

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN K. THOMAS and U.S. POSTAL SERVICE,
VEHICLE MAINTENANCE FACILITY, Pontiac, Mich.

*Docket No. 97-888; Submitted on the Record;
Issued November 18, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's requests for an oral hearing as untimely filed.

The Board has carefully reviewed the record evidence and finds that appellant has failed to meet her burden of proof in establishing that her emotional condition was caused by work factors and that the Office properly denied appellant's hearing requests.

The Federal Employees' Compensation Act¹ is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.² The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.³ Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such a hearing as a matter of right unless his or her request is made within the requisite 30 days.⁴

The regulation implementing section 8124(b)(1) is clear that a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision.⁵

¹ 5 U.S.C. §§ 8101-8193 (1974).

² 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ____ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

³ *Eileen A. Nelson*, 46 ECAB 377, 379 (Docket No. 93-1384, issued December 27, 1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

⁴ *William F. Osborne*, 46 ECAB 198, 202 (1994).

⁵ *Coral Falcon*, 43 *supra* note 2.

Section 10.131(a) is equally clear that the date on which the request is deemed “made” should be “determined by the postmark of the request,” rather than any other date.⁶

The Office’s procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.⁷ The Board has held that the only limitation on the Office’s authority is reasonableness,⁸ and that 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 deductions from known facts.⁹

In this case, the Office issued its decision denying the claim on July 12, 1995. Attached to the decision was a statement outlining appellant’s options regarding her appeal rights. This document clearly indicates that a request for an oral hearing “must be made in writing, within 30 days after the date of this decision as determined by the postmark of your letter.”

Thus, the 30th day after the July 12, 1995 decision was August 11, 1995. Appellant requested an oral hearing in a letter dated August 15, 1995. The envelope containing the letter was postmarked August 16, 1995. The record also contains a memorandum of appellant’s telephone conversation with the Office on July 25, 1995 during which the claims examiner explained appellant’s right to request an oral hearing. Inasmuch as appellant’s letter was postmarked August 16, 1996, 5 days after the 30-day limit, appellant was not entitled to a hearing as a matter of right.

In a letter dated September 28, 1995, appellant argued that the 30-day time limit should be waived because the July 12, 1995 decision was not mailed until July 18, 1995. However, the appeals statement reiterates that a request for a hearing, reconsideration, or Board review must be made within the appropriate number of days “of the date of this decision.” The Office’s December 13, 1995 letter explained to appellant that the decision date was controlling and that her request for a hearing was untimely.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.¹⁰ Here, the Office informed appellant in its September 13, 1995 decision, that it had considered the timeliness matter in relation to the issue involved and denied appellant’s hearing request on the basis that additional evidence on whether

⁶ *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

⁷ *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

⁸ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

⁹ *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

¹⁰ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

her emotional condition was sustained in the performance of duty could be fully considered through a request for reconsideration.

Nothing in the record indicates that the Office committed any act in denying appellant's hearing request, which could be found to be an abuse of discretion. Further, appellant was personally advised of her right to an oral hearing at least 2 weeks prior to the 30-day deadline. She was also informed that she could request reconsideration and submit evidence in support of her assertion that specific work factors caused her emotional condition. Finally, appellant has offered no explanation for her untimely request or any argument to justify further discretionary review by the Office.¹¹ Thus, the Board finds that the Office properly denied appellant's request for a hearing.

Under the Act,¹² appellant also 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. To establish that she 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 her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹³

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.¹⁴ There are distinctions regarding the type of work situation giving rise to an emotional condition, which will be covered under the Act.

For example, disability resulting from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employing establishment is covered.¹⁵ However, an employee's emotional reaction to an administrative or personnel matter is generally not covered,¹⁶ and disabling conditions caused by an employee's fear of termination or frustration from lack of promotion are not compensable. In such cases, the employee's feelings are self-generated in that they are not related to assigned duties.¹⁷

Nonetheless, if the evidence demonstrates that the employing establishment erred or acted abusively or unreasonably in the administration of a personnel matter, any physical or

¹¹ Cf. *Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

¹² 5 U.S.C. §§ 8101-8193 (1974).

¹³ *Vaile F. Walders*, 46 ECAB 822, 825 (1995).

¹⁴ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

¹⁵ *Jose L. Gonzalez-Garced*, 46 ECAB 559, 563 (1995).

¹⁶ *Sharon J. McIntosh*, 47 ECAB ____ (Docket No. 94-1777, issued August 28, 1996).

¹⁷ *Barbara E. Hamm*, 45 ECAB 843, 850 (1994).

emotional condition arising in reaction to such error or abuse may be covered.¹⁸ However, a claimant must support her allegations with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁹

The initial question is whether appellant has alleged compensable employment factors as contributing to her condition.²⁰ Thus, part of appellant's burden of proof includes the submission of a detailed description of the specific employment factors or incidents, which appellant believes caused or adversely affected the condition for which she claims compensation.²¹ If appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.²²

In this case, appellant, then a 38-year-old general clerk, filed a notice of occupational disease on December 19, 1994, claiming that workplace stress had affected her mental condition. Appellant explained that her problems began in January 1994 when she found a racially offensive photograph in a co-worker's desk where she had been assigned while he was on vacation.²³ Appellant identified her difficulties in working with another clerk in her office and the lack of "equitable administrative support" and "sound managerial judgment" she found.

Appellant filed grievances on October 11 and 26, 1994 regarding a supervisor's discussion of a grievance and an alleged failure by management to "do anything" to white employees with whom appellant was unable to work. Appellant also filed a complaint with the Equal Employment Opportunity Commission (EEOC). Appellant stopped work on December 14, 1994. Appellant also submitted statements from three co-workers.

In response to the Office's letter, the employing establishment submitted the report of a climate assessment survey and statements from the employees named in appellant's charges.

On July 12, 1995 the Office denied the claim on the grounds that the work events alleged as taking place prior to December 14, 1994 were not established as arising out of the performance of duty. The Office found that appellant's reactions to incidents at work were generally self-generated and thus not compensable work factors under the Act.

In a letter dated November 6, 1995, appellant pointed out what she called misunderstandings in the decision. Subsequently, she requested reconsideration, which was denied on April 8, 1996 as insufficient to warrant modification of the prior decision.

¹⁸ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

¹⁹ *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

²⁰ *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

²¹ *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

²² *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

²³ The photograph was of three white men in business dress shown in a typical stand-up pose. The men on the left and right were congratulating the man in the middle who was holding an award plaque. Over his face had been pasted the smiling face of a black man.

On June 5, 1996 appellant again requested reconsideration, which was denied on August 2, 1996 on the same grounds. Appellant's October 14, 1996 request for reconsideration was denied on October 29, 1996 on the grounds that the evidence she submitted in support was insufficient to warrant review of the prior decision.²⁴

The Board finds that appellant has identified no compensable work factors that are substantiated by the record and has failed to establish that the employing establishment either erred or acted abusively or unreasonably in the administration of personnel matters.

First, appellant's reaction to a photograph she inadvertently found in a co-worker's desk is not work related in that she was not assigned to search the desk. Nor was the alleged photograph directed at her specifically. Her wish that a co-worker should not possess such a photograph or should apologize publicly is not a requirement of federal employment.²⁵ Further, appellant has not shown that management erred or acted abusively or unreasonably in deciding to do nothing about the photograph.²⁶ Therefore, this incident is not established as a work factor.

Second, appellant's allegations that certain named co-workers engaged in harassment and discrimination by failing to speak to her, slamming the break room door in her face, locking the door to the body shop, leaving footprints on her shop coat, stealing her food from the refrigerator and putting two screws in her car's tire, are not established as factual. Appellant submitted statements from three co-workers in support of her allegations, but these people merely reiterated what they had heard and none stated that they had witnessed any specific incidents alleged by appellant or had first-hand knowledge of her charges.

Moreover, all the co-workers and supervisors accused by appellant either refuted her statements outright or reasonably explained the situations she described. The grievances appellant filed were settled "without precedence." While appellant succeeded in her objectives - management implemented a discrimination training session and had a climate assessment survey done, these actions are administrative functions and not work related.²⁷ Finally, appellant's EEO complaint was accepted for investigation but the outcome is not part of the record.²⁸

²⁴ The Office explained that appellant appeared to be claiming new, additional periods of temporary total disability since she returned to work on January 6, 1995 and thus might have the basis for filing a new claim. The present case, now on appeal before the Board, was confined to job stress alleged in 1994.

²⁵ See *Mary A. Sisneros*, 46 ECAB 155, 162 (1994) (finding that appellant's perceptions of an unsympathetic atmosphere in the workplace were largely self-generated and thus not covered under the Act).

²⁶ See *Effie O. Morris*, 44 ECAB 470, 473 (1993) (finding that appellant's assertions that the employing establishment erred or acted abusively in administering personnel matters were unsupported by any evidence).

²⁷ See *Merriett J. Kauffman*, 45 ECAB 696, 703 (1994) (finding that appellant failed to allege or establish that specific work tasks or requirements assigned to him gave rise to his emotional condition).

²⁸ See *Eileen P. Corigliano*, 45 ECAB 581, 585 (1994) (finding that the stress caused by the filing and processing of EEO complaints was not compensable).

Third, the evidence appellant submitted in support of reconsideration detailed her personal interactions with a co-worker, her details to another facility and the change in her hours. However, appellant's personal relationship with a fellow clerk is not work related in that this clerk had no supervisory authority.²⁹

The details and change in hours occurred after appellant returned to work on January 6, 1995 and are, therefore, irrelevant to this claim. Similarly, the photographic incident on March 27, 1996, the listed comments she overheard since returning to work, the alleged rumor following her return from vacation, her complaints about the office supplies and procedures and her personal interactions with co-workers do not relate to the incidents she alleged as occurring in 1994.

In sum, appellant has made numerous charges of intimidation, discrimination and harassment at work, which she feels exacerbated her underlying mental disorder. However, she has not provided independent corroboration of her allegations or submitted probative evidence that her supervisors erred or acted unreasonably in any of the 1994 incidents. Therefore, the Board finds that the Office properly denied her claim.³⁰

²⁹ See *Janet Hudson-Dailey*, 45 ECAB 435, 438 (1994) (finding that nothing in the record indicated that work contributed to or facilitated the dispute between appellant and a co-worker, which arose out of their personal relationship); cf. *Jean A. Klinchak*, 43 ECAB 1138, 1142 (1992) (remanding the case to clarify whether one of the causes of an altercation at work arose out of an employment factor -- the employing establishment's search of a co-worker's car for drugs).

³⁰ See *Alberta Kinloch-Wright*, 48 ECAB ____ (Docket No. 95-1254, issued April 23, 1997) (finding that appellant's own perceptions of harassment and hostility from her supervisor were neither specific nor independently corroborated and were therefore not compensable under the Act; *Sandra F. Powell*, 45 ECAB 877, 886 (1994) (finding that an employee's mere perception of harassment or discrimination was not compensable); *Chester R. Henderson*, 42 ECAB 352, 359 (1991) (finding that appellant's mere allegation of harassment, without any witness' statement in support, was insufficient to establish that actual harassment had occurred).

The October 29, August 2 and April 8, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 18, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member