejected an offer for a permanent limited-duty position. Appellant alleged that, when he returned to work on March 2, 2002, he received "negative vibes" from management. He filed an EEO complaint regarding the February 26, 2002 incident. Appellant submitted numerous documents including, a copy of the grievance he filed against the employing establishment alleging on February 26, 2002. He also submitted medical reports from Dr. Bull which found that his emotional condition was work related. A March 6, 2002 statement from Tina Segarra, a letter carrier and union steward, noted that Mr. Perez asked her to help appellant clock out. Ms. Segarra stated that appellant became upset and depressed after she told him that management was ordering him off the property and that he could not return until management

told him otherwise. She escorted appellant to his truck and returned to work. Appellant submitted additional medical reports from Dr. Bull and Dr. Edward J. Atler, a Board-certified orthopedic surgeon, which found that his emotional condition was employment related.

By decision dated August 22, 2002, the Office found that appellant failed to submit evidence establishing that his emotional condition was caused by compensable factors of his employment or that he was harassed by management.

In a letter received by the Office on December 31, 2002, appellant requested reconsideration. He disagreed with the Office's previous decision and mishandling of his claims,¹ and disputed the employing establishment's controversion of his claim. Appellant alleged that the medical evidence he submitted was sufficient to establish that his emotional condition was employment related. He further alleged that Donald Schuft, a coworker, was offered a permanent modified position in light of his permanent impairments which he accepted while the employing establishment did not give consideration to appellant's back or emotional conditions. Regarding Ms. Segarra's statement, appellant stated that he was depressed on February 26, 2002 because management treated him like a criminal when it asked him to leave work. He noted the treatment he received for his emotional condition following this incident.

Appellant submitted guidelines concerning controversion of a claim and a complaint filed against the employing establishment for improperly controverting his claim. In an undated letter, appellant alleged that he was totally disabled for work during the period February 26 through March 1, 2002 and March 15 through May 22, 2002. He contended that the offered position was not suitable as it did not comply with restrictions prescribed by his treating physician. Appellant further contended that he was kept in the dark by the employing establishment about his work status which caused him stress. Appellant submitted leave records, his October 1, 2001 acceptance of limited-duty work offered by the employing establishment and correspondence from the Office of Personnel Management (OPM) regarding the processing of his application for disability retirement. He also submitted medical reports from Dr. Bull addressing an employment-related emotional condition and medical treatment notes regarding his physical and emotional conditions.

By decision dated March 10, 2003, the Office denied modification of the August 22, 2002 decision. The Office found that he failed to establish that his emotional condition was caused by compensable factors of his employment.

The Office received additional copies of appellant's employment and leave and earnings records and Dr. Bull's February 8, 2003 medical report which found that appellant had an employment-related emotional condition. In a January 22, 2003 report, Dr. George R. Swajian, an orthopedic surgeon, found that appellant had a herniated nucleus pulposus at L2-3 with foraminal stenosis and spondyloslithesis at L5-S1 and in an October 30, 2002 report he noted appellant's treatment plan for back pain. A December 11, 2002 report of Dr. Ervin A. Hinds, a Board-certified surgeon, indicated that appellant had chronic pain with depression.

¹ Appellant stated that he filed an occupational disease claim on November 22, 2002 which was assigned file number 16-2034840.

In a letter dated March 9, 2004, appellant requested reconsideration and submitted a list of questions to be addressed for an affidavit regarding his EEO claim of discrimination. Appellant also submitted an investigative report regarding the February 26 and March 15, 2002 incidents. Mr. Castro testified that he was not responsible for sending appellant home on February 26, 2002 and that the offered position had been found suitable by the Office. He noted that an employee, Anthony Baca, was sent home because he refused suitable work. Mr. Castro also noted that Mr. Schuft was given an updated job offer because he offered him a limited-duty position based on incorrect restrictions. He stated that Anthony Torres, an employing establishment employee, was given a limited-duty position because he provided updated medical documentation. Mr. Letterhos testified that he had knowledge that appellant was sent home on February 26, 2002 because he refused a job offer deemed suitable by the Office. He stated that he was unaware of another employee in appellant's situation and that Mr. Schuft was not placed off the clock because he accepted the offered position. Terrie Hartsfield, appellant's supervisor, testified that she supervised appellant's daily activities but did not play a role in the February 26, 2002 incident. Regarding the March 15, 2002 incident, Mr. Letterhos stated that he did not want appellant to further injure himself and wanted clear medical documentation to support having applicable work restrictions. Ms. Hartsfield stated that the information provided by appellant's physician was very vague and, in order to provide a limited-duty position, she had to know appellant's exact restrictions. Mr. Castro, Mr. Letterhos, Mr. Perez and Ms. Hartsfield all stated that they were aware of appellant's physical and emotional conditions.

Appellant submitted an August 29, 2003 decision from the Social Security Administration granting disability retirement beginning July 8, 2002 and an April 23, 2003 letter from OPM which approved his application for disability retirement. In an undated statement, Josef Hernandez, a customer service supervisor, indicated that no undue hardship had been placed on appellant as management had made every effort to accommodate the restrictions prescribed by his physicians. Mr. Hernandez noted that appellant answered the telephone which was not a productive eight-hour job and that although other jobs had been offered to him he was not able to perform them due to his medical restrictions. He stated that appellant had been allowed to continue in his position despite appearing confused and having difficulty performing his duties. Mr. Hernandez reiterated that management made every effort to accommodate appellant's medical restrictions.

In a January 17, 2003 affidavit, appellant described the February 26, 2002 incident and contended that it aggravated his emotional condition. He stated that on March 1, 2002 he received a telephone message from Mr. Perez requesting that he report to work on March 2, 2002. Appellant reported to work and was not given any reason for his dismissal and performed his assigned work duties. On March 15, 2002 he stated that Ms. Hartsfield told him to clock out and go home because she had received a vague response from his physician regarding his restrictions. Appellant stated that he did not know who the response was from and assumed it was from Dr. Adler. He reiterated that he was treated differently than Mr. Schuft and alleged that Mr. Torres sustained a work injury but was allowed to correct vague responses from his physician. Appellant noted the specific restrictions associated with his shoulder and back conditions and alleged that the employing establishment refused to provide reasonable accommodations for these limitations. He contended that the job offer was created with malicious intent because it was based on derogatory elements, a work capacity evaluation that was two years old and required him to drive which Mr. Castro should have known was not

permissible since he was taking narcotic medications. Appellant further contended that Mr. Letterhos had his subordinates perform his “dirty work.”

Appellant submitted a statement dated March 9, 2004 regarding his emotional condition claim. He also submitted an undated narrative statement of Mr. Hernandez in which he controverted a claim that appellant had submitted to him on July 31, 2000 for a back injury as appellant rejected offered limited-duty positions and refused to ambulate.

By decision dated September 17, 2004, the Office denied modification of the prior March 10, 2003 decision, finding that the evidence submitted did not prove that the employing establishment committed error or abuse or discriminated against appellant. On November 6, 2004 appellant requested an oral hearing before an Office hearing representative.

In a December 8, 2004 decision, the Branch of Hearings and Review denied appellant’s request for an oral hearing, finding that it was untimely filed and could equally well be handled through a reconsideration request.

By letter dated February 8, 2005, appellant requested reconsideration and submitted materials pertaining to a prior grievance. Appellant also submitted an October 6, 1999 settlement agreement.

By decision dated March 3, 2005, the Office stated that appellant’s letter requesting reconsideration was dated February 8, 2005 and, therefore, found that it was filed more than a year after the Office’s March 10, 2003 decision and was untimely. The Office also found that appellant did not submit any evidence establishing clear evidence of error in the Office’s prior decision. Consequently, the Office denied appellant’s reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

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 factors of his federal employment.² To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions to the type of employment situations giving rise to a

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ 28 ECAB 125 (1976).

compensable emotional condition arising under the Act.⁵ 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 under the Act.⁶ When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁷ 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 under the Act.

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.⁸ 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.⁹

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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.¹⁰ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.¹¹ However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹²

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁷ *Lillian Cutler*, *supra* note 4.

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁹ *Id.*

¹⁰ *Lillian Cutler*, *supra* note 4.

¹¹ *Michael L. Malone*, 46 ECAB 957 (1995).

¹² *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to being ordered to clock out on February 26, 2002 by Mr. Perez because he had refused a job offer and on March 15, 2002 because Ms. Hartsfield had received inadequate medical documentation from his physician concerning his physical limitations. He contends that the employing establishment discriminated against him by not giving him special consideration for his physical and emotional conditions. Appellant contended that other coworkers were given extra consideration by management. He alleged that Mr. Letterhos ordered him to stop work on March 15, 2002 in retaliation for filing an EEO claim on March 6, 2002 for time off from work between February 26 and March 2, 2002 due to an unrelated injury. Mr. Perez's request that appellant clock out and Ms. Hartsfield's request for medical documentation involve an administrative function of the employer and not the employee's regular or specially assigned work duties.¹³ As noted above, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not generally fall within coverage of the Act absent error or abuse. Appellant has failed to establish that the employing establishment committed error or abuse in handling the above noted administrative matters.

Although Ms. Segarra stated that appellant became upset and depressed after she told him that management ordered him off the premises and that he could only return when told to do so by management, she did not establish that the action was unreasonable. Appellant acknowledged that Mr. Letterhos' reason for ordering him to stop work on March 15, 2002 was for his own safety and that he did not want appellant to get hurt. The employing establishment stated that appellant had been working in a modified-duty position for several years as a result of restrictions stemming from other employment-related injuries and that he had rejected a new job offer. By rejecting the offered position, appellant removed himself from the workplace by failing to comply with an administrative directive. Mr. Castro noted that appellant had refused a position that was deemed suitable by the Office and that another employee, Mr. Baca, was similarly sent home when he had refused an offer of suitable work. He also noted that Mr. Schuft was given an updated job offer following additional medical restrictions. Mr. Castro stated that Mr. Torres was given a limited-duty position because he provided updated medical documentation. Mr. Letterhos acknowledged that appellant was sent home because he refused a job offer. He was unaware of another employee in appellant's situation and stated that Mr. Schuft was not placed off the clock because he accepted the offered position and performed the duties of this position. Mr. Hernandez stated that every effort was made to accommodate appellant's medical restrictions and that he had rejected other job offers. Mr. Hernandez further stated that appellant was allowed to remain in his job even though he appeared confused and was having difficulty performing his work duties. Regarding the March 15, 2002 incident, Ms. Hartsfield testified that the medical documentation provided by appellant's physician was very vague and that his exact restrictions had to have been known in order to provide a limited-duty position. The Board finds that appellant has presented insufficient evidence of error or abuse on the part of the employing establishment in requesting him to leave work on because he refused a job offer or to provide adequate medical documentation. Therefore, he has not established a compensable factor of employment under the Act.

¹³ *James P. Guinan*, 51 ECAB 604, 607 (2000); *John Polito*, 50 ECAB 347, 349 (1999).

The filing of an EEO complaint regarding the February 26, 2002 incident and grievance concerning the controversion of his emotional condition claim by appellant are also administrative matters.¹⁴ Appellant did not submit any evidence, such as a decision finding fault on the part of the employing establishment, prior to the issuance of the Office's September 17, 2004 decision. Without substantiated evidence of error or abuse on the part of the employing establishment in ordering him to leave work on February 26, 2002 or in controverting his emotional condition claim, appellant has failed to establish a compensable factor of employment under the Act. Therefore, the Board finds that as appellant has not established any compensable employment factors, he has failed to establish that he sustained an emotional condition while in the performance of duty.¹⁵

LEGAL PRECEDENT -- ISSUE 2

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."¹⁶ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁷

ANALYSIS -- ISSUE 2

The Office denied appellant's November 6, 2004 request for a hearing as he had already requested reconsideration under section 8128. Appellant requested reconsideration on March 9, 2004, which the Office denied in a decision dated September 17, 2004. Appellant, therefore, was not entitled to a hearing as a matter of right since the Office had previously reconsidered his claim under section 8128.

The Office proceeded to exercise its discretion to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. The Office thus properly denied appellant's request for a hearing as it was made after he requested reconsideration and properly exercised its discretion in determining to deny his request for a hearing as he had other review options available.¹⁸

¹⁴ *Diane C. Bernard*, 45 ECAB 223 (1993).

¹⁵ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment, the medical evidence need not be addressed. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

¹⁶ 5 U.S.C. § 8124(b)(1).

¹⁷ *See Claudio Vazquez*, 52 ECAB 496 (2001).

¹⁸ *Id.*

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act¹⁹ does not entitle a claimant to a review of an Office decision as a matter of right.²⁰ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.²¹ Pursuant to this section, if a request for reconsideration is submitted by mail, "the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date." Otherwise, the date of the letter itself should be used."²²

Section 10.607(a) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.²³

ANALYSIS -- ISSUE 3

The last merit decision in this case was issued by the Office on September 17, 2004, which found that appellant failed to establish that his emotional condition was caused by compensable factors of his federal employment. Appellant requested reconsideration of this decision on February 8, 2005. As appellant's request was made within one year of the Office's September 17, 2004 merit decision, the Board finds that his reconsideration request is timely.²⁴ Therefore, the Office did not apply the proper standard to the review of the evidence submitted on reconsideration.

Since appellant's February 8, 2005 reconsideration request was timely filed, the case will be remanded for the Office to adjudicate appellant's reconsideration request in accordance with the criteria set forth in 20 C.F.R. § 10.607(a). After any further development as it deems necessary, the Office shall issue an appropriate decision.

¹⁹ 5 U.S.C. § 8128(a).

²⁰ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²¹ 20 C.F.R. § 10.607(a).

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002).

²³ 20 C.F.R. § 10.607(b).

²⁴ *See Algimantas Bumelis*, 48 ECAB 679, 680 (1997).

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty. The Board further finds that the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124. The Board, however, finds that the Office improperly denied appellant's request for reconsideration on the grounds that it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision. The Office's December 8 and September 17, 2004 decisions are affirmed.

Issued: August 19, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board