

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK H. BRIGHAM and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Erie, PA

*Docket No. 03-607; Submitted on the Record;
Issued May 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

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 reconsideration on the merits under 5 U.S.C. § 8128.

On August 7, 2000 appellant, then a 49-year-old financial accounting technician, filed a notice of occupational disease claim alleging that he suffered from coronary artery disease, which he attributed to work-related stress. He stated on his CA-2a form that, "since my start date I have applied for several positions in the hospital. When I found out less qualified females under the age of 40 were being selected I became suspicious and started asking questions. It was during this time that I started experiencing slight chest discomfort."

In subsequent personal statements, appellant noted that he had applied for at least nine positions consistent with his qualifications. He alleged that the employing establishment consistently promoted individuals who were lesser qualified than himself. Appellant contends that he should have been given a preference in promotion based on his status as a disabled veteran. He provided information regarding the number of females versus males who were hired in various general schedule positions.

The record indicates that appellant had an abnormal stress test on September 14, 1998 and underwent a cardiac cauterization on July 13, 1999, at which time he was diagnosed with triple vessel coronary artery disease. A second cauterization was also performed on June 7, 2000. Appellant stopped work on July 5, 2000. He had open-heart surgery on July 10, 2000 and was approved for limited duty four hours per day effective September 18 through 29, 2000. He was further approved for full duty on October 2, 2000 by his treating physician.

In a letter dated August 9, 2000, the Office advised appellant of the factual and medical evidence required to establish his claim for coronary artery disease aggravated or caused by employment-related stress.

In a September 8, 2000 letter, the employing establishment advised that appellant had been hired as an accounting technician on April 12, 1998. A description of the requirements of appellant's position was provided.

Medical records from a behavioral health clinician prepared on March 6 and 29, 2001 stated that appellant experienced "anxiety and stress due to being underemployed." Appellant was noted as being very upset with his current employment and frustrated at not having received any promotions.

In a decision dated January 12, 2001, the Office denied compensation on the grounds that appellant failed to allege a compensable work fact and therefore failed to establish that he sustained an emotional condition in the performance of duty.

Appellant requested a hearing, which was held on August 27, 2001.

In a September 21, 2001 letter, the employing establishment indicated that appellant was frustrated at not being assigned to a position he felt was consistent with his degree in nuclear medicine. It is noted that appellant applied for numerous positions where he met the basic qualifications as prescribed by the Office of Personnel Management but other applicants were chosen based on merit systems principles. For positions such as a medical administrative specialist and a voluntary service officer, the employing establishment indicated that appellant met the basic qualifications but did not have the specialized experience required for those jobs. The employing establishment maintained that appellant was fully afforded the right to compete with other personnel for promotions.

In a decision dated November 19, 2001, an Office hearing representative affirmed the Office's January 12, 2001 decision.

On September 8, 2002 appellant requested reconsideration and submitted the following evidence: a duplicate copy of a May 19, 1999 letter from the employing establishment; duplicate medical records; a duplicate copy of appellant's enrollment verification at Edinboro University for the fall of 1999; duplicate copies of letters pertaining to the employee incentive scholarship program; two commendation certificates of "customer service star;" a letter of intent to file an equal employment discrimination complaint; pages from "Chapter 307 Employment of Veterans;" duplicate copies of freedom of information requests; a list of names of persons who received an incentive award; a duplicate copy of conversations between Kimberly Dniziak and appellant regarding the position of a prosthetic representative; a document containing messages between Kathleen Morehead and Joseph Pomorski as to why a promotion position was "renounced;" and a copy of a handout regarding veterans and the civil service.

In a December 23, 2002 decision, the Office denied appellant's request for reconsideration, noting that a merit review of the record was not warranted since appellant's evidence on reconsideration was repetitious.

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

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 identified compensable employment factors are causally related to the emotional condition.¹ 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.²

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.³ 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.⁴

As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.⁵ However the Board has also held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.⁶ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁷

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² *Victor J. Woodhams*, 41 ECAB 345 (1989).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁵ See *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

⁶ See *Elizabeth Pinero*, 46 ECAB 123 (1994).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

In this case, appellant attributes his heart condition to stress in the workplace due to the denial of his numerous requests for a promotion to a position more in keeping with his qualifications. Appellant points out that he was frequently denied promotions, which made him feel frustrated and anxious such that he experienced chest pain and ultimately had to have heart surgery.

The Board, however, has consistently held that determinations by the employing establishment concerning promotions are not compensable. The denial by an employing establishment of a request for a different job, promotion or transfer is an administrative decision, which does not directly involve an employee's ability to perform his work duties, but rather constitutes an employee's desire to work in a different position.⁸ Although appellant is understandably disappointed at not having received a promotion based on his qualifications and veteran status, there is no evidence of record from which to conclude that the employing establishment acted abusively in denying appellant's promotion requests. The employing establishment specifically explained to appellant that he either did not have the specialized experience required by many of the advertised vacancies or he failed to score as high on the merit rating system as other applicants for the positions in question. In the absence of error or abuse by the employing establishment in rendering its promotional decisions, the Board finds that appellant has failed to allege a compensable work factor. Appellant has not cited any other work factor as being responsible for his stress. Consequently, the Board concludes that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits.

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.⁹ 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁰ When an 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. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹² When a claimant fails to meet one of the

⁸ *Brain H. Derrick*, 51 ECAB 417 (2000); *Ernest J. Malagrida*, 51 ECAB 287 (2000).

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

¹⁰ 20 C.F.R. § 10.606(b) (1999).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹² *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.”¹³

In support of his reconsideration request appellant submitted duplicate copies of correspondence, documents and medical evidence of record, which is insufficient to meet the requirement of section 8128 for reopening a claim for a merit. Although he provided evidence in the form of information handouts on the role of veterans and the civil service. This type of documentation is generalized and therefore not considered new and relevant evidence as described in section 8128.

Similarly, appellant provided lists of people who received merit awards and a copy of a conversation pertaining to the renouncement of a position for which appellant presumably applied but was not selected. Appellant has already described in great detail in the record the positions for which he was not selected and that the Office did not find abuse or error by the employing establishment in its administrative practices. This latter evidence is deemed repetitious and therefore insufficient to warrant a merit review. Because appellant did not satisfy the requirements of section 8128, the Office properly denied his reconsideration request.

The decisions of the Office of Workers’ Compensation Programs dated December 23, 2002 and November 19, 2001 are hereby affirmed.

Dated, Washington, DC
May 12, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

¹³ 20 C.F.R. § 10.608(b).