

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. CARMANY and U.S. POSTAL SERVICE,
POST OFFICE, Youngstown, Ohio

*Docket No. 97-1063; Submitted on the Record;
Issued June 28, 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 his condition or disability arose out of employment as claimed; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely.

On April 29, 1996 appellant, then a 48-year-old custodial laborer, filed a notice of occupational disease claiming that his preexisting depression and obsessive-compulsive disorder were aggravated by stress from his employment which included alleged taunting and harassment by coworkers.

Appellant attributed the worsening of his preexisting conditions to harassment and threats from coworkers. Appellant has alleged: verbal harassment from coworkers; physical threats from coworkers; being accused of racism; having his character "assassinated" in conversations between coworkers; and having coworkers eavesdrop and/or spy on him.

A coworker, Jeffrey R. Lund, indicated that he witnessed on several occasions appellant being harassed verbally by another coworker, Delores Fowler. He indicated that "we are all aware that [appellant] is being treated for major depression and it is my belief that this or any type of harassment is doing him further harm." Mr. Lund indicated that a few months ago appellant "blew up" at him for no apparent reason and later apologized stating that he was upset by something that happened earlier that day involving Ms. Fowler. No discussion of the alleged incident with Ms. Fowler was described.

Another coworker, James Rees, indicated in a May 28, 1996 statement, that he was aware of the abusive nature of Ms. Fowler's personality. He stated that Ms. Fowler seems particularly abusive toward appellant and it seems to be very unsettling for him. Mr. Rees further stated that Ms. Fowler is very capable of abusive behavior around anyone. He indicated that he believed everything appellant stated regarding Ms. Fowler's abusiveness.

In a May 28, 1996 note, appellant's manager indicated that appellant is a sensitive person and is upset by abusive behavior displayed towards him whether it is real or perceived. He stated that he was never a witness to appellant's alleged abuse from his coworkers, but has been a party to the after-effects of such alleged altercations. He noted that the two employees appellant accused of harassing him, denied engaging in such activity and stated that having had some knowledge of appellant's condition, he felt that although some alterations with coworkers may be perceived by appellant to be abusive and harassing, he can not verify that those incidents took place.

Although appellant indicated that he was submitting medical evidence, no medical reports were received.

In a June 25, 1996 decision, the Office rejected appellant's claim on the grounds that fact of injury was not established. The Office found that there were no compensable factors of employment as appellant failed to substantiate, corroborate, or document the allegations he has made or provide any supporting medical evidence.

In a letter dated July 31, 1996, which the Office received August 5, 1996, appellant, through his attorney, requested an oral hearing before an Office representative. Included with the request was a June 21, 1996 report from Dr. Thomas J. Mako, a psychologist. He provided a complete history of the onset of appellant's emotional condition in 1971 while serving in Vietnam. Dr. Mako diagnosed a major depressive disorder and noted that appellant has had periods of remissions and relapses which seem to become more intense with each period. He indicated that appellant feels his depression has negatively affected his ability to work productively and efficiently. In addition, the depression seems to affect his ability to communicate and interact with other postal employees. He is particularly sensitive to any comments about his work habits, character, or morals. Dr. Mako noted:

“[S]everal times over the course of the last two years, [appellant] has complained about other workers at the [employing establishment]. He feels that some of the things the other workers say or do to him (*e.g.*, insults and cruel humor, being followed, allegations of being a racist, threatening him with physical harm) create a hostile work environment and aggravate his depression.”

Dr. Mako opined that it was conceivable that appellant's depression and personality make it difficult for him to tolerate these behaviors and that those behaviors make his depression worse.

In a decision dated September 13, 1996, the Office denied appellant's request for a hearing as untimely and found that the matter could be further pursued through the reconsideration process.

By letter dated October 4, 1996, appellant, through his attorney, requested reconsideration. An August 16, 1996 report from Dr. C.A. Ariza, a psychiatrist, stated that appellant had been under his care since 1994 because of major depression and obsessive compulsive disorder. He indicated that since December 1995, appellant's symptomatology had

increased due to difficulties with one coworker who, according to appellant, was threatening him. Dr. Ariza indicated that appellant was very stressed out and very threatened with this situation.

By decision dated December 18, 1996, the Office reviewed the merits of the claim but denied modification of its previous decision on the grounds that the evidence on file was insufficient to demonstrate that appellant's allegations actually occurred as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.²

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁴ On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁵

In this case, appellant attributed the aggravation of his emotional condition to harassment from coworkers. As the record reflects, appellant has established that he has preexisting conditions of depression and obsessive-compulsive disorder. Appellant, however, has not submitted sufficient evidence to show that the factors alleged to have aggravated his condition actually occurred. The Board has held that a claim based on harassment or discrimination may

¹ *Id.*

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁴ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

⁵ *Id.*

be compensable if there is probative evidence that harassment or discrimination did, in fact, occur.⁶ The evidence of record does not establish a claim based on harassment in this case. Neither appellant nor his witnesses have provided specific details as to the alleged threats and harassment by appellant's coworker. Appellant's supervisor indicated no knowledge of any such harassment and indicated that the two coworkers appellant accused denied engaging in such activity. To the extent that appellant's witnesses and supervisor support that appellant had stress due to difficulty in his work environment, neither appellant's coworkers nor his supervisor purported to witness any particular action of an unreasonable or harassing nature.⁷ In the absence of probative evidence, the Board finds that appellant has not established a compensable factor of employment based on harassment.

As appellant has failed to attribute the aggravation of his emotional condition to a factor of his federal employment, the Office properly denied his claim on the grounds that fact of injury was not established.

The Board further finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁸ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁹

In the present case, the Office issued its decision on June 25, 1996. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was dated July 31, 1996 and received in the Office on August 5, 1996 and thus it is outside the 30-day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.¹⁰ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence.

⁶ *Mary A. Sisneros*, 46 ECAB 155 (1994); *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

⁷ See *Jose L. Gonzalez-Garced*, 46 ECAB 559, 564-65 (1995) (where the Board found that coworker statements did not establish harassment by a supervisor where the statements were general in nature and did not refer to any specific incidents that would substantiate appellant's allegations of harassment by supervisors).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹⁰ *Herbert C. Holley*, 33 ECAB 140 (1981).

Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated December 18, September 13 and June 25, 1996 are affirmed.

Dated, Washington, D.C.
June 28, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member