

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT BROWN and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, ROBBINS AIR FORCE BASE, GA

*Docket No. 99-203; Submitted on the Record;
Issued February 14, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant established 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 merit review under 5 U.S.C. § 8128.

On February 7, 1994 appellant, then a 41-year-old inventory management specialist, filed a notice of occupational disease and claim for compensation alleging that "job pressure and frustration from promotional denials over the years" caused him to suffer from high blood pressure and paranoid schizophrenia.¹ Appellant alleged that while the employing establishment had supported his selection into the Air Force Logistics Civilian Career Enhancement Program (LCCEP), it later reneged on a promise to promote him to a GS-12 position, even after he completed the two year career broadening assignment. The record indicates that appellant was removed from his position for cause on May 3, 1993.

In support of his claim appellant submitted copies of employment records and correspondence that pertained to the denial of his promotion. He also submitted medical records including a hospital discharge summary indicating that he was hospitalized from December 23, 1993 to January 19, 1994 for exacerbation of chronic paranoid schizophrenia.

In a January 2, 1991 letter, General Major Richard F. Gillis indicated that appellant had been denied a promotion to a GS-12 because he failed to demonstrate the knowledge or effort

¹ A memorandum dated January 1, 1993, indicates that appellant was discharged from the service in 1980 as a paranoid schizophrenic.

required to assume additional job responsibilities associated with that position.² It was noted that while appellant had undergone a career enhancing program, he was never guaranteed a promotion and his “relatively low appraisal scores” did not give management confidence in promoting him to a GS-12.

In a memorandum dated January 28, 1993, Lieutenant Colonel George J. Kishigian reported that appellant had been charged for being absent without leave on January 27, 1993 because he had not obtained a signed approval for leave on that date by his supervisor.

In a discharge summary it was noted by Dr. Elliott Hammett, a Board-certified psychiatrist, that appellant was hospitalized at the Veterans Administration Medical Center in Raleigh, Durham for chronic paranoid schizophrenia exacerbation from December 23, 1993 to January 19, 1994. Dr. Hammett stated that appellant had initially been admitted to Cherry Hospital under petition from his brothers. He reported that appellant had been found on admission to Cherry Hospital to be psychotic with “paranoid ideation, apparent complete inability to care for himself and voicing experience with a complex delusional system regarding some work he has done for the government.” Dr. Hammett indicated that appellant apparently had been found walking the streets, not eating properly and not bathing. Appellant’s history was listed as having nine prior hospitalizations for paranoid schizophrenia for which appellant was treated with therapy and medication. He indicated that by the end of his hospitalization, appellant had a better understanding of why his chronic schizophrenia was a lifelong problem that would require continual medication.

In medical records dated February 4, 1994, from the Tideland Medical Center, Dr. Michael Nunn, a Board-certified psychiatrist, stated that appellant was seen for follow-up from his discharge from the VA Hospital. Dr. Nunn stated:

“[Appellant] has been involved in psychiatric services since 1979 when he was in the [employing establishment], after being diagnosed with paranoid schizophrenia. He did stop working with the [employing establishment] in 1980. He states that his precipitating factor for going to the hospital, was that he was working for a civil servant in Georgia and was denied a promotion. He states that now he realizes that they were trying to take care of him, instead of rejecting him. He states that he has been taking Navane since 1979, but he was not taking it during the time of this increased stress. Apparently he had been [weaned] off from the Navane approximately one year ago by his doctor in Georgia.”

Dr. Nunn indicated that appellant’s mental status was alert and oriented with both concrete and abstract reasoning. He diagnosed schizophrenia and placed appellant back on medication to regulate his state, noting that appellant’s insight was good in that he could identify those stressors, such as poor sleep and eating habits, that could precipitate another psychotic episode.

² The record contains a notice of proposed removal dated March 24, 1991, indicating that the employing establishment placed appellant in nonduty status for 30 days for unauthorized absence from work, delay in complying with supervisor instructions, failure to perform assigned work, failure to complete work assignment and failure to comply with a direct order.

In a memorandum dated March 22, 1993, Lieutenant Colonel Kishigian noted that appellant violated a direct verbal order on March 21, 1993 when he was seen at work when he was not on duty.

In a decision dated March 30, 1994, the Office denied appellant's claim for compensation on the grounds that the evidence of record failed to establish that he sustained an emotional condition in the performance of duty.

On August 25, 1994 appellant filed a request for reconsideration and argued that his emotional condition was also caused by the fact that the employing establishment scheduled him for several medical evaluations without explaining why those examinations were required for his continued employment.

In conjunction with his reconsideration request, appellant submitted memos from the employing establishment scheduling him for examinations on January 29 and February 1 and 3, 1993, along with a nomination package for the LCCEP career-enhancing program.

Appellant also submitted a hospital discharge summary from Houston Medical Center indicating that he was hospitalized for treatment of paranoid schizophrenia from March 25 to April 16, 1993. Dr. Paul R. Cobin, a Board-certified psychiatrist, who completed the discharge summary, noted that appellant was committed at the request of the local probate court because of severely psychotic behavior he exhibited at home and at work. Appellant's behavior was noted as including "active delusional content, aggressive acting out toward other staff members and what was obvious as a psychosis." Dr. Cobin further noted that appellant had not been taking his medication prior to admission to the hospital and that his psychosis progressed to the point that he was admitted involuntarily.

In a decision dated October 11, 1994, the Office denied modification following a merit review.

Appellant subsequently filed an appeal with the Board. Upon motion of the Director of the Office, the case was remanded for further consideration as the Office had failed to make a finding as to whether the requirement imposed by the employing establishment that appellant appear for a medical examination was a compensable employment factor.

In a decision dated December 12, 1995, the Office denied compensation. The Office noted that in general fitness-for-duty examinations were considered to be in the performance of duty. However, the Office noted that since appellant did not actually appear for any of the scheduled examinations, it could not be found that he alleged a compensable factor of employment.³

On July 30, 1996 appellant requested reconsideration. Appellant alleged that he had not been told by the employing establishment that he was not doing his work properly or that he had behavioral problems. Appellant noted that his wife had been called in to work to discuss his mental status without his knowledge and that his wife subsequently moved out of their home.

³ It was noted that if "[appellant had] reported for the examination as directed and then had a reaction this would be considered in the performance of duty."

He argued that if he had been properly informed of his work situation and why he was being sent for an examination then he would not have suffered from a mental breakdown nor lost his job.

In a decision dated September 3, 1996, the Office performed a merit review and denied compensation.

By letter dated February 10, 1997, appellant requested reconsideration. Appellant argued that despite his prior mental difficulties, he was able to perform his duties and that the employing establishment had no action to remove him for sub-standard performance. He alleged that the employing establishment made two job transfers without explaining why he was being reassigned. He also alleged that if the employing establishment had explained why he was being referred for a mental health evaluation, he would not have sustained an aggravation of his emotional condition, which ultimately led to his job removal. In conjunction with his reconsideration request, appellant submitted an affidavit from his brother attesting to his mental state during January 1993.

In a decision dated June 2, 1997, the Office denied appellant's request for a merit review, finding the evidence on reconsideration to be immaterial and cumulative in nature.

In a March 26, 1998 letter, appellant requested reconsideration and argued that he attended the medical consultation scheduled with Dr. Gary Lebow on February 23, 1993 as requested by the employing establishment, but that he was unsure why appellant was there.

Appellant submitted copies of office notes from Dr. Lebow dated February 3, 1993 which stated in brackets: "seems very intense at times is long-winded but I can not tell whether [appellant] is coherent because it goes into things I am not familiar." He further indicated that appellant was upset because he received a job transfer.

In an April 17, 1998 decision, the Office denied modification following a merit review.

On May 5, 1998 appellant requested reconsideration and resubmitted a copy of the January 1993 letter scheduling him for Dr. Lebow's medical appointment.

In a decision dated July 13, 1998, the Office denied appellant's request for reconsideration on the merits.

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.⁴

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that the

⁴ Appellant submitted new evidence on appeal. The Board, however, does not have jurisdiction to consider evidence that was not before the Office at the time it rendered its final decision. *See* 20 C.F.R. § 501.2(c).

identified compensable employment factors are causally related to the emotional condition.⁵ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁶

Workers' compensation law is not applicable 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 coverage 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 comes within coverage of the Federal Employees' Compensation Act.⁷ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁸

Appellant has alleged that his preexisting schizophrenic disorder was aggravated by not receiving a promotion to a GS-12 position after having completed a career-enhancing program. As noted above, a condition or disability is not considered to be work related where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Determinations by the employing establishment concerning promotions and the work environment are administrative in nature and not a duty of the employee.⁹

Likewise, appellant's dissatisfactions with the employing establishment's decision to transfer him to temporary jobs without explanation, while frustrating, is a reaction to an administrative decision by the employing establishment and not his assigned work duties. The

⁵ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁹ *George A. Ross*, 43 ECAB 346 (1991); *William P. George*, 43 ECAB 1159 (1992).

Board has held that, unless the employing establishment erred or acted abusively in an administrative or personnel matter, there will be no coverage under the Act.¹⁰ In determining whether the employing establishment erred or acted abusively, the Board will examine whether the employing establishment acted unreasonably.¹¹ In this case, no evidence has been submitted that would establish that the employing establishment acted unreasonably in the administration of its personnel decisions. The employing establishment indicated that appellant's promotion was not guaranteed simply because he was accepted into a career enhancement program and that his job performance rating was ultimately found insufficient to qualify for a GS-12 promotion.

Appellant alleged that his preexisting schizophrenic condition was aggravated by the requirement imposed by the employing establishment that he undergo a fitness-for-duty examination. Appellant contends that if the employing establishment had only explained why he was being scheduled for an examination, he would not have sustained an aggravation of his emotional condition.¹² The Board, however, notes that requiring attendance at a fitness-for-duty examination is an administrative or personnel action and is generally not a compensable factor of employment unless error or abuse is demonstrated.¹³ Given that appellant's emotional condition may have posed a threat to the safety of his coworkers or himself if he returned to work, the Board finds that the employing establishment acted reasonably in scheduling appellant for a fitness-for-duty examination. There is no error or abuse demonstrated by the facts of this case. Accordingly, the Board concludes that the Office properly denied appellant's claim for compensation because he has failed to establish that his emotional condition was sustained in the performance of duty.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹⁴ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁵ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁶ Evidence that repeats or duplicates evidence already

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

¹¹ *Id.*; *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹² Appellant has not alleged or suggested that the examination itself caused him any trouble or problem. His only complaint has been that he was directed to undergo the examination without any explanation.

¹³ *Marie T. McKendry*, Docket No. 96-2031 (September 28, 1998); *James W. Blackman*, Docket No. 96-1193 (August 19, 1998).

¹⁴ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁵ 20 C.F.R. § 10.138(b)(1).

¹⁶ 20 C.F.R. § 10.138(b)(2).

in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁷ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁸ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁹

In the instant case, appellant did not submit any new and relevant evidence on reconsideration. He did not advance a new legal argument. He also did not show that the Office erroneously applied or interpreted a point of law. Inasmuch as appellant has failed to satisfy the requirements of section 8128, the Office properly refused to perform a merit review based on his May 5, 1998 reconsideration request.

The decisions of the Office of Workers' Compensation Programs dated July 13 and April 17, 1998 are hereby affirmed.²⁰

Dated, Washington, DC
February 14, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁸ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁹ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

²⁰ The Office's July 13, 1998 decision denying appellant's request for reconsideration on the merits is considered by the Board to be moot given the outcome of this opinion.