

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. RILEY and DEPARTMENT OF THE ARMY,
CIVILIAN PERSONNEL OFFICE, Fort Huachuca, Ariz.

*Docket No. 97-240; Submitted on the Record;
Issued June 7, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

On August 10, 1994 appellant, then a former 48-year-old position classification specialist,¹ filed a notice of occupational disease, claiming that her supervisor, with whom she had "a very close personal relationship," suspended her from work and intimidated her about exercising her appeal rights by threatening to reveal their private activities. Appellant added that when her supervisor told her she was mentally ill, she realized that her employment had exacerbated and accelerated her diagnosed borderline personality disorder.

In support of her claim, appellant submitted a lengthy statement describing specific incidents at work that she believed had contributed to the aggravation of her mental condition and eventually resulted in functional disability. She also submitted a May 23, 1994 report from Dr. Edward M. Gentile, an osteopathic practitioner Board-certified in psychiatry, a discharge summary dated December 17, 1988 from a psychiatric institute, and a May 20, 1994 report from Dr. Anne Bradford Stericker, a licensed clinical psychologist.

On October 3, 1994 the Office asked appellant to provide additional evidence supporting her allegations that her supervisors forced her to fabricate and set up job positions and classifications for employees. The Office also requested that appellant provide a detailed statement concerning the substance abuse for which she was hospitalized in December 1988.²

¹ Appellant was removed from her position, effective March 9, 1994, due to misconduct. A settlement agreement subsequently changed the reason for removal to appellant's "medical inability to perform" her duties.

² Appellant generally alleged that her back problems were also caused by her employment but provided no medical evidence. The issue of a work-related back injury is not before the Board.

The same day the Office sent a copy of appellant's statement to the employing establishment, asking that the supervisors accused by appellant of impropriety respond to her specific allegations. The Office also requested details of the October 1992 investigation by the employing establishment into the supervisors' alleged intimidation and coercion of appellant and their mismanagement.

The employing establishment responded by submitting documentation of appellant's "lengthy disciplinary record" that led to her removal from the federal service, effective March 9, 1994. On May 31, 1995 the Office denied appellant's claim on the grounds that the evidence failed to establish that appellant's disabling emotional condition arose in the performance of duty. The Office noted that appellant's general allegations of harassment, intimidation, coercion, and mismanagement lacked specificity and corroboration. The Office added that appellant's suspension and removal were routine personnel matters.

On June 28, 1995 appellant requested an oral hearing and stated that Dr. Stericker would testify on the relationship between her mental condition and her employment. The Office denied appellant's request on July 16, 1995 as untimely filed, noting that the postmark on her letter to the Office was July 3, 1995, more than 30 days after the date of the May 31, 1995 decision.

Appellant appealed to the Office and to the Board on July 24, 1995 on the grounds that although the Office's decision was dated May 31, 1995, it was not mailed until June 5, 1995, as shown by the postmark on the envelope. On August 28, 1995 the Office again denied appellant's hearing request, noting that despite the delayed mailing, appellant still had sufficient time to request an oral hearing within 30 days from May 31, 1995. The Office added that the issue of whether appellant's mental disorder was sustained in the performance of duty could be resolved equally as well by requesting reconsideration and submitting factual and medical evidence sufficient to meet her burden of proof.

Appellant appealed to the Board, which dismissed her appeal on March 27, 1995 after appellant informed the Clerk of the Board that she wished to have the Office reconsider her case based on new evidence.³

In support of her request for reconsideration, appellant submitted a December 18, 1995 report from Dr. Stericker, who stated that appellant's personality disorder became disabling as a result of incidents and conduct by her employer.

On June 10, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office concluded that appellant and her supervisor had a personal relationship that had deteriorated and that their ongoing argument was played out in the workplace but that no work factors were involved.

³ Docket No. 96-80 (issued March 27, 1995).

Appellant again requested an oral hearing on July 10, 1996, which was denied on August 1, 1996 on the grounds that she had previously requested reconsideration and therefore was not entitled to a hearing.

The Board finds that appellant has failed to meet her burden of proof that she sustained an emotional condition caused by her employment.

Under the Federal Employees' Compensation Act,⁴ appellant 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 he 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 his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁵

Workers' compensation law does not cover each and every injury or illness that is somehow related to employment.⁶ 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.⁷ However, an employee's emotional reaction to an administrative or personnel matter is generally not covered,⁸ 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.⁹

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.¹⁰ However, a claimant must support his allegations with probative and reliable evidence; personal perceptions alone are insufficient to establish an employment-related emotional condition.¹¹

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Vaile F. Walders*, 46 ECAB 822, 825 (1995).

⁶ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

⁷ *Jose L. Gonzalez-Garced*, 46 ECAB 559, 563 (1995).

⁸ *Sharon J. McIntosh*, 47 ECAB 754 (1996).

⁹ *Barbara E. Hamm*, 45 ECAB 843, 850 (1994).

¹⁰ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

¹¹ *Ruthie M. Evans*, 41 ECAB 416, 425 (1990).

The initial question is whether appellant has alleged compensable employment factors as contributing to his condition.¹² 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.¹³ If appellant's allegations are not supported by probative and reliable evidence, it is unnecessary to address the medical evidence.¹⁴

In this case, 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. Appellant alleged that she became paranoid about what rules to follow in doing her work because her supervisors would initially praise her work but then give in to pressure from "big shots" and criticize her efforts. She specified an incident when she was ordered to create a new GS-12 position, which she felt compromised her integrity.

The director of appellant's division stated on November 17, 1994 that the position was requested by management, certified as essential to the agency's mission, and required by the continuing needs of the division. Nothing in the record supports appellant's allegations that her supervisors intimidated or coerced her to falsify position descriptions. Similarly, there is no suggestion of error or abuse on the part of the employing establishment in assigning duties regarding classification of positions to appellant.

Appellant alleged that her supervisor was told in October 1991 to build a case for her removal, but provided no corroborating evidence of this order or its execution. Appellant alleged that she was intimidated by her supervisor who threatened to have her security clearance revoked if appellant continued to pursue a grievance concerning appellant's disciplinary suspension, but nothing in the record supports this allegation, either.

Appellant cited an October 23, 1991 counseling session with her supervisor who "verbally assaulted" her with a "public scolding" over her dealings with other managers in a classification meeting. Appellant was counseled after the meeting in the presence of a third party, but the supervisor's statement, corroborated by that of the third party, indicated that appellant verbally erupted and would not listen.

Appellant alleged that an agency investigation in October/November 1992 into her supervisor's action and management found that her supervisor constantly harassed her and that her agency was mismanaged, but appellant was unable to provide a copy of this report and, in any event, these allegations lack the requisite specificity.

While appellant and her supervisor may have had an off-duty personal relationship, any animosity or dispute flowing from such a relationship, which might have spilled over into the

¹² *Wanda G. Bailey*, 45 ECAB 835, 838 (1994).

¹³ *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

¹⁴ *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

workplace, does not constitute a work factor.¹⁵ The record contains no evidence that the October 23, 1991 counseling session was caused by the emotional confrontation appellant and her supervisor had the night before at a group therapy session.¹⁶ Therefore, the Board finds that appellant's reaction to being counseled is not compensable.¹⁷

In sum, appellant has made numerous charges of intimidation and harassment at work which she feels exacerbated her underlying mental disorder. However, the Board has held that an employee's reactions to administrative actions are not compensable unless the evidence demonstrates error or abuse on the part of the employing establishment in its administrative capacity.¹⁸ Here, appellant has submitted no evidence that her supervisors erred or acted unreasonably in any of the above incidents. Therefore, the Board finds that appellant has failed to show any error or abuse on the part of the employing establishment.¹⁹

The Board also finds that the Office properly denied appellant's requests for an oral hearing.

The Act 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.²⁰ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.²¹ 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.²²

¹⁵ *John H. Woods, Jr.*, 39 ECAB 971, 976 (1988).

¹⁶ The only common note appears to be use of the phrase, "negative body language," as described by Dr. Stericker in her December 18, 1995 report.

¹⁷ 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 coworker, 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 coworker's car for drugs).

¹⁸ *Sharon J. McIntosh*, *supra* note 8.

¹⁹ 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).

²⁰ 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)

²¹ *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

²² *William F. Osborne*, 46 ECAB 198, 202 (1994).

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.²³ 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.²⁴

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.²⁵ The Board has held that the only limitation on the Office’s authority is reasonableness,²⁶ 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.²⁷

In this case, appellant first requested a hearing in a letter dated June 28, 1995. This request was denied on July 16, 1995 as untimely filed because the postmark on appellant’s letter was July 3, 1995, more than 30 days after the May 31, 1994 decision denying her claim. The Office also denied appellant’s request for reconsideration, noting that despite its five-day delay in mailing the May 31, 1994 decision appellant had sufficient time to request an oral hearing within the applicable time frame. Inasmuch as the postmark on appellant’s June 28, 1995 letter is July 3, 1995 and the latter date is beyond the 30-day deadline, the Board finds that appellant’s first request for an oral hearing was untimely filed.

The Board also finds that appellant’s July 10, 1996 request for an oral hearing was properly denied. Attached to the May 31, 1995 decision was a statement outlining appellant’s options regarding appeal and explaining clearly that she could choose an oral hearing, reconsideration, or Board review but that she could not request two forms of appeal simultaneously. Equally clear is the instruction that the hearing option was available if she had *not* requested reconsideration.

Section 8124(b)(1) provides for a hearing only “before review” under section 8128 -- that is, before any request for reconsideration. Inasmuch as appellant had previously requested reconsideration, which was denied on June 6, 1996, she was not entitled to an oral hearing as a matter of right.

²³ *Coral Falcon*, 43 ECAB 915, 918 (1992).

²⁴ *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

²⁵ *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).

²⁶ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

²⁷ *Wilson L. Clow, Jr.*, 44 ECAB 157, 175 (1992).

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.²⁸ Here, the Office informed appellant in its July 16 and August 28, 1995 and August 1, 1996 decisions 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 sustained in the performance of duty could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request that could be found to be an abuse of discretion. Further, appellant was advised that she could request reconsideration and submit evidence in support of her claim. Finally, appellant has offered no explanation for her untimely requests or any argument to justify further discretionary review by the Office.²⁹ Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The August 1 and June 10, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
June 7, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

²⁸ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

²⁹ *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).