U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 98-739; Submitted on the Record;
Issued October 21, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On July 17, 1991 appellant, then a 45-year-old mail distribution clerk, filed a notice of occupational disease and claim for compensation alleging that he suffered from stress as a result of factors of his federal employment.[1] Appellant last worked on June 29, 1991.

In a July 16, 1991 statement, attached to the CA-2 form, appellant alleged that he was harassed and discriminated against by his supervisor because he had to work light duty. He also felt he was being reprimanded for filing previous discrimination complaints with the Equal Employment Opportunity Commission (EEOC). Appellant stated that his supervisor placed demands on him but continued to let other workers stay on light duty. He alleged that there were many employees who declared themselves to be on "light duty" without medical certification but that he was singled out for a fitness-for-duty examination. Appellant also stated that he was given a letter of warning for unsatisfactory attendance in October 1990 which caused him additional stress and that even after he complied with the conditions set forth by the employing establishment, his supervisor refused to rescind the disciplinary measure. He described his supervisor as being in a "relentless pursuit" of him, constantly trying to change his work responsibilities, and watching him wherever he went, even on lunch breaks. According to him, the supervisor permitted another employee, who the supervisor liked personally, to take breaks and neglect assignments without fear of reprimand. Appellant further alleged that he was discriminated against because he received a seven-day suspension for unsatisfactory attendance on June 20, 1991. Lastly, appellant alleged that a personal interview scheduled with a labor relations officer regarding his fitness-for-duty examination caused him to experience stress and anxiety because he was afraid he was going to be declared unfit and removed from his job.

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[1] Appellant was involved in a nonwork-related car accident on March 8, 1989 and sustained a herniated disc at C5-6. Appellant was off work from March 8, 1989 to July 27, 1990 when he returned to light duty.

In a September 9, 1991 report, Dr. Philip M. Carmen, a Board-certified psychologist, noted that appellant believed his supervisor was out to get him and that he was constantly being monitored in an attempt to remove him from light duty. Dr. Carmen indicated that appellant's thought processes were preoccupied with difficulties he continued to experience in the aftermath of his car wreck, and that he was convinced that an orchestrated effort was being made by the employing establishment to end his career. The physician opined that appellant's psychiatric disorder was related to his work "as there is no evidence in the past of psychological stress."

In a decision dated August 4, 1992, the Office denied appellant's claim for compensation on the grounds that appellant failed to establish that he sustained an emotional condition in the performance of duty. The Office specifically determined that the letter of warning on October 12, 1990 and the June 17, 1991 suspension were administrative actions and not factors of appellant's employment. The Office also found the medical evidence insufficient to establish that appellant experienced undue stress caused by the fitness-for-duty examination or the subsequent meeting with regard to that examination.

Appellant requested reconsideration on June 24, 1993 and submitted: (1) an EEOC counseling letter dated July 13, 1992, indicating that appellant's complaint of harassment was under investigation; (2) a disability determination from the Social Security Administration (SSA) dated July 13, 1992 for cervical spondylosis and depression; and (3) a September 18, 1991 medical report from Dr. Carman which diagnosed that appellant suffered from severe depression related to work-related stress.

In a decision dated July 30, 1993, the Office denied modification after a merit review.

By letter dated June 29, 1994, appellant requested reconsideration. He argued that the Office should adopt the findings of the SSA. Appellant also submitted a July 29, 1993 EEOC decision, which remanded appellant's EEOC complaint for further investigation.

In a July 26, 1994 decision, the Office performed a merit review. The Office noted that appellant never alleged a stress-related condition arising from the denial of his EEOC complaint, and the Office was not bound by findings of the SSA. Thus, appellant's request for modification was denied.

On June 17, 1995 appellant filed another request for reconsideration but he only submitted copies of evidence previously of record.

In an August 7, 1995 decision, the Office denied appellant's request for a merit review.

By letter dated July 27, 1996, appellant requested reconsideration and resubmitted the EEOC documentation. Appellant noted that the local EEOC counselor had not been responsive to his complaints. He alleged that this was further evidence that the EEOC was convinced that a full process of his complaints would substantiate the employing establishment's discriminating practices.

In a decision dated August 8, 1996, the Office noted that the filing of an EEOC complaint, and any difficulties appellant experienced with the EEOC counselor, did not constitute a compensable factor of employment. The Office, therefore, denied modification.

Appellant next filed a request for reconsideration on July 27, 1997. He argued that harassment by his supervisor resulted in stress and depression which made it impossible for him to work, and that the failure of the local EEOC to process his discrimination complaints denied him due process. Appellant also alleged that he sustained a cervical spinal cord malformation as a result of repetitive pulling, pushing and lifting in his employment.

In conjunction with his reconsideration request, appellant submitted duplicate copies of EEOC documents previously of record. He also submitted medical reports dated February 24, 1992, July 22, June 26 and January 21, 1991 from Dr. Barry B. Cerverha, a Board-certified neurosurgeon. Dr. Cerverha noted that appellant continued to have back pain related to his previous disc herniation and degenerative spine disease. He opined that appellant was totally disabled.

In a September 29, 1997 decision, the Office denied appellant's request for a merit review.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

The only decision before the Board on this appeal is the Office's decision which denied appellant's request for a review of the merits of his claim under 5 U.S.C. § 8128(a). Since more than one year elapsed between the date appellant filed his appeal January 6, 1998, and the prior Office decisions dated August 8, 1996, August 7, 1995, July 26, 1994, July 30, 1993 and August 4, 1992, the Board lacks jurisdiction to review those prior decisions.[2]

Section 8128(a) of the Federal Employees' Compensation Act (FECA) vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[3] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] When 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.[5] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[6] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[7] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously

[2] 20 C.F.R. § 501.3(d) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office.

[3] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. 10.138(b)(2).

[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[7] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[8]

In the instant case, the Office denied compensation because appellant failed to allege a compensable factor of employment or show that the action of the employing establishment in scheduling a fitness-for-duty examination caused him undue stress. On reconsideration, appellant submitted no new evidence relevant to the issue of whether he sustained an emotional condition in the performance of duty. The medical reports from Dr. Ceverha discuss appellant's back condition and not his emotional condition. The duplicate EEOC evidence is also insufficient to warrant a merit review of the record. In light of these inadequacies, the Board finds that the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated September 29, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 21, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[8] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).