

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN D. SAVAGE and U.S. POSTAL SERVICE,
POST OFFICE, Ashland, Ky.

*Docket No. 97-2183; Submitted on the Record;
Issued July 14, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs' denial of merit review in relation to appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act constituted an abuse of discretion.

On November 7, 1995 appellant, then a 53-year-old distribution clerk, filed an occupational disease claim, alleging that he sustained stress and depression which began October 7, 1995 and was causally related to his federal employment. Appellant ceased work after May 1990 due to a work-related injury to his neck and right shoulder (Office claim number A6-507166) and was receiving compensation for temporary total disability at the time he filed his occupational disease claim. In a supplemental statement appellant alleged the following as causative factors of his claimed stress and depression: while he was off work after May 1990 due to his employment-related disability, the employing establishment failed to offer him modified duty that he was capable of performing; the employing establishment misrepresented his situation and caused him to have a delay in receiving compensation and then interfered with his compensation after it was awarded, he was asked to leave the employing establishment when he went to file paperwork on two separate occasions; and he encountered difficulty in getting his sick and annual leave restored. At his hearing, appellant's wife testified that appellant was also subjected to stress due to the employing establishment's placement of two management people ahead of him on the seniority list.

In a decision dated March 7, 1996, the Office denied appellant's claim on the grounds that he failed to establish that he sustained an emotional condition while in the performance of duty. By decision dated October 4, 1996 and finalized October 7, 1996, an Office hearing representative affirmed the March 7, 1996 decision of the Office. In a decision dated March 18, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant merit review of the prior decision.

The Board has duly reviewed the case record on appeal and finds that appellant has not established that he sustained an emotional condition while in the performance of duty.¹

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment contributing to his condition. Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.² When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.³ In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.⁴

In the present case, appellant has alleged that he was harassed by the employing establishment after May 1990 by actions it took in relation to his approved work-related injury to his neck and right shoulder. Specifically, appellant has alleged that the employing establishment caused a delay in his receipt of workers' compensation benefits, that the employing establishment provided false information which resulted in an improper termination of his workers' compensation benefits, that the employing establishment repeatedly refused his requests for light-duty work and then offered him a position which was beyond his physical capabilities, that the employing establishment failed to restore his annual and sick leave, as requested and that the employing establishment had him removed from the premises on two occasions which caused him embarrassment. Actions by coworkers or supervisors that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on June 16, 1997 the only decisions before the Board are the Office's October 4, 1996 and March 18, 1997 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985).

⁴ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

and out of the performance of duty.⁵ Mere perceptions or feelings of harassment, however, are not compensable. To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.⁶ Appellant failed to provide any such probative and reliable evidence in the instant case. Initially it is noted that appellant made several allegations regarding the employing establishment's role in filing his prior workers' compensation claim of May 1990 and regarding the restoration of annual and sick leave after that claim had been accepted. However, any stress appellant sustained in relation to the delay of the award in his May 1990 claim or restoration of leave in relation to that claim is not compensable under the Act as the processing of a workers' compensation claim does not fall within the scope of appellant's employment duties.

A review of the record does establish that appellant requested a light-duty assignment on several occasions between March 1992 and April 1995. It is noted that with the exception of a limited-duty position which the employing establishment offered appellant in July 1994, the employing establishment refused all of appellant's requests to return to work on the grounds that he was not found fit for duty by the employing establishment's physicians. The employing establishment's refusal to return appellant to work is deemed an administrative/personnel matter and thus is not compensable under the Act as appellant has not established that the employing establishment erred or acted abusively.⁷ Similarly, although an Office hearing representative reversed the Office's termination of benefits under section 8106 of the Act in relation to the employing establishment's offer of a limited-duty assignment in July 1994, this reversal was based on the Office's failure to follow the appropriate procedure prior to terminating appellant's compensation and not error or abuse by the employing establishment. Appellant also has not provided sufficient factual information concerning his removal from the employing establishment premises to establish that this action was inappropriate or constituted harassment. Thus, this is not a compensable factor under the Act.

The final contention raised by appellant at the hearing is that the employing establishment improperly placed two management persons into full-time regular clerk craft positions which gave them seniority over appellant. A grievance was filed in relation to this action which was ultimately settled on January 22, 1993. The parties agreed to the following:

"The two senior PTF clerks in the Ashland, Ky. Post Office are to be converted to full-time status effective January 23, 1993. Virginia Stanbaugh, who was incorrectly converted to full-time regular status on March 9, 1991 is to be changed to PTF status effective January 23, 1993. There is no back pay or consideration (other than listed above) in this settlement."

In a letter dated February 11, 1993, David C. Dunkle, Executive Vice President of appellant's union, advised appellant that he was to be placed in a full-time regular position effective January 23, 1993. The Board finds that the settlement agreement signed by

⁵ See *Marie Boylan*, 45 ECAB 338 (1944); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ See *McEuen*, *supra* note 4.

representatives of the union and the employing establishment is not sufficient to establish that the employing establishment erred in not placing appellant in a full-time regular position prior to January 23, 1993. The settlement notes that it is nonprecedent setting and no back pay or other consideration was awarded. The evidence as to the settlement agreement is not sufficient to show error in placing appellant in a full-time position prior to January 23, 1993.

Following the October 7, 1996 decision, appellant's reconsideration request failed to set forth a valid argument of error or include new evidence. Therefore, the Office properly denied reconsideration.⁸

The decisions of the Office of Workers' Compensation Programs dated March 18, 1997 and October 4, 1996 and finalized October 7, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 14, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ See 5 U.S.C. § 8128, 20 C.F.R. § 10.138.