

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAY R. CALDERON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Tempe, Ariz.

*Docket No. 97-837; Submitted on the Record;
Issued February 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are whether appellant established that he sustained an emotional condition in the performance of duty and whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing as untimely filed.

On April 2, 1996 appellant, then a 52-year-old postmaster, filed a notice of occupational disease, claiming that his anxiety attacks and stress resulted from being placed on administrative leave on December 20, 1995 while allegations of sexual harassment against him were investigated. In support of his claim, appellant stated that since October 1992 a "core group of letter carriers" had continually harassed and belittled him because of administrative decisions he had made.

Appellant also submitted a July 8, 1996 report from Dr. Franklin M. Berry, a licensed clinical psychologist, who stated that appellant's diagnosed adjustment disorder was "directly related" to his employment, specifically his three-month absence from his position on administrative leave while allegations of sexual abuse were investigated by the employing establishment. Dr. Berry opined that being relieved of his duties caused appellant's "intense mixed emotions (anger, frustration, anxiety and depressed mood), and even when exonerated fully, appellant received "some sort of letter of reprimand," which he considered a "blemish" on his otherwise exemplary career.

On July 19, 1996 the Office denied appellant's claim on the grounds that appellant's psychological condition was not sustained in the performance of duty. On August 20, 1996 appellant requested an oral hearing. On September 23, 1996 the Office denied appellant's request as untimely filed.

The Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing as untimely filed.

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 hearing as a matter of right unless his or her request is made within the requisite 30 days.⁴

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.⁵ The Board has held that the only limitation on the Office's authority is reasonableness,⁶ 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.⁷

In this case, the Office issued its decision denying the claim on July 19, 1996. Attached to the decision was a statement outlining appellant's options regarding his 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 19, 1996 decision was August 18, 1996. This day was a Sunday, so appellant's letter needed to be postmarked no later than August 19, 1996, the following day. Inasmuch as appellant's letter was postmarked August 20, 1996, one day after the 30-day limit, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.⁸ Here, the Office informed appellant in its September 23, 1996 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 appellant's emotional condition was caused by his employment could be fully considered through a request for reconsideration.

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 (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 *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).

⁶ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

⁷ *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

⁸ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

In this case, 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 advised that he could request reconsideration and submit evidence in support of his assertion that his emotional condition was causally related to work factors. Finally, appellant has offered no explanation for the untimely request or any argument to justify further discretionary review by the Office.⁹ Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

Under the Act, appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her 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.¹⁰

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.¹¹ 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.¹² However, an employee's emotional reaction to an administrative or personnel matter is generally not covered,¹³ 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.¹⁴

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 emotional condition arising in reaction to such error or abuse may be covered.¹⁵ However, a

⁹ 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).

¹⁰ *Vaile F. Walders*, 46 ECAB 822, 825 (1995).

¹¹ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

¹² *Jose L. Gonzalez-Garced*, 46 ECAB 559, 563 (1995).

¹³ *Sharon J. McIntosh*, 47 ECAB 754 (1996).

¹⁴ *Barbara E. Hamm*, 45 ECAB 843, 850 (1994).

¹⁵ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

claimant must support his allegations with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁶

The initial question is whether appellant has alleged compensable employment factors as contributing to his condition.¹⁷ 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 he claims compensation.¹⁸ If appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.¹⁹

In this case, appellant alleges that he sustained an emotional condition as a result of an investigation into charges of sexual harassment against him, which was caused by appellant's administrative changes as postmaster. Appellant related several incidents of harassment from employees -- he received a postcard on September 16, 1995 wishing him a happy anniversary of his wife's death, and after a meeting one of his employees stated publicly that appellant's present wife should be advised not to go in the garage (where appellant found his first wife dead). Appellant added that after the sexual harassment investigation was concluded, articles and cartoons in the union newspaper ridiculed and threatened him and another supervisor in retaliation.

The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered factors of employment under the terms of the Act. For harassment or retaliation to give rise to a compensable disability, there must be evidence that harassment or retaliation did in fact occur -- mere perceptions of harassment or retaliation are not compensable.²⁰ While appellant has submitted a copy of a personally offensive postcard and was subjected to an employee's inappropriate remark, appellant has submitted no evidence that the employing establishment either harassed him or retaliated against him in any way or that this harassment was work related. Therefore, these incidents, while regrettable, cannot be considered compensable work factors.²¹

Finally, regarding appellant's allegations that the three-month investigation of him was beyond the normal time frame and that the incident caused a tremendous strain on his health, leaving psychological scars, the Board finds that these allegations do not constitute compensable factors of employment under the Act.

¹⁶ *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

¹⁷ *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

¹⁸ *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹⁹ *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

²⁰ 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).

²¹ 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).

The employing establishment retains the right to conduct investigations if wrongdoing is suspected or as part of an evaluation process.²² Generally, investigations are related to the performance of an administrative function of the employer and are not compensable factors of employment unless there is affirmative evidence that the employer either erred or acted abusively in the administration of the matter.²³ In this case, appellant has not submitted the corroborating evidence necessary to establish that the sexual harassment investigation was delayed or prolonged or that the employing establishment erred or acted abusively in conducting the investigation. Thus, there is no evidence of record to establish error or abuse on the part of the employing establishment.

Inasmuch as appellant has not established any compensable work factors under the Act, the Board need not consider the medical evidence.²⁴

The September 23 and July 19, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 17, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

²² *Larry J. Thomas*, 44 ECAB 291, 300 (1992).

²³ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

²⁴ *See Dinna M. Ramirez*, 48 ECAB ____ (Docket No. 94-2062, issued January 17, 1997) (finding that the Board need not consider psychiatric evidence because appellant failed to establish that the employing establishment acted abusively in denying her request for official time).