

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Maine

*Docket No. 98-184; Submitted on the Record;
Issued June 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying merit review on September 15, 1997.

This is the second appeal of this case. By decision dated September 11, 1996, the Board affirmed the Office's decisions dated March 7 and June 20, 1994 which denied appellant's emotional condition claim on the grounds that fact of injury was not established. On July 15, 1997 appellant requested that the Office reconsider his case. The Office denied appellant's application for review, without merit review, on September 15, 1997.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. 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.¹

The Board in the prior decision essentially found that appellant's allegations did not concern his inability to perform his own work duties, but rather concerned appellant's disagreements with his supervisor regarding personnel and administrative actions. The Board advised appellant that he had not established that he sustained an emotional condition in the performance of duty, because he had not established that the supervisor's actions regarding personal and administrative matters were abusive or were in error.

In support of his request for reconsideration, appellant alleged that he was submitting new documentation that he had to undergo a "medical review" because of lies by his supervisor

¹ James A. England, 47 ECAB 115 (1995).

and by the director of delivery and collection; that the statements made by the employing establishment that appellant had previously been on "stress leave" and had attendance problems were lies; that his privacy was invaded when the employing establishment investigated whether he had contacted the Equal Employment Opportunity Commission (EEOC); and that his supervisor's techniques were "in direct violation of articles in the M-39." Appellant submitted a supervisor's request for a fitness-for-duty examination signed by his supervisor and two upline supervisors which noted that the examination was requested due to appellant's erratic behavior which seemed to appear after he returned to work from military leave. Appellant also submitted a June 6, 1997 statement from a former supervisor who indicated that he had supervised appellant from 1991 through 1993 and had not found any effect on appellant's performance or attendance that could be related to his being a reservist. Appellant further submitted payroll records which indicated that appellant had used many hours of annual leave, and leave without pay prior to August 2, 1993, however, that appellant had also worked intermittently during this time period.

Regarding the issue of the fitness-for-duty examination, the Board notes that the request for the examination was previously of record and was therefore itself not new evidence. Regarding this issue, the only new evidence appellant submitted was the June 6, 1997 statement from his prior supervisor, that he had not seen any change in appellant's behavior which could be ascribed to his reserve duties. As this individual was no longer appellant's supervisor during the time period in question, his perceptions are not relevant to the issue of whether appellant's current supervisor and two upline supervisors acted in error or abusively in requesting the fitness-for-duty examination.

Regarding appellant's allegations that his supervisor's reports about his stress leave and poor attendance were "lies," appellant's own statements corroborate the supervisor's statement that appellant was on leave immediately prior to August 2, 1993. The payroll documentation appellant submitted indicates that appellant did work intermittently between April and August 1993, but that he used many hours of annual leave and leave without pay during this time period. While appellant disagrees with his supervisor's statement that he was on stress leave from April to August 1993, ultimately this issue is irrelevant to appellant's claim. Appellant has never alleged that his emotional condition was in any way caused by his supervisor's statement that he was on stress leave during this time period. Similarly, while on reconsideration appellant alleged that his privacy was invaded by the employing establishment's investigation of his EEOC complaint, appellant is disagreeing with statements made by the employing establishment in response to his claim, but appellant has never alleged that the employing establishment's contacts with the EEOC in fact caused his emotional condition.

Finally, appellant submitted pages from a management manual which notes that the employer and employee should assure mutual respect for each other and that discipline should be corrective in nature and not punitive. This manual does not document, however, that appellant's supervisor in fact acted unreasonably, with error or abuse, in carrying out supervisory responsibilities. This manual is therefore irrelevant to appellant's burden of proof in this matter.

As appellant did not meet at least one of the requirements of section 10.138(b)(2), the Office did not abuse its discretion in denying merit review of this claim.²

The decision of the Office of Workers' Compensation Programs dated September 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

² 20 C.F.R. § 10.138 (b)(2).