United States Department of Labor
Employees' Compensation Appeals Board

DONALD GILMORE, Appellant	)	
and	)	**Docket No. 05-224**
	)	**Issued: July 22, 2005**
U.S. POSTAL SERVICE, JAMES A. FARLEY POST OFFICE, New York, NY, Employer	)	

Appearances:
Donald Gilmore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 1, 2004 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated April 23 and July 19, 2004, which found that appellant failed to establish an emotional condition while in the performance of duty and an October 1, 2004 nonmerit decision, which denied his request for reconsideration. 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; and (2) whether the Office properly refused to reopen appellant's claim for a further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 25, 2004 appellant, then a 46-year-old dispatch clerk, filed a traumatic injury claim alleging that on February 25, 2004 he experienced chest pain, headache and felt hot as a result of his supervisor's actions. He submitted a February 3, 2004 letter of warning issued by Maria Cooke, his supervisor, on February 25, 2004 for his failure to follow her instructions to work in "receiving" on January 30, 2004. Appellant also submitted a December 27, 2001 document in which the employing establishment advised him of his reassignment to "receiving."

Appellant submitted medical records in support of his claim, which included hospital discharge instructions dated February 25, 2004, with an illegible signature noting his symptoms of chest pain and referral to his primary care physician. A January 16, 2004 treatment note of Dr. James R. Booth, a Board-certified psychiatrist, indicated that appellant had been under his care since April 2002. Dr. Booth stated that due to appellant's relatively fragile degree of stability, he requested that appellant not be assigned work outside his regular position as a dispatcher. Appellant had improved somewhat and was highly motivated to cooperate with the needs of the employing establishment. He also noted that appellant wanted to try a light-duty assignment to "receiving" on Sundays only to expand his functions without risk of worsening his post-traumatic stress disorder and generalized anxiety disorder. Dr. Booth concluded that if appellant could not be assigned within these guidelines, he should be found incapacitated on medical grounds. Dr. Booth's February 25, 2004 treatment note indicated that appellant had panic disorder and post-traumatic stress disorder. He opined that appellant was fully incapacitated at that time and his prognosis was fair to good. Dr. Booth concluded that appellant would remain totally incapacitated for work through April 1, 2004.

Renee Lapene, an employing establishment supervisor, controverted appellant's claim. She stated that at approximately 3:15 a.m., Ms. Cooke served appellant with a letter of warning for failure to follow instructions from a prior infraction. At approximately 4:15 a.m., appellant claimed that he wanted to go to the medical unit because he was experiencing stress and a headache. As the medical unit was closed, an employing establishment police officer had called an ambulance. At 4:25 a.m., appellant told her, Lieutenant Petty, Ms. Cooke and Denise Headley, a shop steward, that he did not want an ambulance and wanted to go to the medical unit. Lieutenant Petty cancelled the ambulance at 4:40 a.m. Appellant talked to Ms. Headley from 4:40 a.m. until 5:00 a.m. At approximately 5:00 a.m., he complained of chest pains and Lieutenant Petty called for an ambulance again which arrived at 5:20 a.m. The emergency medical services worker evaluated appellant's chest pains and determined that his heart and pulse were okay.

By letter dated March 23, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that he submit additional factual and medical information, including a detailed description of the February 25, 2004 incident.

In a March 31, 2004 treatment note, Dr. Booth reiterated his diagnosis of panic disorder and post-traumatic stress disorder and prognosis. He stated that appellant was totally incapacitated for work until May 10, 2004. In a March 31, 2004 treatment note, Dr. Pierre R. Beaubrun, a Board-certified internist, indicated that appellant was under his care for "ICD 250.0." He recommended that appellant avoid stressful situations, engage in moderate exercise,

maintain a specific diet and take hypoglycemic agents to prevent a hyperclycemic state. On April 2, 2004 Dr. Booth indicated that appellant experienced symptoms when he was given a letter of warning on February 25, 2004 which was wholly unjustified.

By decision dated April 23, 2004, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office found that appellant had failed to submit a statement identifying the actions of his supervisor alleged to have caused his emotional condition. Accordingly, the Office denied his claim.

On April 27, 2004 appellant requested reconsideration. He submitted an April 27, 2004 narrative statement in which he alleged that the employing establishment's letter of warning disrespected his diabetic condition by not allowing him to go home when work was not available, as recommended by his treating physician. Appellant noted his treatment for alcoholism and stated that he had no preexisting disciplinary problems prior to working at the employing establishment. He also submitted the employing establishment's change in designation of representation regarding an Equal Employment Opportunity (EEO) complaint he filed. In a May 5, 2004 report, Dr. Booth reiterated appellant's reaction to receiving the letter of warning from the employing establishment on February 25, 2004 and the diagnosis of post-traumatic stress disorder. Dr. Booth related that appellant believed he was being persecuted and indicated with an affirmative mark that his condition was caused by ongoing arbitrary disregard for his well-being by supervisors.

In a April 18, 2002 treatment note, Dr. Booth indicated that appellant could not work outside his regular work duties due to the severity of his disorder and the tenuousness of his recovery.

In an April 6, 2002 letter, appellant further alleged that he was harassed by his supervisors, Neil Meisner, Anthony Coles and J.R. Correrro. He stated that on March 27, 2002 he was assigned to work on the computer by Mr. Coles, who denied his request for help while another employee who worked on the computer received help. Appellant further stated that the assignment was very stressful for him to perform alone. He spoke to Evette Reyes, a shop steward, about this situation and waited 45 minutes for a response, during which time his neck and head began to hurt. He decided to go home due to the stressful environment. On April 3, 2002 appellant stated that he was working on the computers alone again and that Danny Dowling a coworker, was scheduled to work with him. When Mr. Dowling arrived at work, he was given a different assignment by Mr. Meisner. When appellant asked Mr. Coles who was scheduled to work with him, Mr. Coles responded that he should perform the task assigned to Mr. Dowling. Appellant alleged that Mr. Dowling was verbally abusive towards him and physically threatened him when he learned his assignment had been changed. Mr. Correrro reassigned appellant to his previous assignment, which he believed was unfair since he had more seniority than Mr. Dowling. Appellant's request to go home was denied by Mr. Coles. Appellant decided to leave because he felt unfairly treated by Mr. Coles. Appellant indicated that before leaving, he told Mr. Coles that he was going to use the restroom and Mr. Coles called the employing establishment police. The police officers surrounded him while he was using the restroom. He stated that they watched him until he was finished which was a humiliating experience and that

he became upset which resulted in him seeing his physician. Appellant concluded that he felt threatened by Mr. Dowling, Mr. Meisner, Mr. Coles and Mr. Correrro.

Appellant submitted an EEO complaint alleging that the employing establishment discriminated against him by harassing him on September 11, 2001, by instructing him to work on the computer with no help on March 27, 2002, by changing his work assignment on April 3, 2002, by denying his April 5, 2002 request for annual leave, by charging him with being absent without official leave (AWOL) and by issuing a letter of warning dated April 25, 2002 and on May 8, 2002 for failure to perform his assigned work duties.

An arbitration decision dated September 26, 2002 rescinded the April 25, 2002 letter of warning for failure to follow instructions on March 27, 2002. It was noted that Mr. Coles failed to respond properly to appellant's claim that he was mentally ill and to recommend the Employee Assistance Program (EAP) or the Federal Medical Leave Act (FMLA) for any problems he might have been having. Further, the arbitrator found that the discipline issued was punitive rather than corrective in nature.

In a April 5, 2002 treatment note, Dr. Booth indicated that appellant had acute stress and had begun to take medication and undergo psychotherapy. Dr. Booth opined that appellant was incapacitated and that he was unable to work through April 10, 2002.

In a June 11, 2004 letter, appellant advised the Office that he did not have a preexisting case and that the employing establishment's actions had been deemed improper by an arbitration decision. He submitted a June 10, 2004 prearbitration settlement agreement, which indicated the terms of his payment for January 30, 2004 and his withdrawal of his request for an arbitration hearing.

In a June 10, 2004 treatment note, Dr. Booth stated that appellant was still under his care and that he was recovering from his recent temporary incapacitation. Dr. Booth stated that appellant could return to full-duty work effective June 16, 2004. He further stated that appellant should be temporarily excused on medical grounds for the remainder of the day. Dr. Booth also reviewed appellant's history of seeking treatment on April 5, 2005 for extreme anxiety and panic symptoms precipitated by a conflict at work. Since that time, appellant had experienced several periods of increased symptoms. Dr. Booth stated that his previous notes indicated that appellant had been treated at his clinic in June 1989, May 1993 through July 1994 and December 1996 through March 1997, for alcohol-related problems. He noted that appellant's panic/anxiety and post-traumatic stress disorder did not predate his meeting with appellant in April 2002.

By decision dated July 19, 2004, the Office denied modification of the April 23, 2004 decision on the grounds that appellant failed to establish that his emotional condition was caused by a compensable factor of his employment. The Office noted that it was not necessary to address the medical evidence of record.

On July 23, 2004 appellant requested reconsideration alleging that the Office disregarded the evidence he had submitted and incorrectly found that Mr. Coles did not commit an error in issuing the April 25, 2002 letter of warning in light of the arbitration decision.

Appellant submitted duplicate evidence of factual and medical evidence. He also alleged that on January 30, 2004 he was working at his normal work assignment when a supervisor from another area instructed him to work in another section. He presented the supervisor with a letter from his physician, which contained his limitations and the supervisor responded that the physician had no knowledge of what went on at the employing establishment and that he had to work where he was told to do so. Appellant asserted error by insisting that he work in an environment other than what was advised by his physician. He was unable to work in that area and was subsequently sent home. Appellant also submitted a list of jobs bided upon at the employing establishment.

In an October 1, 2004 decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was of a duplicative nature.

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.[1] 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.[2]

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered 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. On the other hand, where 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 Federal Employees' Compensation Act.[3]

In emotional condition cases, the Office 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 to be factors of employment and may not be considered.[4] Therefore, the initial

[1] *Pamela R. Rice*, 38 ECAB 838 (1987).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

[4] *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

question is whether appellant has alleged compensable factors of employment that are substantiated by the record.[5]

ANALYSIS -- ISSUE 1

Appellant attributed his emotional condition to being harassed and discriminated against by his supervisors and verbally abused and physically threatened by a coworker. He stated that Mr. Coles refused to help him with his computer work while another employee received help. Appellant also stated that his supervisors exchanged his work assignment with that of Mr. Dowling who responded by treating him in a verbally abusive manner and physically threatening him. He contended that employing establishment police officers watched him while he was using the restroom. The Board has held that the employee's unfounded perceptions do not constitute a compensable factor of employment.[6] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. A claimant must substantiate such allegations with probative and reliable evidence.[7] The Board finds that appellant did not submit sufficient evidence to establish his allegations that Mr. Coles refused to help him with his work, that he was being watched by employing establishment police officers and that Mr. Dowling treated him in an abusive manner.

The February 3, 2004 letter of warning issued by Ms. Cooke,[8] appellant's reassignments,[9] the denial of his request for annual leave and placement of him on AWOL status[10] and the filing of EEO complaints against the employing establishment[11] involve administrative or personnel matters. The Board has found, however, that an administrative or personnel matter may be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[12] Appellant has not submitted evidence establishing that the employing establishment's issuance of the February 3, 2004 letter of warning, handling of his reassignments, denial of his request for annual leave and placing him on AWOL status violated its policies or were otherwise in error. Without substantiated evidence of error or abuse on the part of the employing establishment in handling the above-administrative matters, appellant has failed to establish a compensable factor of employment under the Act.

---

[5] *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

[6] *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[7] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *see Donna Faye Cardwell supra* note 2 (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice supra* note 1 (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[8] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[9] *Peggy Ann Lightfoot*, 48 ECAB 490 (1997).

[10] *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993).

[11] *Diane C. Bernard*, 45 ECAB 223 (1993).

[12] *Robert W. Johns*, 51 ECAB 137 (1999).

The April 25, 2002 letter of warning was issued to appellant for failing to follow instructions on March 27, 2002. It was rescinded by a September 26, 2002 arbitration decision, in which the arbitrator found that Mr. Coles failed to respond properly to appellant's claim that he was mentally ill at a predisciplinary interview and to recommend the EAP or FMLA. The arbitrator found that the discipline issued was punitive rather than corrective in nature. As the employing establishment was found to have acted abusively or unreasonably by the arbitrator, the Board finds that appellant has established a compensable factor of employment.

Appellant's burden of proof, however, is not discharged by the fact that he has established a compensable employment factor. To establish his claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[13]

None of Dr. Booth's treatment notes and reports attributes appellant's diagnosed emotional conditions to the compensable factors found in this case, *i.e.*, the issuance of the April 25, 2002 letter of warning. The hospital discharge instructions regarding appellant's chest pain and Dr. Beaubrun's finding that appellant had "ICD 250.0" and recommendations that he avoid stressful situations, engage in moderate exercise and maintain a specific diet do not attribute appellant's emotional condition to the accepted compensable factor.

As appellant has failed to submit rationalized medical evidence establishing that his emotional condition was caused by the issuance of the April 25, 2002 letter of warning, he has failed to establish that he sustained an emotional condition while in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[14] the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[15] 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.[16] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

[13] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[14] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b)(1)-(2).

[16] *Id*. at § 10.607(a).

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for an emotional condition because he did not establish any compensable factors of employment. Thus, the relevant issue in this case is whether appellant has established that his emotional condition was caused by a compensable factor of employment. In support of his request for reconsideration of the Office's decision, appellant submitted duplicate copies of Dr. Booth's April 5 and 18, 2002 and June 10, 2004 notes, the June 10, 2004 prearbitration settlement agreement and his April 6, 2002 narrative statement. Appellant also submitted a complaint alleging that on January 30, 2004 a supervisor violated article 14 of the National Agreement in reassigning him to work in another area, which involved the performance of duties outside the limitations set forth by his physician. The Board has held 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.[17] Dr. Booth's notes, the prearbitration settlement agreement and appellant's narrative statement were already of record at the time appellant requested reconsideration and had been considered by the Office. Appellant's complaint is cumulative evidence in that he reiterates his contention that his emotional condition was caused by being reassigned to perform work outside the restrictions prescribed by his physician. Thus, the above evidence is deemed insufficient to reopen appellant's claim for a merit review as it is duplicative and cumulative of evidence already of record.

The list of jobs bided upon at the employing establishment does not address the relevant issue in the Office's decision and, therefore, it is insufficient to reopen appellant's claim for a merit review.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant substantiated only one compensable factor of employment and has failed to submit the necessary rationalized medical evidence to establish that this factor caused or contributed to his diagnosed emotional condition. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[17] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2004 decision of the Office of Workers' Compensation Programs is affirmed. The Office's July 19 and April 23, 2004 decisions are affirmed as modified.

Issued: July 22, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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