U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON W. ANGELL and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

Docket No. 01-1049; Submitted on the Record;
Issued January 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an emotional condition causally related to compensable factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying merit review of appellant's claim.

On June 15, 1999 appellant, then a 57-year-old electronics technician filed an occupational disease claim alleging that he became depressed, developed short-term memory problems and low stress tolerance as a result of his federal employment. Appellant stopped work on May 18, 1999.

In a narrative statement dated June 1, 1999, appellant stated that he began work with the employing establishment in May 1993 and soon thereafter, his supervisor, Jeff Carter began closely watching his work. Appellant alleged that, although he felt that he had been performing work duties well and had even received performance awards, his supervisor's behavior caused him stress and confusion. Appellant indicated that following a medical evaluation approximately two years after he began work, it was determined that he had short-term memory problems and as a result, his supervisor continued close observation of his work. He then alleged that after Patricia Francisco, a new maintenance manager was assigned, the labor-management relationship became more adversarial; that attendance records became more critical, training class failure became a reason for termination and the accumulation of two accidents on the job could result in investigation and possible adverse action. Appellant discussed that a coworker was persuaded to "voluntarily" accept a reduction of two pay grades after a training failure and that the event caused considerable stress on all future training. Appellant further stated that following two minor work accidents, he was summoned by Ms. Francisco with his supervisor to explain the incidents and she instructed appellant's supervisor to do safety observations on him. Appellant then alleged that he hit a "breaking point" when he was sent to a four-day class for "Advance Trouble Shooting" and then "drafted" for another 22-day class. He indicated that these classes created great stress on him and his wife, as they had just been involved in a car accident and he was needed at home to handle issues pertaining to the accident.

Appellant stated that he disenrolled after beginning the course because he could not concentrate although he was forced to return. Appellant alleged that prior to his return to class, he was informed that instructors of the employing establishment and students had discussed a proposal to make a "Fitness For Duty" determination as an initial step towards his removal, which caused him further stress and problems with concentration. He indicated that he ultimately failed due to a high level of stress and lack of concentration. Appellant alleged that after returning from the course, an investigation session was initiated and that he felt it best to get a medical evaluation, as his work performance had been impaired by stress. Appellant then stated that following his evaluation he was restricted from work on high voltage or repair machinery, which effectively prevented him from continuing work as an electronics technician.

Appellant submitted a report dated May 26, 1999, in which Dr. Mary Pepping, his attending physician indicated that appellant was first seen in September 1995 secondary to concerns regarding changes in his cognition and later for neuropsychological evaluation in June 1996. She noted that appellant had been continually evaluated neurologically with magnetic resonance imaging scan, which had demonstrated greater cerebral atrophy than expected for someone his age, along with white matter changes deep within his brain. Dr. Pepping stated that appellant had experienced a dramatic decline in memory function and a persistent gradual reduction in his speed and flexibility of thinking since his 1996 evaluation, which appeared to be organically based and that the most likely diagnostic category for this pattern would be subcortical dementia. She further stated that appellant was employed in repairing and maintaining postal machines and that when interrupted from repair, he was easily confused, could not recall the original task and had difficulty performing duties on new equipment, which had heightened his irritability level.

In a report dated June 23, 1999, Dr. Lily Jung, attending physician reported that she had first seen appellant on November 17, 1995 for evaluation of poor work performance secondary to short-term memory problems. She found that appellant also had difficulty with visual spatial tasks and accurate perception of detail and angles and lines. Dr. Jung indicated that appellant was prescribed medication and reevaluated on June 26, 1996 by Dr. Pepping. She was noted to have stated that heightened emotional distress could produce difficulties concentrating at work, tendencies to be easily distracted and problems with short-term memory. Dr. Pepping reportedly further noted that diagnostically, appellant's neurocognitive changes remained puzzling and felt that his difficulty with visual spatial tasks in the context of relatively well-preserved memory otherwise was consistent with literature on human neurotoxic syndrome, particularly exposure to solvents such as gasoline. She was further noted to have recommended that appellant remain in a low stress environment. Dr. Jung, in her June 23, 1999 report, concluded that appellant could return to his position except that he should not work around high voltage lines or around machinery. She further concluded that the etiology of appellant's memory loss and cerebral atrophy was unclear and unlikely to be elucidated given the limitations of technology and that if solvent exposure was the possible etiology for his memory loss, presumptively removing the exposure should cause him to reach a static state.

The employing establishment submitted a statement from Taylor Welch, appellant's supervisor dated June 15, 1999, which indicated that appellant attended a course for analytical troubleshooting in Oklahoma on three occasions and received one incomplete and two

unsatisfactory scores. He stated that appellant's instructors reported that appellant was distracted, lacked concentration and had difficulty completing forms. Mr. Welch stated that after appellant returned to work, he had difficulty orienting himself back to specific job tasks if routine work was interrupted and that he was later informed that appellant had been diagnosed with a permanent brain atrophy condition. He then indicated that appellant was restricted from work around high voltage or repair machinery, therefore, appellant was assigned to clerical tasks, which he struggled to complete.

By decision dated July 20, 1999, the Office denied appellant's claim finding that the evidence of record did not establish that he sustained the claimed emotional conditions in the performance of duty. In a letter dated August 10, 1999, appellant requested an oral hearing.

A hearing was held December 7, 1999, during which appellant submitted a statement dated December 6, 1999, that reiterated assertions previously submitted to the Office regarding stress and concentration problems in the workplace. Appellant further alleged in the December 6, 1999 statement that his exposure to gasoline while in the military caused his brain condition and that it was aggravated by his exposure to chemicals while working as an electronics technician for the employing establishment. Appellant submitted material safety data sheets for products used, including greaseless lubricant, chain oil and tin alloy solder and testified at the hearing that he believed these chemicals may have triggered whatever damage done in the military. Appellant also submitted copies of school records and awards received in training courses and additional medical reports.

During the hearing, coworkers of appellant testified and statements were submitted regarding training courses required and disciplinary actions taken by the employing establishment. Coworkers asserted that appellant was belittled and singled out by management and that instructors had in fact discussed appellant's training performance with employees during the analytical trouble-shooting course in January 1999. Coworkers further alleged that the training course was used as punishment and that failure could result in downgrading or removal. Others indicated that appellant was called into meetings to discuss his work habits and that no other employees have been called in for the similar behavior. Another coworker indicated that appellant was subjected to repeated trips to the training center in Oklahoma and that appellant's failure to pass the course and absence from his family caused him to become upset and forgetful.

In a statement dated December 22, 1999, the employing establishment replied to the testimony offered in the hearing and additional evidence submitted to the Office. A representative of the employing establishment indicated that appellant had not been singled out, however, his safety performance had not been acceptable and that management's actions to address the problem was appropriate. The representative further stated that electronic technicians were required to update and acquire new skills through training and that appellant would not have been terminated if he were unable to pass the course. The representative further indicated that chemicals used by appellant in the course of his duties had been in very small amounts; that appellant wore protective equipment when exposed to chemicals and that these products had been reviewed to ensure safety in the postal environment.

Appellant submitted a reply to the employing establishment's statement reiterating his contentions and noting that the employing establishment had no knowledge of the amount of chemicals used in the performance of duty.

By decision dated February 14, 2000, an Office hearing representative affirmed the prior decision, finding that the evidence presented was insufficient to establish that appellant's psychological and physiological conditions were causally related to employment factors.

In a letter dated March 25, 2000, appellant requested reconsideration. In support, appellant argued that new magnetic resonance imagery evidence warranted review and that he would request copies of the imagery to be provided to the Office as soon as possible. Appellant further submitted a letter from Dr. Jung dated February 28, 2000, in which she again stated that the etiology of appellant's memory loss was unclear although neurophychological testing in the past indicated a possible relation to solvent exposure. Dr. Jung further stated that it was unclear whether these agents caused his memory loss although there could be some poorly defined correlation.

By decision dated May 30, 2000, the Office denied appellant's request for merit review on the grounds that the evidence was repetitive and insufficient to warrant review.

The Board has reviewed the record and finds that appellant has not established an employment-related emotional condition.

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.[1] 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.[2] 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.[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

[1] *Pamela R. Rice*, 38 ECAB 838 (1987).

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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 to 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]

The initial question presented is whether appellant has alleged compensable factors of employment that are substantiated by the record.[5] His claim appears to rest on what he believed was an erroneous emphasis on his work performance by management, which he alleged caused his stress and concentration problems. Appellant first asserted that his supervisor intimidated him and made him uncomfortable with his close observation of his work performance. He then asserted that he was required to travel to training courses, although it caused stress on him and his family. Appellant indicated that he failed training due to stress associated with comments made by instructors to others about his performance and from the knowledge that he could have been terminated from his position if he did in fact fail. Appellant further asserted that his performance was particularly observed after a medical evaluation indicated that he had a brain condition and that he was singled out and counseled about work safety. In support of these allegations, the record contains hearing testimony and witness statements alleging in general terms that management often required appellant to attend out of town training and singled out appellant from other employees by counseling him on safety. Statements from the employing establishment indicate that many employees were required to update and acquire new skills through training and that appellant would not have been terminated if he were unable to pass the course. The employing establishment asserted, however, that appellant's safety and classroom performance had not been acceptable and that management's actions to address the problem were appropriate. The Board notes that disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertaining to actions taken in an administrative capacity are not compensable under the Act unless it is demonstrated that the employing establishment has erred or acted abusively in its administrative capacity.[6] Appellant presented no corroborating evidence that his supervisors' concerns about his work performance were not meritorious. Absent evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In the absence of probative evidence to support his contentions, the Board finds no error or abuse by the employing establishment in the administration of these personnel matters.

Appellant has further asserted that exposure to certain chemicals at the employing establishment such as greaseless lubricant, chain oil and tin alloy solder have aggravated a brain condition, which developed while previously serving in the military. Witness accounts also allege that appellant was exposed to various chemicals in the performance of duty. On the other hand, the record contains letters from the employing establishment, asserting that chemicals used

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

[5] The Board notes that if a claimant has not established a compensable employment factor it is not necessary to address the medical evidence of record; *see Margaret S. Krzycki*, *supra* note 3.

[6] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

by appellant in the course of his duties had been in very small amounts. It was also noted that appellant wore protective equipment when exposed to chemicals and that these products have been reviewed to ensure safety in the postal environment. The factual circumstances surrounding appellant's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a compensable factor arising out of and in the course of employment. Upon review of the factual evidence on this issue, appellant has not established that his claimed emotional condition can be attributable to occupational exposure to chemicals, thereby constituting a compensable factor of employment.

The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (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) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request fails to meet at least one of the standards described in section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

In the present case, appellant filed a request for reconsideration on March 25, 1998. New and relevant factual evidence did not accompany the request. This is important since the underlying issue in the claim, whether appellant has sustained an emotional condition in the performance of duty, is reliant upon an initial factual finding of compensable employment factors. Appellant reiterated contentions previously considered by the Office and discussed new medical evidence which he noted had not been submitted but was forthcoming. Appellant further submitted medical evidence in support of his request, however, as stated above, since compensable factors of employment have not been established, the medical evidence need not be considered in this case.

In its May 30, 2000 decision, the Office correctly noted that appellant did not submit relevant and pertinent new evidence not previously considered by the Office nor did he advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's March 25, 2000 request for reconsideration.

The May 30 and February 14, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 7, 2002

[7] 20 C.F.R. § 10.608(b) (1999).

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member