United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
	)	**Docket No. 08-380**
and	)	**Issued: May 20, 2008**
U.S. POSTAL SERVICE, KENMORE STATION, Kenmore, NY, Employer	)	

Appearances:
Melanie M. Peterson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 16, 2007 appellant, through his attorney, filed a timely appeal of a March 5, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Because more than one year has elapsed between the last merit decision dated February 7, 2006 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 14, 2005 appellant, then a 45-year-old customer service supervisor, filed a traumatic injury claim alleging that on January 31, 2005 he sustained trauma, sleeplessness, depression and neck and shoulder stiffness with headaches. He stated that an unknown employee left a newspaper clipping about a supervisor who was killed by an employee. On

February 11, 2005 appellant stopped work. On his claim form, James Gavner, an employing establishment manager, controverted the claim.

By letter dated February 28, 2005, the Office requested factual and medical evidence appellant needed to submit to establish his claim. It also requested that the employing establishment respond to his allegation.

In an undated narrative statement, Mr. Gavner contended that appellant's injury was not work related. He stated that appellant failed to timely report his injury in accordance with the employing establishment's policy. Mr. Gavner related that the timing of the newspaper clipping was suspicious as it appeared shortly after appellant was questioned about his poor work performance. As a result, he was transferred to another post office by Iggy Vaccaro, an up line supervisor, which made him extremely unhappy. Mr. Gavner spoke to appellant on January 31, 2005 about the newspaper clipping. He did not seem phased by it and acted extremely nonchalant. At no point did appellant express any concern or feelings about the article. Mr. Vaccaro requested an investigation of the alleged incident. Mr. Gavner gave a lengthy service talk to all employees regarding appropriate behavior at work. He stated that appellant had several opportunities during regular meetings to discuss the article and his resultant symptoms but failed to do so. The employing establishment also controverted appellant's claim on the grounds that no medical evidence had been submitted to establish a causal relationship between any alleged emotional condition and his employment.

In a March 6, 2005 narrative statement, appellant described the January 31, 2005 incident. He found a newspaper clipping on his desk around 8:30 a.m. Appellant read it and was stunned. He gave it to Ann Niemiec, a coworker, who read it and gasped. Ms. Niemiec immediately took the article to Mr. Gavner. Meanwhile, appellant went to the bathroom and put cold water on his face. He tried to brush off the article and finished his workday. Appellant contended that he did not delay in filing his claim as he was not scheduled to work on February 10, 2005. On February 10 and 22, 2005 he received medical treatment related to the January 31, 2005 incident. Appellant was diagnosed with depression and given medication for his stomach problem.

Appellant submitted a disability certificate dated March 10, 2005 and medical reports dated March 14 and 16, 2005 which addressed his ability to return to work. A March 23, 2005 authorization for examination and/or treatment stated that he suffered from depression, neck stiffness and headaches due to the January 31, 2005 incident.

By decision dated March 31, 2005, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. It found the factual evidence of record insufficient to establish that the January 31, 2005 incident occurred at the time, place and in the manner alleged. The Office further found the medical evidence of record insufficient to establish that appellant sustained an injury caused by the alleged incident.

The Office received medical treatment notes dated February 10 to July 5, 2005 which addressed appellant's depression and insomnia problems.

By letter dated November 9, 2005, appellant requested reconsideration of the March 31, 2005 decision. He contended that on January 31, 2005 his life was threatened at work which constituted a crime. Appellant further contended that he was traumatized and suffered a breakdown due to this incident. He stated that Mr. Gavner's allegation that he was facing disciplinary action was irrelevant as his life was threatened. Appellant acknowledged that he had many opportunities to discuss the alleged incident, but failed to do so because his reaction to the incident was to suppress it and pretend that it never happened. He described his emotional and physical ailments resulting from the January 31, 2005 incident.

Appellant submitted a June 22, 2005 medical report of Dr. Horacio A. Capote, a Board-certified psychiatrist, who reviewed a history of the January 31, 2005 incident. Dr. Capote stated that appellant suffered from bipolar disorder, post-traumatic stress disorder, irritable bowel syndrome and severe stressors. A July 26, 2005 report of Dr. Joshua M. Usen, a family practitioner, stated that appellant sustained a post-traumatic stress reaction due to the January 31, 2005 incident.

In an August 22, 2005 letter, Ms. Niemiec stated that on January 31, 2005 appellant showed her the newspaper article. He appeared to be in shock. After reading the article, Ms. Niemiec took it to Mr. Gavner. She never heard another word about the article. Ms. Niemiec believed that it affected appellant's work performance a great deal.

By decision dated February 7, 2006, the Office denied modification of the March 31, 2005 decision. It found the factual evidence of record insufficient to establish that the January 31, 2005 incident occurred at the time, place and in the manner alleged.[1]

The Office received a March 28, 2006 report of Dr. Kristin Stievater Ahrens, a Board-certified psychiatrist, who stated that appellant's depressive disorder, not otherwise specified, was caused by a work-related stressor. Dr. Ahrens stated that his depression and secondary anxiety evolved over time which was the reason why he delayed seeking medical treatment.

By letter dated February 5, 2007, appellant, through his attorney, requested reconsideration of the February 7, 2006 decision. Counsel contended that appellant worked under extremely stressful conditions at the employing establishment from July 2004 through January 2005 during his attempt to improve operations. He was compelled to take warranted disciplinary action which was disliked by his subordinates. On January 31, 2005 appellant conducted meetings with his employees who were greatly displeased by his comments. When he returned to his desk, he discovered the newspaper clipping. Counsel noted appellant's and Ms. Niemiec's reaction to the article. She stated that Mr. Gavner did not take any action related to the article and no investigation was ever conducted. Counsel explained that appellant did not seek medical treatment until February 10, 2005 because his insight was impaired. It was not until he realized that he could not return to the workplace or sleep that he sought medical treatment. Counsel argued that the medical evidence of record established a causal relationship between appellant's emotional condition and the January 31, 2005 incident. She denied that he only filed a claim in response to being relocated. Counsel stated that Mr. Vaccaro never told

[1] In the February 7, 2006 decision, the Office also found that since appellant had not met his burden of proof to establish fact of injury, it was not necessary to discuss the probative value of the medical evidence of record.

appellant that the relocation was the result of disciplinary action. He was not unhappy about the transfer as he wished to go to a station that he was familiar with and he had requested a transfer in November 2004 due to a leg surgery. Counsel stated that appellant did not discuss personal issues including his chiropractic care during regular meetings at work.

Appellant submitted Dr. Usen's August 7 and September 7, 2006 reports. Dr. Usen stated that appellant continued to experience post-traumatic stress syndrome. In notes dated May 2 to November 30, 2006, he stated that appellant was totally disabled for work during intermittent periods from April 3, 2006 to January 5, 2007 due to his ongoing illness. In a June 6, 2006 report, Dr. Usen stated that appellant did not feel well enough to return to work in any capacity. He planned to release him to return to work on July 7, 2006.

By decision dated March 5, 2007, the Office denied appellant's request for reconsideration.[2] It found that the evidence submitted was either repetitive or not relevant and, thus, insufficient to warrant further merit review of its prior decisions.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5] 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.

ANALYSIS

By letter dated February 5, 2007, appellant disagreed with the Office's decisions, which denied his claim on the grounds that the fact of injury was not established, as the evidence of record did not establish that the January 31, 2005 incident occurred as alleged. The relevant issue in this case is the factual question of whether appellant has established that the claimed incident occurred as alleged.

In his request for reconsideration, appellant reiterated his previous contention that the January 31, 2005 incident involved a newspaper article he found on his desk about a supervisor

[2] The Office noted that a copy of the decision would not be mailed to appellant's attorney because there was no written notice provided by appellant appointing her as his representative before the Office.

[3] 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).

[4] 20 C.F.R. § 10.606(b)(1)-(2).

[5] *Id.* at § 10.607(a).

who was killed by a disgruntled employee. He contended that his emotional condition was not due to his relocation to another post office and that he did not delay seeking medical treatment. These allegations were previously considered and addressed by the Office. Therefore, they do not constitute relevant legal argument or relevant and pertinent evidence not previously considered by the Office.[6]

Dr. Ahrens' March 28, 2006 report stated that appellant's depressive disorder, not otherwise specified, was caused by a work-related stressor. Dr. Usen's reports advised that appellant continued to suffer from post-traumatic stress syndrome. On June 6, 2006 he opined that appellant was totally disabled for work until July 7, 2006. Dr. Usen also stated that appellant was totally disabled on intermittent dates from April 3, 2006 to January 5, 2007 due to an ongoing illness. The Office, however, is not required to consider medical evidence in an emotional condition case where no work factors have been established.[7] The reports and treatment notes of Dr. Ahrens and Dr. Usen, consequently, are not relevant to the underlying issue in this case, which is the factual question of whether appellant has established that the January 31, 2005 incident occurred as alleged.[8] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9]

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law; advancing a relevant legal argument not previously considered; or constituting relevant and pertinent new evidence not considered previously by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that his claim is not entitled to further merit review.[10]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

[6] *Patricia G. Aiken*, 57 ECAB 441 (2006).

[7] *See Richard Yadron*, 57 ECAB 207 (2005).

[8] Even assuming the newspaper clipping incident took place as alleged, it would not constitute a compensable factor of employment. *See Edye Ann Smith,* 49 ECAB 463 (1998) (a secretary who learned of the death of her children in the Murrah Federal Building bombing did not sustain an emotional condition arising in the performance of duty); *Carla E. Phillips,* 39 ECAB 1040 (1998) (a distribution clerk who learned of the murder of her husband did not sustain an emotional condition arising in the performance of duty). *Accord*, *Kathryn S. Graham,* 49 ECAB 458 (1998); *Gregory N. Waite,* 46 ECAB 662 (1995). *See also Richard L. Harris,* Docket No. 02-152 (issued May 2, 2002).

[9] *Patricia G. Aiken, supra* note 6.

[10] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board