

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSCAR WIGGINS and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 98-758; Submitted on the Record;
Issued September 21, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On February 5, 1996 appellant, then a 49-year-old mail clerk, filed a notice of occupational disease and claim for compensation alleging that he suffered from stress and depression as a result of harassment by his supervisor. He stopped work on January 6, 1996, and has not returned to work, as the record indicates that he is undergoing treatment for depression and post-traumatic stress disorder.

In a March 6, 1996 letter, the Office requested additional information regarding the factors of appellant's employment alleged to have caused his emotional condition.

Appellant submitted a witness statement dated March 17, 1996 from Suzanne McGovern, a union steward. Ms. McGovern stated that she was called in to meet with appellant's supervisor because appellant was charged absence without leave (AWOL) after attending a family memorial service, in honor of his deceased son, without first requesting leave or calling in sick. She indicated that when appellant returned to work following his two-day absence, he learned that he had been charged AWOL and was advised by his supervisor that his records were to be reviewed for the purpose of having him removed from his job. The union steward noted that appellant was visibly upset and on the verge of tears when he recited the situation. She indicated that she had experienced ongoing problems with appellant's supervisor." According to Ms. McGovern, the purpose of her meeting with appellant's supervisor was to explain to him that appellant had been on medication and was emotionally distraught such that on the two days he was absent from work he was unable to make the reasonable decision to call in sick. She indicated that she requested that appellant's leave not be listed as AWOL but that it be changed to unpaid leave under the Family Medical Leave Act. She also noted that because the supervisor

refused to change appellant's leave status, she had to call in another employing establishment official, who likewise recommended to the supervisor that he charge appellant unpaid leave and not AWOL. She indicated that after the meeting it took 45 minutes before appellant was calm enough to return to work.

In a September 4, 1996 statement, Al Stetser, appellant's supervisor, noted that appellant had been charged AWOL on December 9 and 10, 1995 for not having requested advanced leave and for not having called in sick on those days. He acknowledged that he told appellant that he was going to take steps to correct appellant's absence problem. Mr. Stetser also noted that appellant became very upset when he learned that he had been charged AWOL. According to appellant's supervisor, appellant received prior warnings about his attendance on February 23 and May 25, 1995 from other supervisors. He also stated that, while he felt sorry for appellant's loss, it was his duty to see that workers followed the procedures set down by the employing establishment regarding use of leave.

The record also contains correspondence between appellant and the employing establishment indicating that appellant was denied a request for a transfer from mail processor to mailhandler.

In a decision dated November 15, 1996, the Office denied appellant's claim on the grounds that the employment factors alleged by appellant to have caused his emotional condition were not compensable under the Federal Employees' Compensation Act and failed to establish that he sustained an emotional condition in the performance of duty.

By letter dated December 2, 1996, appellant requested an oral hearing which was held on July 9, 1997.

In a decision dated September 12, 1997, an Office hearing representative found that appellant failed to establish a compensable factor of employment. She, therefore, affirmed the Office's November 15, 1996 decision.¹

Appellant, by counsel, requested reconsideration on September 24, 1997.

In support of his reconsideration request, appellant submitted a report from Dr. Harry A. Doyle, a Board-certified psychiatrist, dated September 16, 1997. He opined that appellant suffered from major depressive disorder and post-traumatic stress disorder. Dr. Doyle related appellant's depressive disorder to the January 5, 1996 AWOL notification.

¹ The Office hearing representative noted in a September 12, 1997 decision that appellant had testified at the hearing on July 9, 1997 regarding the statements made by his supervisor which he alleged was harassment. Appellant stated "I buried my son and my brother. They got killed two days apart and I buried my son and my supervisor approached me to let me know, that my job was to bury my child, come back to work and if that could not be done, he was going to lay a paper trail to get me out of the [employing establishment] and at which time he marked me AWOL for my son's birthday [which was] right after he had died." The record indicates that appellant's brother died on July 9, 1995 and that his son was murdered at his place of business on July 11, 1995. Appellant was subsequently absent from work on December 9 and 10, 1995.

In a December 23, 1997 decision, the Office denied appellant's request for a merit review of the case.

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty.

Workers' compensation law is not applicable 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 coverage 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 comes within coverage of the Act.² On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.³

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁴ If a claimant does implicate a factor of employment, then the Office should determine whether the evidence of record substantiates the factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁵

Appellant has made a general claim that his emotional condition was aggravated by harassment from his supervisor.

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act.⁶ Thus, actions of the employing establishment in matters involving the use of leave are generally not considered compensable factors of employment.⁷ But error or abuse by the employing establishment in what would otherwise be an administrative

² 5 U.S.C. §§ 8101-8193.

³ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁴ *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁵ *Id.*

⁶ *E.g., Norman A. Harris*, 42 ECAB 923 (1991).

⁷ *Mildred D. Thomas*, 42 ECAB 888 (1991); *Gracie A. Richardson*, 42 ECAB 850 (1991); *Jack Hopkins, Jr.*, 42 ECAB 818 (1991); *Sylvester Blaze*, 42 ECAB 654 (1991); *see Apple Gate*, 41 ECAB 581 (1990); *Joseph C. DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987); *Edgar Lloyd Pake*, 33 ECAB 872 (1982).

or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.⁸

In the instant case, appellant alleged that he was harassed by his supervisor with regard to his absence from work and the use of leave, which is a personnel matter. The Board has reviewed the record and finds that the statements alleged by appellant to have been made by his supervisor with regard to his unapproved absence from work do not rise to the level of abuse or error on behalf of the employing establishment in the administration of this personnel matter. Moreover, even though appellant's supervisor was apparently required to change appellant's leave status on December 9 and 10, 1995 from AWOL to approved leave without pay, the mere fact that the supervisor modified his earlier personnel action does not, in and of itself, show error or abuse.⁹

Appellant also alleged that he suffered from stress as a result of the employing establishment's denial of his request for a transfer from mail processor to mailhandler. As indicated previously, however, denials by an employing establishment of a request for a different job, promotion, or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his regular assigned work duties but rather constitute his or her desire to work in a different position or in a different environment.¹⁰

Thus, because appellant has failed to allege a compensable factor of employment, the Office properly found that he failed to establish that he sustained an emotional condition in the performance of duty.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's case on reconsideration for a merit review.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹¹ 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.¹² 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.¹³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening

⁸ *Thomas D. McEuen*, 42 ECAB 566 (1991).

⁹ *Michael Thomas Plante*, 44 ECAB 510 (1993).

¹⁰ *Id.*

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

¹² 20 C.F.R. § 10.138(b)(1).

¹³ 20 C.F.R. § 10.138(b)(2).

a case.¹⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁵ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously 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.¹⁶

In support of his reconsideration request, appellant submitted a medical report from his psychiatrist attributing his emotional condition of depression to the work incident on January 5, 1996. This medical report, however, is not relevant to the issue in the case on reconsideration which is whether appellant alleged a compensable factor of employment. Thus, since appellant failed to allege a compensable factor of employment, there is no need to evaluate the medical evidence of record.¹⁷

Consequently, appellant has not established that the Office abused its discretion under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office, or that he submitted relevant and pertinent evidence not previously considered by the Office.⁸

The decisions of the Office of Workers' Compensation Programs dated December 23 and September 12, 1997 are hereby affirmed.

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

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁵ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁶ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

¹⁷ See *Margaret S. Krzycki*, *supra* note 4.