

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD J. WODESKY and DEPARTMENT OF DEFENSE,
WASHINGTON HEADQUARTERS SERVICES, Arlington, VA

*Docket No. 02-2041; Submitted on the Record;
Issued January 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an emotional condition and heart attack in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration.

Appellant, a 49-year-old computer specialist, filed an occupational disease claim on December 14, 2000, alleging that he sustained emotional stress and anxiety caused by factors of his employment. He stated that he sustained two heart attacks caused by employment-related stress; one on August 6, 1995 and one on February 16, 2000. He attributed stress while attempting to recover periods of annual leave with which he had been charged. In a supplemental statement, appellant noted stress after sustaining a work-related head injury on September 23, 1999. He asserted that this injury caused ringing in his ears, dizziness, nausea, sleep deprivation, loss of memory, inability to concentrate, confusion, an inability to carry out multiple tasks and contributed to the development of his emotional condition.

In a report dated May 30, 2001, Dr. Quentin Macmanus, Board-certified in thoracic surgery and a specialist in cardiology, stated that he treated appellant at Mary Washington Hospital after his February 16, 2000 heart attack and performed open heart surgery on February 19, 2000. Dr. Macmanus stated that appellant had a history of diabetes since the age of 32 and indicated that a stressful work environment precipitated his 1995 heart attack. He further opined that following the September 1999 head injury, appellant experienced symptoms of severe chronic headaches and ringing in his ears, which resulted in sleep deprivation, memory difficulties and confusion. Dr. Macmanus noted that since this accident, appellant had not been able to concentrate or perform his managerial responsibilities at the employing establishment. He concluded that appellant had arteriosclerotic heart disease which was not caused by his work, but that stressful factors of his employment, combined with complications brought about by his work injuries, had precipitated his disability and had aggravated his condition.

In a letter to the Office dated July 9, 2001, appellant stated that he engaged in a time-consuming, year-long dispute with a management official, Joe Stormer, which pertained to

periods of annual leave with which he had been charged. Appellant filed an Equal Employment Opportunity (EEO) claim, which was settled on September 27, 2000.¹ He stated that Mr. Stormer displayed a hostile and threatening attitude toward him on several occasions. Appellant also alleged that following the settlement of his EEO claim, Mr. Stormer engaged in retaliatory actions toward him, by ordering his staff to delay and sabotage the processing of his claims. He asserted that Mr. Stormer deliberately lost or misplaced the forms pertaining to his compensation claim.

By letter dated June 27, 2001, appellant's second line supervisor rebutted appellant's allegations that he was harassed or mistreated by Mr. Stormer or that he had been subjected to a hostile work environment.

By decision dated November 1, 2001, the Office found that fact of injury was not established, as the evidence of record failed to establish that an emotional injury was sustained in the performance of duty.

By letter dated March 27, 2002, appellant's representative requested reconsideration. Appellant submitted a February 27, 2002 report from Dr. Macmanus, in which he reiterated his prior findings and conclusions. Appellant submitted reports dated January 9 and February 27, 2002 from Dr. Lewis B. Eberly, a specialist in neurology and internal medicine. In the January 9, 2002 report, Dr. Eberly noted that appellant was referred by Dr. Macmanus on October 20, 1999, following his head injury and he confirmed symptoms of severe neck pain, headaches and insomnia. Dr. Eberly noted that neuropsychological tests confirmed the presence of cognitive and memory dysfunction, which rendered appellant unable to perform multiple tasks. He stated that appellant, while at work on September 7, 2001, began to experience a series of massive, explosive and severely debilitating headaches. Dr. Eberly recommended that appellant be immediately retired due to his permanent disabilities, which included post-concussive syndrome, chronic headaches, short-term memory loss, inability to concentrate, hearing loss and sleep apnea.

In the February 27, 2002 report, Dr. Eberly stated that there was evidence that sleep apnea may be related to cardiovascular disease and heart attacks in addition to cerebrovascular disease and strokes. He advised that, although causality in terms of sleep apnea could not be specifically demonstrated, appellant's sleep apnea symptoms did not develop until after his September 1999 work-related head injury and that "a causal relationship therefore appears clear."

By decision dated July 22, 2002, the Office denied appellant's application for a review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

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

¹ Appellant asserted in a subsequent, undated statement that, pursuant to the settlement, he was awarded the full amount of restored leave and all of his legal fees.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.³

With regard to appellant's allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Federal Employees' Compensation Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable; a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁴ The Board has held that, when working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable 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.⁵ The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.⁶

The Board finds that appellant has failed to submit sufficient evidence to establish his allegations that he was harassed, mistreated or treated in a discriminatory manner by his supervisors. In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to support that he was harassed or discriminated against by the employing establishment in retaliation for challenging its assessment of annual leave and for filing an EEO claim.⁷ As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support his claim for an emotional

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁵ *Norma L. Blank*, 43 ECAB 384 (1992).

⁶ *Id.*

⁷ See *Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

disability.⁸ For this reason, the Board finds that the alleged incidents of harassment constituted mere perceptions of appellant and were not factually established.

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error and are therefore, not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.⁹

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.¹⁰ However, error or abuse by the employing establishment in an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.¹¹ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹² In this case, there is no evidence of record to substantiate appellant's allegations of error or irregularity when he was charged with annual leave for the periods in question. Further, the fact that appellant had all of his leave restored pursuant to the September 27, 2001 settlement agreement does not, of itself, constitute an admission of wrongdoing on the part of the employing establishment.¹³ The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.¹⁴ Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Accordingly, a reaction to such factors does not constitute an injury arising within the performance of duty. The Office properly concluded that in the absence of agency error or abuse such personnel matters were not compensable factors of employment.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting

⁸ See *Curtis Hall*, *supra* note 4.

⁹ *Alfred Arts*, 45 ECAB 530 (1994).

¹⁰ *Elizabeth Pinero*, 46 ECAB 123 (1994).

¹¹ *Margreate Lublin*, 44 ECAB 945 (1993).

¹² See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹³ *Id.*

¹⁴ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

relevant and pertinent evidence not previously considered by the Office.¹⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁶

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions or is not relevant to the issue on appeal. Although appellant submitted reports from Drs. Macmanus and Eberly, he failed to submit factual evidence to establishment compensable factors of employment. These medical reports are cumulative and repetitive of previous reports, which are not relevant or pertinent because the Office has found that appellant failed to establish fact of injury. Additionally, the letter from appellant's representative failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits. The Board therefore, affirms the Office's July 22, 2002 decision.

The decisions of the Office of Workers' Compensation Programs dated July 22, 2002 and November 1, 2001 are affirmed.

Dated, Washington, DC
January 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁵ 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

¹⁶ *Howard A. Williams*, 45 ECAB 853 (1994).