U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY LITTLEJOHN and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 99-1092; Submitted on the Record;
Issued July 27, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a).

On November 21, 1995 appellant, then a 30-year-old-clerk, filed a notice of occupational disease and claim for compensation alleging that he suffered from stress and a nervous condition caused by constant harassment from his two immediate supervisors relating to his sexual/gender orientation. He indicated that he first realized his condition was caused by factors of his employment on November 14, 1995, at which time he stopped work and also notified his supervisor of his emotional condition.

In a statement attached to his CA-2 claim form, appellant alleged the following: (1) beginning August 1995, his supervisor, Dennis Lawson, began taking 15 to 20 minutes away from his time card because appellant was considered to have been taking too long on his coffee break; (2) that on October 12, 1995 appellant was docked 15 minutes from his time card because he was not at his designated place at a designated time; (3) that on October 13, 1995 Mr. Lawson approached appellant and started asking questions in front of other coworkers as to appellant's whereabouts at 7:30 a.m. on Monday, October 8, 1995 and other questions pertaining to his schedule; and (4) that on October 12, 1995 appellant requested a late lunch due to a fire drill scheduled to take place during his designated lunch hour and that his supervisors harassed him by making him go back and forth from one to another seeking approval of his request for a late lunch. It is appellant's position, that his supervisor was placed in his section at work to deliberately harass him which they accomplished by making fun of him and not permitting him to take any initiative in his job. Appellant further stated that he overhead his supervisors stating that they did not like to work with him.[1]

[1] In support of his claim, appellant submitted a petition signed by alleged coworkers requesting that the

By letter dated January 30, 1996, the Office requested additional medical and factual evidence regarding appellant's alleged emotional condition.

In a report dated April 9, 1996, Dr. Noel L. Smith advised that appellant suffered from stress-related disorder, labile hypertension, asthma and feminization. The doctor stated: "Conflict with supervisor reportedly due to his appearance concerning which he states that he registered a report at work. The patient is undergoing gender change procedure and those who know him as a male are reportedly having difficulty adjusting with the gender change. This problem was eventually recognized by the employing establishment who reportedly transferred [appellant] to a different floor for this reason. This stress-related disorder has involved other conflicts as well. This was a stressful condition for him leading to anxiety which has improved with transfer, medication and counseling."

In a decision dated July 2, 1996, the Office denied appellant's claim on the grounds that he failed to establish that his emotional condition was sustained in the performance of duty.

On June 17, 1997 appellant requested reconsideration and submitted a copy of a complaint filed with the Equal Employment Opportunity Commission (EEOC) alleging harassment and a hostile work environment. He also submitted corresponding evidence with regard to that complaint. Appellant submitted a December 1, 1995 settlement notice regarding appellant's harassment claim; a copy of a request dated November 10, 1995 indicating appellant's desire to be transferred from under the supervision of Mr. Rambert and Mr. Lawson; and a copy of a notice of restricted duty issued by the employing establishment's medical department advising that appellant should avoid stressful situations and avoid working with his two supervisors.

In a decision dated September 10, 1997, the Office denied appellant's request for modification following a merit review.[2]

Appellant filed a second request for reconsideration on September 1, 1998. In conjunction with that second request, he argued that he was entitled to compensation based on his emotional claim because the employing establishment had been forced to issue him pay for one and one-fourth hours on October 11, 1995 pursuant to a decision of the Labor Relations Board dated December 1, 1995. Appellant argued that the December 1, 1995 employing

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undersigned not work under the supervision of Dennis Lawson.

[2] The claims examiner stated: "In the present case, in his reconsideration request the claimant alleges that a decision dated December 1, 1995, form a senior labor relations specialist is proof that the employing [establishment] acted in error in the administrative matter the decision settled the grievance over 1.25 hours. However, in a telephone discussion with the person making the December 1, 1995 decision – Alan Schreck- it was explained that the decision was not an admission of harassment or wrongdoing, or guilt or innocence, but rather, given the amount of time considered it would be a decision of administratively settling the matter because it would be more expensive to proceed with it."

establishment decision was *prima facie* evidence of error or abuse on behalf of the employing establishment.[3]

In a decision dated October 21, 1998, the Office denied appellant's request for a merit review.

The only decision before the Board in this appeal is the Office's decision dated October 21, 1998 denying appellant's request for a merit review. Since more than one year has elapsed between the date of the Office's most recent merit decision dated September 10, 1997 and appellant's appeal filed on January 28, 1999, the Board lacks jurisdiction to review the September 10, 1997 decision or the issue of whether appellant establish an emotional condition in the performance of duty.[4]

The Board finds that the Office acted within its discretion in denying appellant's request for a merit review under section 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[5] 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.[6] 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.[7] 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.[8] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[9] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously

[3] Appellant submitted a January 6, 1998 note by Mr. Schreck, the labor relations specialist, who issued the December 1, 1995, indicating that Mr. Schreck does not recall having a conversation with an Office claims examiner regarding the settlement agreement reached between the employing establishment and appellant with reference to the October 11, 1995 pay dispute. He also filed two grievances filed by parties unknown and with denials of the grievances issued by the Labor Relations Board.

[4] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

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

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. 10.138(b)(2).

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

[9] *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.[10]

In the instant case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. Appellant did not submit new and relevant evidence to support a finding of error or abuse on behalf of the employing establishment, such that appellant's claim for an emotional condition may be established. The Office previously rejected appellant's argument that the action of the employing establishment in removing him from under the supervision of Mr. Rambert and Mr. Lawson, who appellant identified as the source of his stress and harassment, is compelling evidence of the merit and veracity of his claim. The Office noted that, from a medical standpoint, the employing establishment acted in the best interest of appellant regardless of whether his perceptions of harassment were true or imagined. The Office further considered appellant's arguments with respect to the December 1, 1995 decision by the labor relations specialist, finding that the settlement of one and one-half hours of back pay was not *prima facie* evidence of agency error or abuse, rather the settlement was the product of the employing establishment's desire to avoid costly litigation fees.

Since appellant's reconsideration request merely repeats evidence and argument already discussed and disposed of in this matter, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138.

The decision of the Office of Workers' Compensation dated October 21, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 27, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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