

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM KRUEGER and DEPARTMENT OF DEFENSE,
DEFENSE COMMISSARY AGENCY, Barbers Point, HI

*Docket No. 01-645; Submitted on the Record;
Issued October 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On February 26, 2000 appellant, then a 60-year-old former grocery department manager filed an occupational disease claim and alleged that he suffered from a psychiatric illness causally related to factors of his federal employment. He asserted that on April 26, 1999 he suffered from work-related stress as a result of receiving a 14-day suspension. Appellant asserted that he first became aware of his condition in October 1999. The reverse side of appellant's claim form indicated that he stopped work on January 27, 2000 and did not return.

In a statement dated February 25, 2000, appellant explained that in 1999, Celine Ruiz, his supervisor had informed him that she contemplated giving him a 14-day suspension from work due to statements provided by employees and a vendor representative in which he had been accused of sexual harassment. Appellant indicated that he responded to the allegations, however, management did not investigate his statements prior to formally issuing the suspension. He also indicated that Ms. Ruiz informed him of a proposed 60-day suspension from work in October 1999 for continued sexual harassment. Appellant stated that he was accused of inappropriately touching and making forward advances to female employees and staff, who were retaliating against him for actions presumed to have been taken by him. He asserted again that the allegations were rebutted; however, his claims were never investigated and he received the 60-day suspension unjustly. Appellant alleged that he hired an attorney to represent his interests against the employing establishment and when appellant's counsel requested a meeting with the employing establishment in order to confront his accusers, his request was denied. He stated that in May 1999, he began to feel tired but had trouble sleeping, that he lost a desire to participate in previous activities which he enjoyed and that he became irritable and unproductive in maintaining his household responsibilities. Appellant further stated that following the 60-day

suspension his feelings were compounded with guilt and despair, which caused him to seek medical attention.

In a letter dated April 7, 2000, the employing establishment controverted the claim. A representative of the employing establishment indicated that appellant had received a 14-day suspension on or about April 26, 1999 for conduct unbecoming a federal employee; specifically that appellant was charged with kicking a female employee, making intimidating comments to a vendor and providing incorrect information to management. It was also noted that appellant was suspended for 60 days from November 27, 1999 to January 25, 2000 for unauthorized possession of a Playboy magazine, use of profanity on the worksite and inappropriate conduct and behavior. The employing establishment representative contended in the letter that appellant's reactions to the charges that led to disciplinary actions imposed upon him were self-generated and he did not wish to recognize that his actions were unacceptable.

By decision dated May 16, 2000, the Office denied appellant's emotional condition claim finding that the evidence failed to establish that appellant's condition arose out of the performance of duty. The Office found that appellant had failed to substantiate his allegations of work-related stress and provide medical evidence to support the claimed condition. Further, the Office found that the incident described involved an administrative/personnel matter not covered under the Federal Employees' Compensation Act and that the evidence was insufficient to establish that the employing establishment erred or abused its authority or acted unreasonably in these matters.

In a letter dated June 4, 2000, appellant requested reconsideration. He alleged that according to the assistant store manager, William Roger, appellant should not have received a 14-day suspension but a letter of reprimand on or about April 26, 1999. Appellant also alleged that, while on sick leave, he was asked to report to work under the pretext of an emergency and upon reporting he was immediately called into his supervisor's office and informed of the 60-day suspension. Appellant alleged that he submitted workers' compensation forms to the employing establishment in January following this suspension, however his employer held the documents until April. He further stated that he did not utilize the grievance process upon suspension because he was under the impression that he would nevertheless be determined guilty. Appellant also stated that all of the allegations made against him were false and had been unsubstantiated by witnesses. He denied making intimidating comments towards a vendor and stated that his tapping of a coworker with his foot was done in jest and was never intended to cause threat. Appellant further stated that he did not believe that having a Playboy magazine in his possession constituted any form of harassment. He further stated that he requested that a hearing be conducted on the allegations against him but the store manager, Ms. Ruiz refused. Appellant indicated that he had asked to be reassigned to another work site but that his request was denied. He asserted that working in his former position caused continual feelings of emotional inadequacy, stress, frustration and depression. Appellant also submitted medical documentation in support of his claim.

By decision dated August 16, 2000, the Office denied appellant's application for review on the grounds that the evidence submitted in support of the request was insufficient to warrant review.

The Board finds that appellant has failed to meet his burden of proof in establishing that he developed an emotional condition in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept of coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.¹ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.²

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.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that 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.⁴

Furthermore, appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

Appellant alleged that he was falsely accused by fellow employees and staff of sexual harassment, which led to his unjust suspension from work in April and November 1999. These allegations relate to administrative or personnel matters not directly related to appellant's regular or specially assigned work duties. Therefore, they do not fall within the coverage of the Act.⁷

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁴ *Id.*

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁷ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. Dedonato*, 39 ECAB 1260, 1266-67 (1988).

However, the Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence establishes error or abuse on the part of the employing establishment.⁸ Appellant has not submitted evidence sufficient to establish that management erred or acted abusively in a specific instance relating to the 14-day or 60-day suspension regarding his inappropriate work behavior. His allegations that he did not like the way management handled these issues, without evidence establishing error or abuse, is not sufficient to establish compensability under the Act.⁹ The Board also notes that an employee's emotional reactions to a disciplinary action are generally not covered by the Act.¹⁰ For the foregoing reasons, appellant has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.¹¹

The Board further finds that the refusal of the Office to reopen appellant's claim for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Under section 8128(a) of the Act¹² 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,¹³ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a specific point of law, or

“(ii) Advancing a relevant legal argument not previously considered by the Office, or

“(iii) Constituting relevant and pertinent new evidence not previously considered by the Office.”

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without reopening the case for a review of the merits.¹⁴

⁸ See *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ *Diane C. Bernard*, 45 ECAB 223, 228 (1993).

¹¹ As appellant has failed to allege a compensable factor of employment substantiated by the record, the medical evidence need not be discussed; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁴ 20 C.F.R. § 10.608(b) (1999).

In the instant case, appellant submitted no relevant and pertinent evidence in support of his June 4, 2000 request for reconsideration, nor did he show that the Office erroneously applied or interpreted a point of law. On reconsideration appellant essentially restated the allegations made in his claim, denied allegations of inappropriate behavior and sexual harassment made by the employing establishment and explained why he did not utilize the grievance process regarding these matters. He did additionally allege that the employing establishment delayed in submitting paperwork to the Office; however, he failed to establish compensability under the Act. Appellant further alleged that his supervisor refused to reassign him; however, this argument is also deficient. The Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute his desire to work in a different position.¹⁵ Accordingly, the Office properly denied appellant's request for review on the merits.¹⁶

The decisions of the Office of Workers' Compensation Programs dated August and May 16, 2000 is affirmed.

Dated, Washington, DC
October 24, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹⁵ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹⁶ With appellant's request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).