

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA J. DIZARD and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 99-139; Submitted on the Record;
Issued May 3, 2000*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that she sustained an emotional condition while in the performance of duty; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138; and (3) whether the Office properly denied appellant's request for a hearing.

On June 14, 1998 appellant, then a 58-year-old training technician, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained an emotional condition while in the performance of duty. She explained that her condition was the result of her unjust removal from the employing establishment effective May 20, 1998. Appellant identified June 1, 1998 as the date she first became aware of her illness and she identified June 3, 1998 as the date she realized her illness was caused or aggravated by her employment. In support of her claim, she submitted treatment notes dated June 3, 1998, which included a diagnosis of moderate anxiety neurosis. Additionally, appellant submitted emergency room treatment records dated June 13, 1998, indicating that she had been treated that day for depression, chest wall pain and reflux esophagitis.

By letter dated June 18, 1998, the Office requested that appellant provide additional medical and factual information. In response, appellant submitted a June 22, 1998 statement wherein she explained that on March 4, 1998 she requested leave under the Family Medical Leave Act (FMLA) and submitted the necessary documentation in support of her request.¹ Although appellant had available annual and sick leave, she requested that her absence be charged against leave without pay (LWOP). She subsequently went on leave for approximately eight weeks and during this time period appellant explained that unbeknownst to her, the

¹ The medical documentation provided by appellant consisted of a February 26, 1998 report from Dr. Charles Duncan requesting that appellant be permitted a medical leave of absence from March 5 through May 2, 1998 as appellant was suffering from "multiple medical problems." This report was submitted to the employing establishment's medical unit and bears the notation "information confidential [and] restricted."

March 4, 1998 FMLA request had been denied. Shortly after returning to work on May 3, 1998, appellant indicated that she was advised, via e-mail, that she would be removed from her position effective May 20, 1998. The removal action was based upon appellant's absence without official leave (AWOL) and her apparent failure to submit the necessary documentation to justify her absence from work. Appellant alleged that the removal action was retaliatory in nature and that her supervisor, Mary Burton, had previously attempted to thwart her efforts to obtain overtime work. She also stated that Ms. Burton had wrongfully accused her of breaking an employing establishment camera. Additionally, appellant indicated that she filed both a grievance and an equal employment opportunity (EEO) complaint regarding her removal.

In a statement dated July 1, 1998, appellant's supervisor, Ms. Burton, explained that when she arrived at work on March 5, 1998 she found on her desk several documents pertaining to appellant's leave request. She indicated that the forms submitted suggested that appellant would be absent as a result of an employment-related injury to her hand and arm. However, there was no medical documentation supporting the leave request. Ms. Burton further indicated that she contacted the employing establishment's medical unit in an effort to obtain the necessary documentation, but was advised that she lacked the required authorization to access appellant's medical records. She also explained that her supervisor was similarly unsuccessful in his efforts to obtain the necessary documentation from the medical unit. Ms. Burton subsequently spoke with appellant on March 20, 1998 and explained to her that she would be receiving a continued absence letter dated March 19, 1998, which inquired about appellant's availability for work and requested documentation to support her absence. The letter also purportedly explained why appellant's request for LWOP under the FMLA had been denied and why her absence had been charged against sick leave. During this conversation, Ms. Burton indicated that she explained to appellant the need for documentation to justify her absence. When appellant did not subsequently respond to the continued absence letter, Ms. Burton indicated that she issued a notice of removal dated April 14, 1998. After appellant returned to work in May 1998, Ms. Burton stated that she sent appellant an e-mail on May 13, 1998 to remind her of the need for the previously requested documentation. The e-mail also advised appellant that her removal would be effective May 20, 1998 if she did not submit the required documentation.

Appellant was removed from service on May 20, 1998. In her June 22, 1998 statement, appellant indicated that it was not until May 7, 1998 that she was officially notified that her request for LWOP under the FMLA had been denied. She further indicated that the e-mail she received from Ms. Burton on May 13, 1998 was the only notification she received regarding her removal from service as a result of her absence during the period March 5 through May 2, 1998. The record indicates that appellant's May 20, 1998 removal was subsequently reduced to a time served suspension and she was authorized to return to her regular duties effective June 29, 1998.

By decision dated July 27, 1998, the Office denied appellant's claim on the basis that appellant failed to establish that her injury occurred in the performance of duty. In an accompanying memorandum, the Office explained that appellant failed to implicate or substantiate any compensable employment factors.

On July 31, 1998 appellant filed a request for reconsideration. She, however, did not submit any additional factual or medical evidence along with her request for reconsideration. By

decision dated August 6, 1998, the Office denied appellant's request for reconsideration without reaching the merits of her claim.

By letter dated August 7, 1998, appellant's attorney filed a request for a hearing regarding the Office's July 27, 1998 decision denying compensation. In a decision dated September 8, 1998, the Office denied appellant's request for a hearing on the basis that she had previously requested reconsideration, which was denied by decision dated August 6, 1998. The Office explained that having previously requested reconsideration, appellant was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether she sustained an injury while in the performance of duty could equally well be addressed through the reconsideration process. Appellant's counsel subsequently filed an appeal with the Board on September 28, 1998.

The Board finds that appellant failed to establish that she sustained an emotional condition while in the performance of duty.

To establish that she sustained an emotional condition causally related to factors of her federal employment, appellant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that her emotional condition is causally related to the identified compensable employment factors.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview 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 is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.³ Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁴

Initially, the Board finds that appellant failed to substantiate her allegations that Ms. Burton interfered with her efforts to obtain overtime work and that she wrongfully accused appellant of breaking a camera belonging to the employing establishment. Appellant did not provide any specific instances when she sought overtime work and was denied. Moreover, appellant did not provide any details regarding her allegation that Ms. Burton wrongfully

² See *Kathleen D. Walker*, 42 ECAB 603 (1991).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Ruthie M. Evans*, 41 ECAB 416 (1990).

accused her of breaking a camera. The absence of specific dates and times and witness corroboration, calls into question whether the alleged instances occurred.

We next address appellant's allegations that the employing establishment improperly denied her request for leave under the FMLA and that her removal was retaliatory in nature. Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.⁵ As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Federal Employees' Compensation Act.⁶ However, to the extent that the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.⁷

The record indicates that appellant's request to use LWOP under the FMLA was denied because she had available sick and annual leave to cover her period of absence. Appellant's removal was premised on the fact that she failed to provide adequate documentation to justify her approximate eight week absence from work. Appellant assumed that the medical documentation she provided to the employing establishment health unit would suffice. However, this information was not readily available to appellant's supervisor. While appellant asserted that she was unaware of any problems with her leave request prior to her return to duty, appellant's supervisor indicated that she brought the matter to appellant's attention during a March 20, 1998 conversation. In summary, appellant took leave from work without obtaining prior approval from her supervisor on the assumption that the request would subsequently be approved without incident. When the employing establishment sought an explanation for appellant's prolonged absence, she failed to respond in a timely fashion, which resulted in her removal from service. Although appellant filed both a grievance and an EEO complaint regarding her removal from service, the record does not include a final determination with respect to either the grievance or the EEO complaint. As such, the record fails to demonstrate that the employing establishment improperly charged appellant's absence to her available sick and annual leave balances or that appellant was improperly removed from service. Although the record indicates that appellant's dismissal was subsequently reduced to a suspension for time served, this fact does not, in and of itself, demonstrate that the removal action was either improper or unreasonable. Consequently, appellant has failed to implicate a compensable employment factor as a cause for her claimed emotional condition.

Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record.⁸ Inasmuch as appellant failed to implicate any compensable factors of employment, the Office properly denied her claim without reaching the medical evidence of record.

⁵ *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Gary M. Carlo*, 47 ECAB 299, 305 (1996).

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides 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.⁹ 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 the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.¹⁰

Appellant's July 31, 1998 request for reconsideration merely noted that she had been seeing a psychiatrist on a regular basis and that certain unidentified medical records had not been mentioned in the decision. She further indicated that she had previously signed a release of her medical records so that they would be forwarded to the Office and that she was willing to sign another release. Appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, she did not advance a point of law or a fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that appellant did not submit any additional evidence with her request for reconsideration. Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1). As she is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's July 31, 1998 request for reconsideration.

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

As previously indicated, appellant's counsel filed a request for a hearing on August 7, 1998 with respect to the Office's July 27, 1998 decision denying compensation.

The Office's regulations provide in pertinent part:

“A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing,

⁹ 20 C.F.R. § 10.138(b)(1).

¹⁰ 20 C.F.R. § 10.138(b)(2).

or if review of the written record as provided by paragraph (b) of this section has been obtained.”¹¹

In the instant case, while appellant’s August 7, 1998 request for a hearing was timely filed, appellant had previously requested reconsideration of the July 27, 1998 decision. Furthermore, the Office had issued an August 6, 1998 decision denying reconsideration prior to counsel’s hearing request.¹² Since appellant had requested reconsideration prior to requesting a hearing, she is not entitled to a hearing as a matter of right. Although appellant is not entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹³ As previously indicated, the Office in its September 8, 1998 decision, advised appellant that her request for a hearing was further denied on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional relevant evidence. This is considered a proper exercise of the Office’s discretionary authority.¹⁴ Moreover, there is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant’s hearing request.

The decisions of the Office of Workers’ Compensation Programs’ claims dated September 8, August 6 and July 27, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 3, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

¹¹ 20 C.F.R. § 10.131(a).

¹² It is not entirely clear from the record whether appellant’s counsel was even aware that she had filed a request for reconsideration on July 31, 1998 and that this request had been denied prior to counsel’s August 7, 1998 request for a hearing.

¹³ See *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁴ *Mary B. Moss*, 40 ECAB 640, 647 (1989).