

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

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**D.W., Appellant**

**and**

**U.S. POSTAL SERVICE, BOULDER  
VALMONT POST OFFICE, Boulder, CO,  
Employer**

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**Docket No. 08-1382  
Issued: January 6, 2009**

*Appearances:*  
*Appellant, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 9, 2008 appellant filed a timely appeal of a January 4, 2008 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition in the performance of duty and a March 25, 2008 nonmerit decision, denying his request for review of the written record by an Office hearing representative as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

**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 appellant's request for a review of the written record as untimely pursuant to 5 U.S.C. § 8124.

## **FACTUAL HISTORY**

On November 11, 2007 appellant, then a 60-year-old customer service supervisor, filed a traumatic injury claim alleging that on November 10, 2007 he became totally stressed out upon receipt of a letter from the Equal Employment Opportunity (EEO) Office of Dispute Resolution regarding the investigation into his harassment and discrimination claims which he alleged included statements from the employing establishment containing untruths. On November 23, 2007 the employing establishment controverted the claim as appellant was not at work when he received the letter and EEO activities are generally not compensable.

In a letter dated November 23, 2007, the employing establishment controverted the claim on the grounds that the injury was sustained while appellant was not at work and not performing any official duties at his home. It noted that appellant attributed his depression and stress to receipt of a letter at his home from the Colorado District EEO Office on his complaint.

By letter dated November 27, 2007, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It addressed the additional factual and medical evidence he needed to submit within 30 days to support his claim. Also on November 27, 2007 the Office requested that the employing establishment respond to appellant's allegations and provide a statement from a knowledgeable supervisor on the accuracy of appellant's statements regarding the alleged November 10, 2007 incident within 30 days.

On November 30, 2007 the Office received a November 24, 2007 letter from appellant noting his disagreement with the Office's statement that he had not established his claim as he had submitted a copy of the national EEO investigation. Appellant alleged that his supervisors and coworkers involved in the investigation lied and, as they are his immediate supervisors, he has established his claim. With his November 30, 2007 letter, appellant submitted a copy of the November 7, 2007 precomplaint counseling/final interview letter he had received on November 10, 2007, his November 9, 2007 response to allegations made against him in his EEO complaint and a November 12, 2007 disability slip by Dr. Sally C. Berger, a treating Board-certified family practitioner, indicating appellant could return to work on November 26, 2007.

On December 5, 2007 the Office received a November 26, 2007 disability slip by Dr. Berger. Subsequently, it received a November 26, 2007 report by Dr. Berger diagnosing work stress. Dr. Berger noted that appellant had previously been treated for job-related depression stress and that he saw her on November 12, 2007 for a recurrence of that condition. Appellant attributed his depression and stress to his belief that his job was threatened and his inability to "be productive at work under his present management." In concluding, Dr. Berger attributed appellant's current symptoms and mood to work stress and recommended he take "a leave of absence from work while he resolves the present difficulties."

On December 7, 2007 the Office received an undated letter from appellant responding to the Office's November 27, 2007 request for additional information. It reviewed the facts and the circumstances surrounding the November 10, 2007 incident.<sup>1</sup>

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<sup>1</sup> Appellant also included a description of the allegations contained in his EEO complaint, which are not part of this appeal.

Subsequently the Office received additional evidence from appellant regarding his EEO claim. The evidence included: appellant's November 12, 2007 response to allegations made against him in his EEO complaint; a December 21, 2007 memorandum regarding the expiration of his continuation of pay eligibility; a December 27, 2007 letter from the employing establishment challenging appellant's EEO allegations; a November 7, 2007 preletter from the EEO Office of Dispute Resolution; a December 17, 2007 letter and an undated response to appellant's EEO allegations from Joshua Fordham, appellant's supervisor; an undated response to appellant's EEO allegations by Keith Coleman, postmaster Boulder; an undated response to appellant's EEO allegations by Julie Shaffer, manager customer service operations, Denver west; an undated response to appellant's EEO allegations by Jarmin Smith, manager, post office operations (B); an undated response to appellant's EEO allegations by Jaime Osborne, manager, customer service services, Boulder Flatirons; an undated response to appellant's EEO allegations by Servo Garza, postmaster Grand Junction; an undated response to appellant's EEO allegations by Selwyn D. Epperson, district manager, customer service sales, Colorado/Wyoming district; an undated response to appellant's EEO allegations by Lee Carruthers, postmaster, Aurora; a December 20, 2007 by Dr. David R. Torres, a treating psychiatrist, diagnosing depression and noting appellant attributed his condition to age and sex discrimination by the employing establishment; disability notes dated November 12 and 26, 2007 by Dr. Berger.

By decision dated January 4, 2008, the Office denied the claim on the basis that appellant had not established a compensable factor of employment. Specifically, it found appellant's reaction to the November 7, 2007 EEO letter to be unrelated to his assigned duties.<sup>2</sup>

In a letter dated February 22, 2008 and postmarked February 28, 2008, appellant requested a review of the written record by an Office hearing representative.

By decision dated March 25, 2008, the Office denied appellant's request for a review of the written record by an Office hearing representative. It stated that his request was dated February 22, 2008 and postmarked February 23, 2008, which was more than 30 days after the issuance of the Office's January 4, 2008 decision, and that he was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

### **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.<sup>3</sup> There are situations where an injury or an

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<sup>2</sup> The Office adjudicated appellant's claim as a traumatic injury based on his claim form and initial allegation. A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(ee), (q); *Brady L. Fowler*, 44 ECAB 343, 351 (1992). The Board notes that appellant submitted evidence regarding his EEO claim of age and sex discrimination, which occurred over more than one day. Appellant is not precluded from filing an occupational disease claim based on his EEO allegations of age and sex discrimination.

<sup>3</sup> *L.D.*, 58 ECAB \_\_\_\_ (Docket No. 06-1627, issued February 8, 2007).

illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.<sup>7</sup> However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.<sup>8</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>9</sup>

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 factors of employment and may not be considered.<sup>10</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.<sup>11</sup> 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.<sup>12</sup>

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<sup>4</sup> A.K., 58 ECAB \_\_\_\_ (Docket No. 06-626, issued October 17, 2006).

<sup>5</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>6</sup> *J.F.*, 59 ECAB \_\_\_\_ (Docket No. 07-308, issued January 25, 2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>7</sup> See *K.W.*, 59 ECAB \_\_\_\_ (Docket No. 07-1669, issued December 13, 2007); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>8</sup> See *M.D.*, 59 ECAB \_\_\_\_ (Docket No. 07-908, issued November 19, 2007); *William H. Fortner*, 49 ECAB 324 (1998).

<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>10</sup> *D.L.*, 58 ECAB \_\_\_\_ (Docket No. 06-2018, issued December 12, 2006).

<sup>11</sup> *K.W.*, *supra* note 7.

<sup>12</sup> *Robert Breeden*, 57 ECAB 622 (2006).

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment. At the time he filed his compensation claim, he attributed his stress to the receipt of letter while he was at home from the EEO Office of Dispute Resolution regarding the investigation into his harassment and discrimination claims which he alleged included statements from the employing establishment containing lies. An employee's emotional reaction to an administrative or personnel matter is generally not covered by workers' compensation.<sup>13</sup> However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>14</sup> The Board finds that appellant has not provided any evidence establishing error or abuse by the employing establishment with respect to the November 7, 2007 EEO letter.<sup>15</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.<sup>16</sup> A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<sup>17</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>18</sup> In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's request dated February 22, 2008 and postmarked February 23, 2008, for review of the written record by an Office hearing representative was made more than 30 days after the date of issuance of the Office's prior decision dated January 4, 2008 and, thus, appellant was not entitled to a review of the written record as a matter of right. He requested a review of the record by an Office hearing representative in a letter dated February 22, 2008 and postmarked February 23, 2008. Hence, the Board finds that the Office properly denied appellant's request for a review of the written record as a matter of right because his request for a

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<sup>13</sup> *L.S.*, 58 ECAB \_\_\_\_ (Docket No. 06-1808, issued December 29, 2006).

<sup>14</sup> *Jeral R. Gray*, 57 ECAB 611 (2006).

<sup>15</sup> As appellant has not established a compensable work factor, it is not necessary to address the medical evidence. *T.G.*, 58 ECAB \_\_\_\_ (Docket No. 06-1411, issued November 28, 2006); *Barbara J. Latham*, 53 ECAB 316 (2002).

<sup>16</sup> 5 U.S.C. § 812(b)(2). See *A.B.*, 58 ECAB \_\_\_\_ (Docket No. 07-387, issued June 4, 2007).

<sup>17</sup> 20 C.F.R. § 10.616(b).

<sup>18</sup> *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>19</sup> *Teresa M. Valle*, 57 ECAB 542 (2006).

review of the written record was not made within 30 days of the Office's January 4, 2008 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its March 25, 2008 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that his claim could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>20</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

### **CONCLUSION**

The Board finds appellant has not met his burden of proof that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied his request for an oral hearing as untimely.

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<sup>20</sup> *Teresa M. Valle, supra* note 19; *Daniel J. Perea*, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 25 and January 4, 2008 and are affirmed.

Issued: January 6, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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