U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of WINSTON E. WALTERS and U.S. POSTAL SERVICE,
LUIS MUNOZ INTERNATIONAL AIRPORT POST OFFICE, PR

*Docket No. 98-339; Submitted on the Record;*
*Issued September 13, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a stroke while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act.

On August 23, 1996 appellant, then 55-year-old supervisor, filed a claim, alleging that he sustained a cerebral infarction due to factors of his federal employment. In a supplemental statement, appellant indicated that his stroke was caused by constant changes of his shift, constant harassment, bad direction by his manager and training less than 24 hours after he received notice. Appellant also submitted a chronological order of events that noted that he attended supervisory classes at the Fort Buchanan Army Base, that he left August 21, 1996 classes after feeling ill and that he awoke on August 23, 1996 at 2:30 a.m. and went to a medical facility for treatment for cerebral infarction. In a decision dated May 23, 1997, the Office denied appellant's claim on the grounds that his disabling condition resulted from his reaction to administrative or personnel matters and, therefore, was not covered within the performance of duty. By decision dated September 5,1997, the Office denied appellant's request for hearing on the grounds that the original decision was dated May 23, 1997 and his request for hearing was postmarked June 29, 1997 and, therefore, was not timely.

The Board has duly reviewed the case record and finds that appellant has not established that he sustained a stroke while in the performance of duty.

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.[1] 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.[2] 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.[3]

In the present case, appellant alleges that he sustained a stroke as a result of emotional factors that occurred while in the performance of duty. Specifically, appellant alleges that he was subjected to constant shift changes, that he was constantly harassed, that his manager gave bad directions and that he received less than 24 hours notice prior to being scheduled for training. 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 implicate disputes and incidents are established as arising in and out of the performance of duty.[4] 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.[5] Appellant failed to provide any such probative and reliable evidence in the instant case.

Initially it is noted that appellant did not give any specifics concerning his allegations that he was subjected to constant harassment and that he received bad directions from his manager. Inasmuch as it is appellant's burden to establish a factual basis for these allegations, he has not submitted sufficient evidence to establish that either alleged factor occurred within the performance of duty. With respect to the issues that appellant underwent constant changes in his shift and that he received less than 24 hours notice prior to training, the only relevant evidence of record was presented by appellant's supervisor, Martin Acevedo. He reported that appellant had informed him he had a sick relative when he told appellant that he had to undergo mandatory supervisory training. In order to permit appellant to complete his training early during the week so that he could take off the latter part of the week to visit his sick relative, Mr. Acevedo

[1] *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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

[5] *Ruthie M. Evans*, 41 ECAB 416 (1990).

scheduled appellant's training for August 18 through 20, 1996, Monday through Wednesday. However, Mr. Acevedo indicated that appellant also attended training on August 21, 1996, which was not scheduled and did not report to work as expected. Inasmuch as Mr. Acevedo has indicated that appellant's schedule was changed and his training notice was changed in order to accomodate him to take time to visit his sick relative, this does not constitute a shift change as contemplated for coverage under the Act.[6] As appellant has not presented any evidence to dispute Mr. Acevedo's statement or otherwise provide factual information concerning his alleged shift changes, he has not established a compensable factor under the Act.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitations 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.[8]

In the present case, the Office issued its decision denying appellant's claim on May 23, 1997. By letter postmarked June 28, 1997, appellant requested an oral hearing in his claim. As appellant's request for a hearing was not within 30 days of the Office's decision, he is not entitled to a hearing under section 8124 as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that the injury occurred within the performance of duty. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

[6] *Dodge Osborne*, 44 ECAB 849 (1993).

[7] 5 U.S.C. § 8124(b)(1).

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

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated September 5 and May 23, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 13, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member