

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

LOVELL SIMS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flint, MI, Employer**

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**Docket No. 05-1044
Issued: September 15, 2005**

Appearances:
Lovell Sims, 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
DAVID S. GERSON, Judge

JURISDICTION

On April 5, 2005 appellant filed a timely appeal from a June 23, 2004 merit decision of the Office of Workers' Compensation Programs, denying his emotional condition claim, an October 27, 2004 merit decision denying modification and a March 24, 2005 decision denying his request for review of the written record under 5 U.S.C. § 8124. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the March 24, 2005 decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied review of the written record under 5 U.S.C. § 8124.

FACTUAL HISTORY

On May 3, 2004 appellant, then a 56-year-old customer service manager, filed an occupational disease claim alleging that he sustained stress in the course of his federal employment. He stopped work on February 2, 2004.

In a statement accompanying his claim, appellant related that he was accused of sexual harassment in October 2003. He stated, "As manager of the office I have removed three craft employee[s] for attendance problems. The employee[s] would talk every day about doing whatever it would take to get rid of me." He related that the employing establishment removed him on November 6, 2003 but that he returned after one week when the employing establishment found no evidence of sexual harassment. Appellant indicated that on February 6, 2004 the postmaster stated that the workers he fired told her "that they witnessed me harassing the white employee." He further noted that the Office of Personnel Management had approved his application for disability retirement.

By letter dated May 18, 2004, the Office requested additional factual and medical information from appellant. In a response dated May 20, 2004, he indicated that he received a letter of warning but that it was not for sexual harassment. Appellant also noted that he had filed a claim with the Equal Employment Opportunity Commission (EEOC). He stated:

"I was removed from the office the first time on November 6, 2003 because the postmaster stated that I had to be removed while an investigation was in progress for the charge filed against me. However, my doctor had removed me from work for 30 days for stress relief and I remained off. I returned to work on December 6, 2003 and on February 4, 2004 the postmaster once again called me into the office and removed me from the office because the plaintiff refiled charges."

The record establishes that on December 23, 2003 the employing establishment issued appellant a letter of warning for inappropriate conduct. He received the letter of warning for purchasing a mobile telephone for a subordinate and engaging in a verbal altercation with another employee.

In a statement dated June 7, 2004, Pamela J. Franklin, the postmaster, related that appellant's work as a mid-level manager was inherently stressful and that he "periodically experienced problems with subordinate supervisors not completing assignments as he had instructed and he would become frustrated but no more than normal in a mid[-]level managerial assignment." Ms. Franklin noted that in August 2003, a female employee alleged that appellant had sexually harassed her but that an investigation in August and September 2004 was "inconclusive for sexual harassment, although it was discovered [he] had conducted himself in an inappropriate manner with another female subordinate." She stated:

"A few weeks later, in October 2003, [appellant] was involved in a verbal altercation with a subordinate employee. [He] claimed the subordinate employee had threatened him and involved the [employing establishment's] Inspection Service and thus, issued the employee corrective action. After further

investigation and written statements from witnesses, it was determined that [appellant] had somewhat initiated and subsequently contributed to the situation by making threatening statements to the employee, therefore, again conducting himself in an inappropriate manner.”

Ms. Franklin related that in November 2003 more charges of sexual harassment were brought and that she told appellant that he would be temporarily reassigned during the investigation. She indicated that he did not accept the assignment but instead took leave. Ms. Franklin noted that the allegations were again found inconclusive and that appellant resumed work on December 8, 2003. She stated that the case was reopened in January 2004 as “additional information was brought forward to [employing establishment] investigators regarding alleged sexual harassment by [appellant] toward a subordinate female employee.” Ms. Franklin related:

“A predisciplinary interview was held with [appellant] concerning the alleged sexual harassment on April 19, 2004. [He] was informed [that] based on the investigation, it was concluded [that] he had sexually harassed female subordinates under his jurisdiction. Based on the level of seriousness of the said offenses, [appellant] was informed [that] a request for a proposed removal would be initiated.”

On June 14, 2004 appellant received a notice of proposed removal from employment due to his unacceptable conduct and failure to follow instructions. The notice indicated that a February 2004 investigation revealed that he behaved inappropriately toward female employees and used a motor vehicle to follow a female employee after receiving instruction to have no contact with her.

In a decision dated June 23, 2004, the Office denied appellant’s claim on the grounds that he did not establish that he sustained an emotional condition in the performance of duty. The Office found that he had not established any compensable employment factors.

On July 5, 2004 appellant requested a review of the written record.¹ He asserted:

“When I sent in my earlier statement I thought that I indicate[d] that duties and responsibilities as manager of [c]ustomer [s]ervice was the reason [for] my stress on the job. I had to make daily contact with all of my staff, as well as my craft employees. My manager mandated this from all of her managers. My problems sta[r]ted when I removed three craft employees from the [employing establishment].”

¹ The request is dated June rather than July 5, 2004; however, it is apparent from the context and the postmark of the letter dated July 5, 2004 that this is a typographical error.

On August 8, 2004 appellant informed the Office that he desired reconsideration rather than a review of the written record.² In a letter dated September 8, 2004, the Office notified him that it had accepted the withdrawal of his request for a review of the written record.

In a decision dated October 27, 2004, the Office denied modification of its June 23, 2004 decision. The Office determined that appellant had not established that he had to make daily contact with his staff.

On December 2, 2004 appellant requested reconsideration.

In a decision dated March 24, 2005, the Office denied appellant's request for review of the written record under section 8124(b), on the grounds that he had previously requested reconsideration of his claim.

LEGAL PRECEDENT -- ISSUE 1

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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.³ 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.⁴

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 employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which he believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

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

² Appellant submitted medical evidence in support of his claim.

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Roger Williams*, 52 ECAB 468 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Claudia L. Yantis*, 48 ECAB 495 (1997).

⁶ *Roger Williams*, *supra* note 4.

factors of employment and may not be considered.⁷ 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.⁸

ANALYSIS -- ISSUE 1

Appellant primarily attributed his emotional condition to investigations by the employing establishment into allegations that he sexually harassed female coworkers. An investigation is considered an administrative function of the employer unless it is related to an employee's day-to-day duties or specially assigned duties or to a requirement of the employee's employment; consequently, it is not a compensable factor of employment unless there is affirmative evidence that the employer erred or acted abusively in the administration of the matter.⁹ In this case, the employing establishment investigated appellant based on complaints of sexual harassment by a female employee. Ms. Franklin, the postmaster, noted that an initial investigation in August and September 2004 was inconclusive for sexual harassment but established that he behaved inappropriately with a female subordinate. She further noted that the employing establishment reinvestigated appellant in November 2003 and January 2004 because of additional charges of sexual harassment. Ms. Franklin related that based on the final investigation, the employing establishment determined that appellant "sexually harassed female subordinates under his jurisdiction." The Board has held that the employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of the evaluation process.¹⁰ In this case, the investigation of appellant conducted by the employing establishment established that he sexually harassed female subordinates. Appellant has not submitted any evidence to show that the employing establishment erred or acted abusively in conducting its investigation and thus, has not established a compensable employment factor.

Regarding the disciplinary actions taken by the employing establishment resulting from its investigation into appellant for sexual harassment, the Board has held that disciplinary matters, absent a showing of error or abuse, generally fall outside the scope of coverage of the Act.¹¹ Appellant received a letter of warning on December 23, 2003 for inappropriate conduct and a notice of removal on June 14, 2004 for unacceptable conduct and failure to follow instructions. The employing establishment also temporarily removed him from employment for certain periods during its investigations. Appellant, however, has not submitted any probative and reliable evidence sufficient to establish that the employing establishment erred in issuing its disciplinary action. While appellant filed an EEO complaint regarding the notice of removal, he

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁸ *Id.*

⁹ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁰ *Thomas O. Potts*, 53 ECAB 353 (2002).

¹¹ *Bobbie D. Daly*, 53 ECAB 691 (2002).

did not submit a final decision finding any error or abuse by the employing establishment. Consequently, he has not established a compensable employment factor.

Appellant additionally attributed his stress to his duties as a manager because he had to make daily contact with his staff and as his difficulties began after he removed three employees. The Board has held that emotional reactions to situations where an employee is trying to meet his position requirements are compensable.¹² In this case, however, while appellant noted that he had daily contact with his staff, he indicated that his “problems started” when he removed three subordinates. He contended that the employees attempted to get him fired in retaliation. Appellant, however, has submitted no evidence, such as witness statements, in support of his contention. Further, he attributed the beginning of his stress-related condition not to his day-to-day duties as a manager but to his belief that his former subordinates were retaliating against him. Appellant, therefore, has not established a compensable factor of employment.

On appeal, appellant contends that his physicians found that his inability to work was employment related. The Board has held, however, that unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence.¹³ In this case, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Regarding reconsideration as provided for in 5 U.S.C. § 8128(a), the Office’s implementing regulations states as follows:

“The [Act] provides that the Director may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the ‘application for reconsideration.’”¹⁴

ANALYSIS --ISSUE 2

Appellant initially requested a review of the written record on July 5, 2004. He subsequently informed the Office that he wanted reconsideration of his claim in lieu of a review of the written record. The Office accepted appellant’s withdrawal of his request for a review of the written record on September 8, 2004. By decision dated October 27, 2004, the Office denied modification of its prior decision. On December 2, 2004 appellant requested reconsideration of

¹² See *Georgia F. Kennedy*, 35 ECAB 1151 (1984); *Joseph A. Antal*, 34 ECAB 608 (1983).

¹³ *Andrew J. Sheppard*, 53 ECAB 170 (2001).

¹⁴ See 20 C.F.R. § 10.605.

the Office's October 27, 2004 decision.¹⁵ The Office determined that appellant requested a review of the written record and, in a decision dated March 24, 2005, denied his request under section 8124(b), on the grounds that he had previously received reconsideration of his claim.

The Board finds that appellant requested reconsideration of his claim rather than a review of the written record. His December 2, 2004 correspondence to the Office clearly requests "reconsideration" of the claim. The Office improperly characterized his timely reconsideration request as a request for a review of the written record. As appellant timely requested reconsideration of the claim, the case will be remanded to the Office to consider his reconsideration request according to the standards set forth in 20 C.F.R. § 10.606(b).¹⁶

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty. The Board further finds that the Office improperly characterized his request for reconsideration as a request for a review of the written record. The case is remanded for the Office to consider appellant's timely request for reconsideration under 5 U.S.C. § 8128.¹⁷

¹⁵ On January 12, 2005 the Office received correspondence from appellant dated August 12, 2004 regarding a telephone conversation on that date and a request by him to keep his case file for a request for a review of the written record. As this correspondence predates the Office's October 27, 2004 decision, it cannot be construed as a request for a review of the written record subsequent to that decision.

¹⁶ See *Aminata A. Ross*, Docket No. 02-1294 (issued November 5, 2002).

¹⁷ Appellant submitted new evidence on appeal. The Board has no jurisdiction to review evidence that was not in the case record before the Office at the time of its final decision. See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2005 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board. The decisions of the Office dated October 27 and June 23, 2004 are affirmed.

Issued: September 15, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board