

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN A. CARMAN and DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, Otay Mesa, Calif.

*Docket No. 97-1754; Submitted on the Record;
Issued April 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an emotional condition while in the performance of duty.

The Board finds that the evidence of record is insufficient to establish that appellant sustained an emotional condition while in the performance of duty.

On July 12, 1996 appellant filed a claim asserting that he suffered extreme stress as a result of retaliation for his making protected disclosures against his employer and manager. The Office of Workers' Compensation Programs denied his claim in a decision dated January 9, 1997. On February 5, 1997 the Office denied his request for a review of the merits of his claim. Appellant appealed to the Board on April 23, 1997.

In its January 9, 1997 decision, the Office found that 11 of the incidents implicated by appellant were not accepted as factual because he provided insufficient detail to substantiate that the incidents occurred at the time, place and in the manner alleged. Appellant either failed to explain when the incidents occurred, failed to identify who told him the information in question, failed to describe the nature or circumstances of the situation or failed to provide witness statements.

An individual seeking benefits under the Federal Employees' Compensation Act¹ (Act) has the burden of establishing the essential elements of his claim,² including that the incidents alleged occurred at the time, place and in the manner alleged. With respect to these 11 incidents, appellant has not established a factual basis for his claim by substantiating his allegations with probative and reliable evidence. The Office, therefore, properly found that these incidents were not accepted as factual.

¹ 5 U.S.C. §§ 8101-8193.

² See *Margaret A. Donnelley*, 15 ECAB 40 (1963).

The Office did accept the remaining seven incidents as factual.³ These incidents include the following:

“(1) After sustaining an on-the-job injury on February 2, 1995 that prevented him from performing certain duties and working in certain locations, appellant was prevented from working in a light-duty position and ordered to stay home by the managers against whom he made reports for illegal activity. Appellant felt that he was not given the choice of light duty because of his whistle blowing activities.

“(2) While receiving compensation for wage loss from March through November 1995, appellant was offered a reassignment to an import specialist position. He accepted the offer against his will and under duress of being separated. Appellant protested this administrative action through the Equal Employment Opportunity Commission (EEOC) and Merit System Protection Board (MSPB). Appellant had no background or desire to perform the duties of an import specialist.

“(3) Appellant has been removed from his former accesses in the computer, which hinders his regular maintenance of lookouts in the system.

“(4) Appellant was ordered to turn in his badge and credentials when he was reassigned.

“(5) Appellant was not allowed to carry a firearm at work.

“(6) Appellant had information removed from his access by customs.

“(7) On October 8, 1996 appellant was instructed to attend a training session. He voiced his concern that he was not feeling well and would have to leave the class if he got worse. He felt that he was being ordered to do something outside of his abilities as his medical condition worsened. He felt that he had a right to leave when he thought he was going to be sick.”

As the Office observed, with respect to these incidents, appellant was not reacting to his assigned work duties but to administrative or personnel matters within the discretion of the employing establishment. As the Board observed in the case of *Lillian Cutler*,⁴ workers' compensation law does not cover each and every illness that is somehow related to one's employment. When an employee experiences emotional stress in carrying out his employment duties, or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his emotional reaction to

³ The Board notes that the Office included in this finding one incident it did not accept as factual, namely, that appellant felt that he was being overloaded with work. As the Office specifically found that appellant failed to provide details of specific incidents of being overworked, it is apparent that the Office did not accept this incident as factual.

⁴ 28 ECAB 125, 129-31 (1976).

a special assignment or requirement imposed by the employing establishment or by the nature of his work. On the other hand, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from 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.

The Board has held that emotional reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably. The Board has also generally held that allegations alone by a claimant are insufficient without evidence corroborating the allegations.⁵ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁶

Appellant has failed to substantiate that the employing establishment's decision not to offer light duty and its later offer of a reassignment to an import specialist position constituted retaliation for his whistle-blowing activities. Though he has sought relief from the EEOC and MSPB, he has submitted no finding or favorable decision from these agencies to support that the employing establishment erred or acted abusively in their actions. Nor has appellant submitted probative and reliable evidence to establish error or abuse by the employing establishment in such administrative matters as removing his computer access, requiring him to turn in his badge and credentials upon reassignment, not allowing him to carry a firearm, removing information from his access or instructing him to attend a training session. Without such evidence, appellant's emotional reaction to such administrative actions falls outside the scope of coverage of the Act.

The Board also finds that the Office properly denied appellant's January 16, 1997 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides 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.⁷ Section 10.138(b)(2) provides that when an 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.⁸ Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for

⁵ *Joe E. Hendricks*, 43 ECAB 850, 857-58 (1992).

⁶ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991).

⁷ 20 C.F.R. § 10.138(b)(1).

⁸ *Id.* § 10.138(b)(2).

reopening a case.⁹ Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.¹⁰

In his January 16, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or a fact not previously considered by the Office. Instead, he reiterated his position that the employing establishment retaliated against him and that he experienced severe job stress as a result. To support this, appellant submitted medical documentation from his attending psychiatrist, Dr. Mark Zweifach. This evidence, however, is irrelevant. The Office did not deny appellant's claim on the insufficiency of any of the medical evidence submitted to support the claim. Indeed, the Office did not reach the medical issue of causal relationship because it found that appellant had not yet established a factual basis for his claim. Before the psychiatrist may effectively address whether appellant's diagnosed condition is causally related to compensable factors of employment, appellant must submit probative and reliable evidence of error or abuse by the employing establishment in implicated administrative or personnel matters.¹¹

As appellant's request for reconsideration did not meet at least one of the requirements for obtaining a merit review of his claim, the Board finds that the Office did not abuse its discretion in denying his request.

The February 5 and January 9, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 8, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁹ *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

¹⁰ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹¹ The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, has no jurisdiction to review new evidence on appeal.