

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WENDELL P. TYLER and U.S. POSTAL SERVICE,
POST OFFICE, Rantoul, IL

*Docket No. 00-1961; Submitted on the Record;
Issued September 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 causally related to compensable work factors; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration without merit review of the claim.

On June 19, 1991 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an emotional condition causally related to his federal employment. Appellant alleged on the claim form that he was subject to discrimination due to a mental handicap and reprisal for filing an Equal Employment Opportunity (EEO) complaint; he also generally alleged erroneous actions by the employing establishment. Appellant did not return to work.

In a decision dated July 15, 1992, the Office denied appellant's claim. By decision dated October 19, 1999, an Office hearing representative, based on a review of the written record, affirmed the prior decision. In a decision dated May 12, 2000, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

Before addressing the underlying issues, the Board notes that appellant did file a timely request for a hearing following the July 15, 1992 Office decision, and yet a decision from the Branch of Hearings and Review was not issued until October 19, 1999. The record indicates, however, that several attempts were made to schedule an oral hearing in this case. A hearing was scheduled for November 5, 1993 in St. Louis, and December 7, 1995 and December 18, 1996 in Chicago. Appellant requested postponement of these hearings on the grounds that his mental condition and prescribed medications prevented his travel to a city such as St. Louis or Chicago; he requested a hearing be held in Urbana or Champaign, Illinois. The Branch of Hearings and Review advised appellant that it did not normally hold hearings in these cities, but eventually did accommodate appellant by scheduling a hearing for November 18, 1998 in Urbana. Appellant again requested postponement, although the Branch of Hearings and Review had advised him that a hearing in Urbana could not be rescheduled in that location.

The Branch of Hearings and Review then scheduled another hearing for June 15, 1999 in Chicago. On June 11, 1999 appellant again requested postponement, stating that he could not travel to Chicago. Pursuant to the Office's regulations, effective January 4, 1999, the Office hearing representative properly issued a decision based on a review of the written record.¹

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

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

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁴

Appellant has alleged that he was subject to discrimination based on his mental condition and reprisal for filing an EEO complaint when he was initially hired.⁵ With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and

¹ 20 C.F.R. § 10.622(c) indicates that a postponement may be granted due to death of claimant's parent, spouse, or child, or claimant's nonelective hospitalization. Section 622(b) provides that when a request to postpone a hearing does not meet the above requirements, the hearing will take the form of a review of the written record.

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ Appellant had filed an EEO complaint when the employing establishment refused to hire appellant due to his diagnosed condition of paranoid schizophrenia. By settlement agreement dated February 17, 1989, the employing establishment agreed to hire appellant as a part-time flexible clerk and pay a lump sum of \$5,000.00.

reliable evidence.⁶ An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.⁷

The record in this case does not contain any probative evidence to support a claim based on discrimination or reprisal. An EEO decision dated November 29, 1990 indicates that appellant had filed a complaint with respect to the employing establishment's decision not to train him as a window clerk. The decision found that the actions of the employing establishment were not a violation of the settlement agreement. Appellant then filed a complaint of discrimination in U.S. District Court, but there are no findings or decisions on this matter in the record.

Appellant also alleged that he was subject to discrimination and retaliation by the employing establishment's failure to allow him to return to work commencing in November 1991. In this regard the record contains a December 20, 1993 decision from the Merit Systems Protection Board, finding that appellant was not medically able to return to work and therefore he could not establish a constructive suspension by the employing establishment. The decision indicates that appellant had also filed an EEO complaint on this issue, but the case record contains no evidence in this respect.

It is appellant's burden of proof to substantiate the allegations of discrimination and reprisal made in this case. With respect to an allegation of error by the employing establishment in a specific administrative action, there must be probative evidence demonstrating error or abuse by the employing establishment.⁸ Appellant has not submitted probative evidence supporting his allegations, and therefore the Board finds that he has not substantiated a compensable work factor. Since appellant has not established a compensable work factor, the Board will not address any medical evidence of record.⁹

The Board further finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁰ the Office's 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹¹ Section 10.608(b) states that any application for review that does not meet at least one of the

⁶ *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁷ *Helen P. Allen*, 47 ECAB 141 (1995).

⁸ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁹ *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹⁰ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

¹¹ 20 C.F.R. § 10.606(b)(2).

requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹²

In this case, appellant's request for reconsideration again argues that the employing establishment improperly refused to allow him to return to work. He does not, however, submit new and relevant evidence on this issue. There is, for example, a letter from coworkers requesting that appellant not be reinstated, but this does not support a claim of error by the employing establishment. Appellant also submitted a medical report dated February 8, 1993 from Dr. Robert Connor, a psychiatrist. This is not pertinent evidence as a medical issue is not raised until appellant has established a compensable work factor. The Board finds that appellant did not meet any of the requirements of section 10.604(b)(2), and the Office properly refused to reopen the claim for merit review.

The decisions of the Office of Workers' Compensation Programs dated May 12, 2000 and October 19, 1999 are affirmed.

Dated, Washington, DC
September 24, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹² 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).