U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER W. ROBINSON and DEPARTMENT OF THE ARMY, ARMY DEPOT, Tooele, UT

Docket No. 03-348; Submitted on the Record;
Issued September 30, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant's claim for Gulf War syndrome was timely filed; (2) whether appellant has established that he sustained an emotional condition in the performance of duty; and (3) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim.

On November 15, 1999 appellant, then a 53-year-old telecommunications specialist, filed a claim for an occupational disease for Gulf War syndrome, that he attributed to his temporary assignment to Saudi Arabia, during operation Desert Shield and Desert Storm from September 1990 through January 1991. He indicated that he first became aware of his disease or illness on April 15, 1991 and that he first realized his disease or illness was caused or aggravated by his employment on August 11, 1994.

Appellant identified substances to which he potentially was exposed while in Saudi Arabia, listed the medical problems he had experienced since his return and submitted medical reports addressing his condition.

By decision dated January 21, 2000, the Office found that the evidence supported that appellant actually experienced the claimed event, but did not establish that a medical condition was diagnosed in connection with it.

By letter dated February 8, 2000, appellant requested a hearing. By decision dated September 22, 2000, an Office hearing representative found that the issue of whether the claim was timely filed within three years should be developed, as appellant's claim filed on November 1, 1999 indicated he was aware of the relationship between his condition and his employment on August 11, 1994.

On September 14, 2000 appellant filed another claim for an occupational disease. He described an August 1, 2000 incident, in which his supervisor reprimanded him for not meeting with a contractor the previous day and for going over her head by calling the contracting officer

without her knowledge or consent. Appellant stated that this incident resulted in "an overwhelming feeling of sorrow and depression." He stopped work on August 1, 2000 and did not return.

Appellant submitted comments from his supervisor, who stated that there was no reprimand on August 1, 2000, but rather a discussion of performance. The supervisor also noted that appellant commuted approximately 400 miles to work on Monday and to return home on Thursday and was allowed to work extra hours during these days, accruing compensatory time which he used for long weekends as it was accrued.

By letter dated December 5, 2000, the Office advised appellant of the additional evidence he needed to submit with regard to his claim for an emotional condition. In a letter dated December 27, 2000, appellant stated that his "condition began due to the stress, anxiety and uncertainty of being in a foreign country (Saudi Arabia) and in the preparations for a war" and that "stress and the demands of my federal employment at the Tooele Army Depot and dealing with contractors and management caused it to escalate with my breaking down mentally and emotionally at work on August 1, 2000." Appellant stated that he felt his job activities contributed to his condition due to "working 12 to 14 hours a day even though my regular work schedule was 4, 10-hour days" and that his "feeling of my immediate management betrayal occurring on August 1, 2000 at work was the final action that I was unable to deal with."

By letter dated February 7, 2001, the Office advised appellant and the employing establishment that it needed further evidence regarding when appellant's supervisor had actual knowledge that appellant related his conditions to his temporary assignment in the Persian Gulf to his employment.

In a February 20, 2001 letter, appellant contended that his disability was latent and that he did not comply with the time limitations because of exceptional circumstances: the employing establishment "did NOT acknowledge until some years later that personnel (active military) who served in the Gulf War campaign, may have been exposed to undetermined chemicals while serving in Saudi Arabia, Iraq and Kuwait." Appellant also stated that it was not until late October 1999 that he was advised by Air Force doctors who he saw for a medical evaluation under the Comprehensive Clinical Evaluation Program that he should file a workers' compensation claim through his employer.

By decision dated May 22, 2001, the Office found that the evidence did not establish that appellant's claim was timely filed, as it was not filed within three years of the date appellant was aware of the relationship between his condition and his employment. The Office also found that the evidence did not show that his immediate superior had actual knowledge of his injury within 30 days after the date of the injury and that he had not met the requirements to show he failed to provide timely notice because of exceptional circumstances.

By letter dated June 18, 2001, appellant requested a hearing.

At the hearing, held on February 27, 2002 an Office hearing representative stated: "[T]he issue before me today is whether or not the claim for compensation is timely filed." Appellant's testimony described his duties as a contracting officer representative, responsible for telephone

and data system contractors, his role in an investigation of these contractors regarding theft of materials on weekends, the increase in his work load after personnel at the employing establishment were eliminated in 1993 and the August 1, 2000 meeting with his supervisor, which resulted from him trying to keep the contracting officer abreast of the investigation of his contractors. Appellant testified that in 1993, his organization was reorganized and reduced from 140 employees to 24, that as a result his work load tripled, but later "came back down" with a reorganization of the 24 employees, that he had "an impeccable performance record," that he received calls from contractors on weekends and that he had to confront some contract workers about losing materials. Appellant submitted additional evidence at the hearing, including medical reports and documents showing that his service-connected compensation from the Department of Veterans Affairs for post-traumatic stress disorder had increased from 50 to 70 percent, that his application for disability retirement had been approved and that he was receiving benefits from the Social Security Administration.

On March 8, 2002 the Office sent a copy of the transcript of the February 27, 2002 hearing to the employing establishment. Appellant's supervisor submitted comments dated March 28, 2002 on the transcript, stating that appellant was late for work on Monday, July 31, 2000, that when appellant arrived about 8:00 a.m. he became very agitated when she told him a contractor had requested a meeting at 11:00 a.m., that appellant did not attend this meeting and that later that day appellant informed her that he had called the contracting officer to report that the supervisor had no business having this meeting. Appellant's supervisor stated that she called the contracting officer who told her that there were "no identifiable issues" and no "infractions on anyone's part," that by this time the investigation of the contractor was "out of our hands" and that on August 1, 2000 she told appellant that proper protocol, if he had a problem with her or her actions, was to go to her supervisor. The employing establishment certified that it had forwarded a copy of the supervisor's comments to appellant.

By decision dated May 20, 2002, an Office hearing representative found that appellant's claim for Gulf War syndrome filed on November 15, 1999 was not timely filed and that appellant's "claim filed on September 14, 2000 is considered timely as it relates to the claimant's reaction to incidents occurring in 2000." With regard to the September 14, 2000 claim, the Office hearing representative modified the Office's May 22, 2001 decision "to reflect denial on the basis that the claimed condition was not sustained in the performance of duty due to compensable employment factors," as there was no evidence that appellant's supervisor erred or abused her authority in the discussion with appellant on August 1, 2000, that there was no indication that appellant was unable to handle the work load or that the work load was excessive and that there was no evidence to support that appellant received conflicting directions during the investigation into improper actions of a contractor.

By letter dated July 21, 2002, appellant requested reconsideration, stating that the explosion of conventional munitions at the employing establishment reminded him of his Vietnam experiences and made him anxious and nervous. Appellant further described the events of July 31 and August 1, 2000, stating that his supervisor's instruction not to contact the contracting officer in Arizona unless the supervisor approved doing so was contrary to the contracting officer's order to report to her immediately any difficulties he might be having with the contractors, leading him to feel he "was pulled in two different ways by the immediate supervisor and the contracting officer. It made me feel I was caught in the middle, with no way

of escape. "No matter what I did, I wasn't able to win." Appellant also contended that working long hours, dealing with unscrupulous contractors and having his supervisor condone the contractors' improper performance contributed to his mental condition. Appellant submitted a February 27, 2002 Department of Veterans Affairs' decision increasing his service-connected disability for post-traumatic stress disorder to 100 percent.

By decision dated September 30, 2002, the Office found that a merit review was not warranted, as the determination of the Department of Veterans Affairs was irrelevant and his contentions were repetitious or did not address the issue.

The Board finds that appellant's claim for Gulf War syndrome was not timely filed.

Section 8122(a) of the Federal Employees' Compensation Act[1] states that "[a]n original claim for compensation for disability or death must be filed within three years after the injury or death." Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware or by the exercise of reasonable diligence should have been aware, of the causal relationship between the employment and the compensable disability.

On his November 15, 1999 claim form for Gulf War syndrome appellant indicated that he first realized on August 11, 1994 that his disease or illness was caused or aggravated by his temporary assignment to Saudi Arabia, from September 1990 to January 1991. His claim was not filed within the three-year time limitation of the Act.

Appellant's claim still would be regarded as timely under 5 U.S.C. § 8122 if his "immediate superior had actual knowledge of the injury ... within 30 days." This provision removes the bar of the three-year time limitation if met.[2] In this case, this provision would mean that the claim would be regarded as timely if the immediate superior knew of the injury within 30 days of appellant's last exposure to the implicated employment factors in January 1991. The provision further provides that knowledge of the injury "must be such to put the immediate superior reasonably on notice of an on-the-job injury." Appellant does not allege and there is no evidence that indicates that his immediate superior had actual knowledge of his alleged injury in Saudi Arabia within 30 days.

Appellant alleges that his failure to file a timely claim should be excused due to exceptional circumstances. Section 8122(d)(3) of the Act[3] provides that the time limitations for filing a claim "do not run against any individual whose failure to comply is excused by the Secretary, on the ground that such notice could not be given because of exceptional circumstances."

Appellant's excuses for not filing a timely claim were that the Department of the Army did not acknowledge for several years that personnel were exposed to potentially harmful chemicals during the time he was in Saudi Arabia and that he was not told until 1999 that he

[1] 5 U.S.C. § 8122(a).

[2] *Hugh Massengill*, 43 ECAB 475 (1992).

[3] 5 U.S.C. § 8122(d)(3).

could file a claim for workers' compensation. The Board has held that unawareness of possible entitlement,[4] lack of access to information and ignorance of the law or of one's rights and obligations under it[5] do not constitute exceptional circumstances that could excuse a failure to file a timely claim.[6] Appellant has not established that he could not file a timely claim due to exceptional circumstances, as that term is used in section 8122(d)(3) of the Act.

The Board finds that appellant has not established that he sustained an emotional condition 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 work 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.[7] 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. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.[8]

Appellant attributed his emotional condition primarily to a meeting with his supervisor on August 1, 2000, the last day he worked. The subject of this meeting was appellant's telephone call the previous day to a contracting officer in Arizona and his supervisor telling him that he should not have made this call, but rather he should have gone through proper channels to her supervisor. Appellant contended that the July 31, 2000 telephone call to the contracting officer concerned an investigation of thefts by contractors. The Board finds the account of appellant's supervisor, who spoke to the contracting officer after appellant, that appellant's call was to complain about the supervisor scheduling a meeting with the contractor on July 31, 2000, the same day appellant called the contracting officer, more credible. His supervisor stated that she and appellant never disagreed on the issue being investigated and that the investigation was "out of our hands" by July 31, 2000.

Appellant characterized his supervisor's action during the August 1, 2000 meeting as a reprimand, while his supervisor characterized it as a discussion of performance. The Board has

[4] *Charlene B. Fenton*, 36 ECAB 151 (1984).

[5] *George M. Dickerson*, 34 ECAB 135 (1982).

[6] Being held as a prisoner of war is the type of situation recognized by the Office as an exceptional circumstance that would excuse the failure to file a timely claim for compensation. *Paul S. Devlin*, 39 ECAB 715 (1988).

[7] *Lillian Cutler*, 28 ECAB 125 (1976).

[8] *Michael Thomas Plante*, 44 ECAB 510 (1993).

characterized criticisms of performance,[9] supervisory discussions of job performance[10] and reprimands[11] as administrative or personnel matters of the employing establishment, which are covered only when a showing of error or abuse is made.

Appellant has not shown any error or abuse in his supervisor's actions on August 1, 2000. He has not shown his supervisor erred by instructing him to follow appropriate supervisory channels and has not shown that the meeting was conducted in an abusive manner. Appellant also has not shown that he received conflicting instructions from his supervisor and the contracting officer, or that his supervisor did not support him regarding the investigation of contractors for theft.[12]

Appellant has cited some compensable factors of his employment. His reaction to being in Saudi Arabia in support of, and at the time of an impending war in the adjoining country of Kuwait, may be covered under the Act, as it constitutes a reaction to his actual physical environment, as opposed to a reaction to being assigned to such an area, which would not be covered.[13] Appellant's confrontation of contract workers about missing items was a part of his regularly assigned duties, as was his receiving telephone calls from contractors on weekends, even if this occurred only about once a month, as stated by his supervisor.

Another compensable factor cited by appellant was the temporarily increased work load that he encountered in 1993, when the number of employees in his organization was reduced from 140 to 24. However, his reaction to working greater than eight hours a day is not compensable, as the assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[14] The evidence indicates that the employing establishment accommodated appellant's commute by allowing him to work extra hours and use the compensatory time he accrued from Monday to Thursday for long weekends. There is no showing of error or abuse in this accommodation.

The fact that appellant has established some employment factors that may give rise to a compensable disability under the Act does not discharge his burden of proof. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized

[9] *O. Paul Gregg*, 46 ECAB 624 (1995).

[10] *Lorna R. Strong*, 45 ECAB 470 (1994).

[11] *Effie O. Morris*, 44 ECAB 470 (1993).

[12] It is well established that perceptions alone are insufficient to establish entitlement to compensation. To discharge his burden of proof, an employee must establish a factual basis for his or her claim by supporting the allegations with probative and reliable evidence. *Mary Margaret Grant*, 48 ECAB 696 (1997).

[13] *Gareth D. Allen*, 48 ECAB 438 (1997).

[14] *Peggy R. Lee*, 46 ECAB 527 (1995).

medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to an accepted compensable employment factor.[15]

The Board finds that appellant has not submitted medical evidence sufficient to establish that his diagnosed psychiatric conditions are causally related to compensable employment factors.

Most of the medical reports appellant submitted addressed the physical or psychiatric conditions that he attributed to his tour of duty in Saudi Arabia in 1990 and 1991. As found above, appellant's claim for this factor of employment was not timely filed.

Only one medical report addresses the effect of incidents and conditions of appellant's employment at the employing establishment in 2000, which is the subject of his timely claim filed on September 14, 2000. In a March 16, 2002 report, Mark S. Smasal, Ph.D., a clinical psychologist, stated:

> "The cause of source of [appellant's] [post-traumatic stress disorder] has been determined to be his combat experience in Vietnam. He has had [post-traumatic stress disorder] since that time. According to information available to this examiner, [appellant] has functioned at least adequately and often superiorly, throughout the years.… Most of his occupational responsibilities allowed him to work autonomously or at least, with a minimum amount of supervision. [Appellant] held positions of responsibility in which his expertise was respected and trusted by his supervisors. To a high degree, [he] was in control of his work environment. Under such conditions, [appellant's] work environment was ideal. [He] could better predict and anticipate his work world. The events that took place in mid-year 2000, significantly altered his work world. [Appellant] no longer felt that he had the support protection of one of his supervisors. [He] was instructed to do things that were inconsistent with his written job description. The new procedure took certain decisions for which he could be held personally responsible out of his hands and placed him in harm's way without recourse. Analogously, he was walking 'point' in the jungle with no troops behind him to protect his back. As a result, [appellant] felt trapped with no way out. He was being given responsibility with[out] authority.
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> "The examiner did not have access to [appellant's] written job description or other job[-]related documents regarding the situation in question. It is understood from information provided by [him] that the above work-related situation occurred and that the details of the situation are not contested. It is in the context of this understanding that the examiner's conclusion is that the work conditions under which [appellant] was asked to perform was a contributing factor in the exacerbation of his [post-traumatic stress disorder] symptoms."

[15] *William P. George*, 43 ECAB 1159 (1992).

Dr. Smasal's March 16, 2002 report is insufficient to meet appellant's burden of proof for the reason that it does not attribute his psychiatric condition to any accepted compensable employment factor. He instead attributes this condition to appellant's desire to work in a different position or environment, which is not compensable[16] and to appellant's perception that his supervisor was not supporting him. This unsupported perception is not compensable for reasons explained above. Dr. Smasal also stated that appellant was instructed to do things inconsistent with his job description, but this allegation is not supported by the evidence in the case record. Finally, Dr. Smasal acknowledged that he did not have a complete history of appellant's employment incidents or conditions, which also reduces the probative value of his report.[17] Appellant has not met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that, 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.[18] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[19]

The only evidence appellant submitted with his July 21, 2002 request for reconsideration was the February 27, 2002 Department of Veterans Affairs decision, increasing his service-connected disability for post-traumatic stress disorder to 100 percent. As this decision relates to

[16] *Donna J. DiBernardo*, 47 ECAB 700 (1996).

[17] *See Cowan Mullins*, 8 ECAB 155,158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

[18] *Eugene F. Butler*, 36 ECAB 393 (1984).

[19] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

his condition due to his military service, it is not relevant to the question of whether appellant's emotional condition is causally related to his federal employment. The allegations appellant raised about incidents and conditions of his employment were repetitive of those previously made, with the exception of his contention that explosion of conventional munitions at the employing establishment reminded him of his Vietnam experiences and made him anxious and nervous. This new contention, which is unrelated to factors implicated in his claim, does not address the issue decided by the Office and is thus, not relevant. The Office properly refused to reopen appellant's case for further review of the merits of his claim.

The September 30 and May 20, 2002 decisions of the Office of Workers' Compensation Programs are affirmed, as modified.

Dated, Washington, DC
September 30, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member