

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND O. McSWAIN and U.S. POSTAL SERVICE,
WEST ASHVILLE STATION, Asheville, NC

*Docket No. 00-218; Submitted on the Record;
Issued August 14, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.

On December 17, 1997 appellant, then a 47-year-old modified clerk, claimed¹ that he sustained an adjustment disorder with mixed anxiety and depression due to a November 10, 1997 notification of a "change in job description" from full-time to part-time flexible "four months after full-time job offer was accepted and disruption in pay."² He explained that he sustained a right leg injury in 1984 while in the performance of duty, and was by early 1997 unable to perform his assigned duties as a letter carrier due to degenerative joint disease requiring surgical reconstruction of the right knee.

On July 2, 1997 the employing establishment offered appellant a full-time modified clerk position, which he accepted on July 11, 1997. The position was subsequently approved by the

¹ Appellant's supervisor, J.F. Braniecki, corroborated appellant's account of events. He initially filed a Form CA-1, notice of traumatic injury. Appellant then filed a Form CA-2, notice of occupational disease and claim for compensation, on December 5, 1997.

² In a January 8, 1998 letter, the Office advised appellant of the type of factual and medical evidence needed to establish his claim.

Office as suitable work. On November 10, 1997 appellant received a “correction” form, converting him from full time on an annual salary to part-time flexible on a hourly pay rate.³ His annual leave was taken to repay the employing establishment for paid holidays from July 5, 1997. Appellant characterized his reassignment to part-time flexible status as harassment and discrimination due to his partial disability. He stopped work on December 8, 1997 and did not return.⁴

By decision dated February 10, 1998, the Office denied appellant’s claim on the grounds that fact of injury was not established. Appellant disagreed with this decision and in a February 19, 1998 letter requested an oral hearing, which was held on August 14, 1998. At the hearing, he asserted that the pending decision (finalized on November 4, 1998) of Professor Carlton J. Snow in a national contract arbitration between the employing establishment and the National Association of Letter Carriers and American Postal Workers’ Union (the Snow award)⁵ should have prevented the employing establishment from reassigning him from full-time to part-time work. Appellant also asserted that he was singled out for harassment and discrimination due to his partial disability status.

By decision dated and finalized November 23, 1998, the Office hearing representative affirmed the February 10, 1998 decision, finding that appellant had not established a compensable factor of employment.⁶ Appellant disagreed with this decision and in an April 20, 1999 letter requested reconsideration. He submitted additional evidence: a copy of the Snow arbitration award;⁷ an April 1, 1999 prearbitration settlement agreement holding appellant’s grievance in abeyance pending final national implementation of the Snow award; and a report from Dr. Robert Harned, an attending Board-certified psychiatrist.⁸

By decision dated August 12, 1999, the Office denied appellant’s request for a merit review on the grounds that the evidence submitted was “irrelevant” and “immaterial,” and thus

³ A July 24, 1997 personnel action form shows that appellant was assigned to a full-time distribution clerk position effective July 5, 1997. A second personnel action form dated October 30, 1997 shows a “correction,” retroactive to July 5, 1997, that appellant was instead assigned to a part-time flexible position with an hourly pay rate and loss-of-leave eligibility.

⁴ Appellant submitted December 12, 1997 grievance forms regarding his reassignment as a part-time clerk, asking to be reinstated to full-time status.

⁵ The grievant was listed as “B. Tate” of a Memphis, Tennessee post office.

⁶ The hearing representative found that “disputes over work scheduling, modified-duty assignments, leave/holiday pay and status” were administrative matters not within the performance of duty and that appellant had not established any error or abuse by the employing establishment that would bring such matters within the coverage of the Federal Employees’ Compensation Act. The hearing representative also found that appellant had not established his allegations of harassment or discrimination.

⁷ Appellant also submitted a July 23, 1998 claim for continuing compensation (Form CA-7) for an indefinite period beginning on August 9, 1998.

⁸ In a December 5, 1997 report, Dr. Harned diagnosed an adjustment disorder with mixed anxiety and depression, noting that appellant was totally disabled for work until February 8, 1998. Dr. Harned submitted periodic reports from May 2 to November 12, 1998 attributing appellant’s major depression and anxiety disorder to “unfair treatment at work,” including a “change to part time after becoming permanently disabled from DJD [degenerative joint disease] right knee.”

did not warrant a review of the prior decision. The Office found Dr. Harned's report "irrelevant to the issue at hand." The Office further found that the Snow arbitration award was irrelevant and that the prearbitration settlement did not "constitute clear evidence of error or abuse" by the employing establishment in appellant's case. The Office noted that loss of leave, bidding rights, seniority or other privileges were labor management issues not covered by the Act.⁹

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

When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.¹⁰ Disabling conditions resulting from an employee's feeling of job insecurity, such as fear of a reduction-in-force or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.¹¹

Job transfers are usually not considered to be compensable factors of employment under the Act, as they do not involve an employee's ability to perform his regular or specially assigned work duties, but rather constitute an employee's desire to work in a different position.¹² However, the Board has also found that administrative or personnel matters, such as job transfers, will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹³

In this case, appellant alleges that the employing establishment committed error or abuse because his transfer to an hourly, part-time position violated the Snow award. In pertinent part, the Snow award held that the employing establishment violated the union contract by assigning the grievant, a "partly disabled, current employee of the carrier craft to the clerk craft as a part-time flexible worker," "rather than as a full-time regular employee."¹⁴

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Lillian Cutler*, 28 ECAB 125 (1976).

¹¹ *Raymond S. Cordova*, 32 ECAB 1005 (1981); *Lillian Cutler*, *supra* note 10.

¹² *See Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

¹³ *See Richard Dube*, 42 ECAB 916 (1991).

¹⁴ The Office published its advisory interpretation of the Snow award in FECA Circular No. 99-03, dated November 20, 1998, entitled "loss of wage-earning capacity -- USPS and reassignment to part-time flexible positions." The Office found that the Snow decision required the "[the employing establishment], when placing an employee in a different craft, to follow the rules of the receiving craft, so that the placed employee does not

However, the Board finds that the Snow award is not relevant to appellant's claim because it was issued on November 14, 1998, more than 17 months after the employing establishment's July 2, 1997 offer to appellant. Therefore, the Snow award does not show error in that offer or that it was inappropriate when made.

The Board further finds that appellant has not established his allegations of harassment and discrimination. Unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.¹⁵ In this case, appellant has not submitted sufficient evidence to establish that any incidents of harassment occurred or that the job transfers themselves constituted either harassment or discrimination. Accordingly, the Board finds that appellant has failed to establish any compensable factors of employment.

The Board finds that the Office in its August 12, 1999 decision properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.¹⁶

Under section 8128(a) of the Act,¹⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹⁸ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”¹⁹

adversely impact other current craft employees. Therefore, if there are part-time flexible (PTF) employees in the receiving craft, the employee must be placed in a PTF job.” The Office noted that the FECA Procedure Manual, at chapter 2.814.7(a)(1), states that if the employing establishment guaranteed a full 40-hour week to the employee reassigned to a part-time flexible position, the Office would view such reassignment as a “full-time position ... even though it is categorized as PTF administratively. If it meets the physical requirements of the employee, it is a suitable job.” The Office noted that the reassigned employee in a part-time flexible position should be granted retained pay at the date-of-injury pay rate. The Office also noted that “[c]omplaints of loss of advanced leave, seniority, bidding rights and other privileges” were “labor management issues” not covered by the Act.” The issues of leave, seniority and bidding rights were not addressed by the Snow award, because the case was remanded to the parties to negotiate a settlement.

¹⁵ *Kathleen D. Walker*, 42 ECAB 603 (1991).

¹⁶ *See* 20 C.F.R. § 10.606(b)(2) (i-iii).

¹⁷ 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.606(b).

¹⁹ 20 C.F.R. § 10.138(b)(1).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.²⁰

In support of his April 20, 1999 request for reconsideration, appellant submitted a copy of the Snow award and an April 1, 1999 settlement agreement suspending appellant's grievance until final national implementation of the Snow award. As set forth above, the Snow award does not demonstrate that the employing establishment committed error in the administrative matter of appellant's transfer. Thus, these documents do not constitute new, relevant legal argument or evidence.

Appellant also submitted a December 5, 1997 report from Dr. Harned, an attending Board-certified psychiatrist. Because appellant failed to establish a compensable factor of employment, the medical record need not be addressed.²¹ The Board therefore finds that the Office's August 12, 1999 decision was proper under the law and facts of this case.

The decisions of the Office of Workers' Compensation Programs dated August 12, 1999 and November 23, 1998 are hereby affirmed.

Dated, Washington, DC
August 14, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

²⁰ 20 C.F.R. § 10.608(b).

²¹ *Margaret S. Krzycki*, 43 ECAB 384 (1992).