

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REUBEN R. ROWAN and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, AIR TRAFFIC CONTROL CENTER,
Olathe, Kans.

*Docket No. 96-953; Submitted on the Record;
Issued May 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the refusal by the Office of Workers' Compensation Programs to reopen appellant's claim for further review under 5 U.S.C. § 8128 constituted an abuse of discretion.

Appellant, an air traffic assistant, filed a claim for a rise in blood pressure, heart palpitations, and anxiety and insomnia, following a meeting at work on February 19, 1993. Appellant did not return to work following the meeting, and he obtained treatment with a family practitioner, together with subsequent psychological treatment. Appellant felt unfairly treated by both the actual comments and criticisms of his coworkers at the meeting and by the manner in which the meeting was conducted. Appellant particularly objected to being singled out in the agenda, which was both posted and handed out, as the person responsible for interpersonal conflict under one of the items for discussion. Subsequently, appellant identified further problems at his employment beginning in mid-December 1992 with interpersonal conflicts with the area manager, Mr. John Bing.

Appellant was informed by the employing establishment that he was reassigned to the processing center, but did not return to work since he objected to the amount of standing involved in the new assignment.¹ He submitted a report from his podiatrist to support his claim that he could not perform the duties of the new assignment. Although appellant was released by his family practitioner to return to work in mid-August 1993, he was terminated from the employing establishment effective July 14, 1993.

Following receipt of information from the employing establishment, the Office found that the employing establishment did not err or act abusively in the administration of personnel

¹ The record indicates that appellant was transferred to another job because of reports that he carried a microphone. Appellant disputed the charges. He noted later that the employing establishment had indicated that once the investigations and grievances were settled, it would consider placing appellant into his former work unit.

matters, including the meeting, which it found was voluntary and not part of appellant's required duties.²

Through an oral hearing scheduled April 20, 1994, appellant submitted additional information contending that while other employees were not directed to attend the meeting, he was directed to attend the meeting. In addition, he submitted a witness statement pertaining to a discussion held at a meeting after appellant's departure, with an inquiry into how everyone was doing in the unit since appellant was no longer there. Appellant submitted a statement from another witness who stated that he overheard an area manager use profanity when referring to appellant and threaten that he would never get out of that unit. Appellant also cited to incidents occurring before mid-December 1992, including an incident when a coworker used profanity with him and called him a "dumb f..." He testified that while he was under the supervision of Mr. Bing since 1991, he believed the occurrences of daily harassment began in mid-December 1992 as a result of the grievances he had filed. Appellant described the meeting in February 1993 and his reaction to the perception that his grievances were interrupting work and causing problems in the office. He felt that as other individuals caused problems in the office, it was unjustifiable to target him as the cause of the morale problem. Appellant contested the statements made by the employing establishment that he agreed not to take action by filing a grievance about things said in the meeting.

The employing establishment responded with a statement from its representative and signed affidavits from supervisors, who contended that appellant was not the sole reason for the meeting and indicated that the staff psychologist who ran the meeting, was consulted to chair such meetings where the employing establishment felt the circumstances warranted such intervention. The employing establishment did not deny appellant's claim that he was not the only one listed on the agenda under "interpersonal conflicts" but highlighted that others were discussed as well when this topic was addressed.

Appellant responded to the statements of the employing establishment by highlighting the perceptions he felt that he was singled out and required to attend because of the intent to single him out as the cause of the problems at the office.

By decision dated August 4, 1994, an Office hearing representative reviewed the evidence and found that while the meeting was part of appellant's duties, there was no evidence to establish abuse on the part of the coworkers or management. The Office hearing representative addressed appellant's complaints concerning his work environment prior to mid-December 1992, including the incidents with coworkers and his frustrations with lack of promotions or training opportunities. The Office hearing representative addressed the events after December 1992, including the meeting held in February 1993 and the subsequent termination of appellant from the employing establishment. The Office hearing representative

² The employing establishment's statements referred to two other individuals whose conduct was discussed under the "interpersonal conflict" part of the meeting. The statements described the purpose of the meeting and the perception in the office that appellant's actions were having an adverse effect on the unit. The notice of the meeting indicated that it was appreciated that all eight employees in the unit would attend. Appellant contested certain statements of the employing establishment, including the statement that conduct of others was on the agenda. He noted that the conduct of the other employees was added during the meeting.

found that the evidence submitted did not support appellant's claim that the meeting was a "tool for additional intimidation and harassment."

By letter dated July 18, 1995, appellant through his representative, requested reconsideration, alleging that in fact the meeting and the manner in which the meeting was held was abusive. Appellant's representative cited to Board precedent relating to conflicts with supervisors, which were found to be compensable and maintained that harassment did not need to be documented or established as long as there was a causal relationship between the perceived harassment and the work duties. Appellant's representative also cited to Board precedent involving public criticism by a supervisor and other incidents of harassment by coworkers.

By decision dated November 3, 1995, the Office denied a review of the merits of appellant's claim on the grounds that the evidence submitted was repetitious and insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the Office's November 3, 1995 decision, which denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a). Since more than one year elapsed between the date of the Office's hearing representative decision on August 4, 1994 and the date of appellant's appeal on January 31, 1996, the Board lacks jurisdiction to review the August 4, 1994 decision, or the earlier decision dated October 22, 1993.³

The Board finds that the refusal by the Office to reopen appellant's claim for further review under 5 U.S.C. § 8128 did not constitute an abuse of discretion.

Section 8128(a) of the Federal Employee's Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.⁵ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁶ When 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.⁷ 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.⁸ Evidence that does not address the particular issue involved also does not constitute a basis for

³ 20 C.F.R. § 501.3(d) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office.

⁴ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ 20 C.F.R. § 10.138(b)(1).

⁷ *Id.* at § 10.138(b)(2).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

reopening a case.⁹ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁰

In requesting reconsideration, appellant's representative cited prior Board precedent to support his contention that perceptions of harassment alone suffice and that the meeting was conducted in an abusive manner, to constitute a compensable basis for compensation. The Board finds appellant's arguments unpersuasive. While the cases he mentioned highlighted the requirement that the emotional condition be related to specific job duties or requirements, the Board has long held that harassment alleged but not substantiated does not constitute a compensable factor of employment.¹¹ Appellant has not submitted any evidence with his request for reconsideration to show that, in fact, that he was treated abusively. While he restated his contention that the listing of his name on the agenda for discussion was abusive, the Office determined that the employing establishment had appropriately explained the basis for the meeting and the manner in which it was conducted. Appellant submitted no further evidence to establish his claim for abuse and harassment not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated November 3, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 22, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁰ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

¹¹ *Anna C. Leanza*, 48 ECAB ____ (Docket No. 95-2598, issued October 1, 1996); *Elizabeth Pinero*, 46 ECAB 123 (1994); *Norman A. Harris*, 42 ECAB 923 (1991); *Delores F. Ximinez*, 29 ECAB 929 (1978).