U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH E. HARRIS and U.S. POSTAL SERVICE,
POST OFFICE, Pine Bluff, AR

Docket No. 02-713; Submitted on the Record;
Issued March 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's October 19, 2001 request for reconsideration as untimely.

On October 28, 1999 appellant, then a 50-year-old window clerk, filed a claim for stress and gastric ulcers, which he attributed to a pattern of alleged harassment by coworker Howard Crosby. He described incidents on unspecified dates in which Mr. Crosby allegedly screamed in his face in front of his supervisor, Larry Wells, and his coworkers. Appellant stopped work on October 6, 1999 and did not return.

In a July 13, 1999 letter to Postmaster J. Pete Jordan, appellant described a pattern of verbal harassment by Mr. Crosby. Appellant stated that Mr. Wells would not take any corrective action. Appellant asserted that, on July 8, 1999, when he went to the general clerk's office to retrieve a travel voucher for another employee, Mr. Crosby announced over the intercom that appellant was "working the front window and not the front office." Appellant also alleged that, on July 14, 1999, Mr. Jordan called him into his office and forbade appellant from having any further contact with Mr. Crosby, noting that Mr. Crosby had been instructed to avoid appellant.

A September 17, 1999 gastric endoscopy and biopsy performed for Dr. James Trice, an attending Board-certified gastroenterologist, showed gastric and duodenal ulcers. In a November 3, 1999 report, Dr. Trice opined that appellant's "peptic ulcer disease … appear[ed] to be aggravated by working conditions (job)" and large doses of Motrin.[1]

In reports dated October 6 to 18, 1999, Dr. Stephen Broughton, an attending psychiatrist, diagnosed "[m]ajor depression, recurrent, severe" and "[a]djustment disorder with mixed emotions of anxiety and depression." Dr. Broughton attributed these symptoms to appellant's

[1] A September 27, 1999 colonoscopy was normal.

accounts of harassment by an unnamed coworker, possibly due to the fact that appellant was African-American and the coworker was caucasian. Dr. Broughton held appellant off work due to "extreme emotional stress causing depressive symptoms and hyperalertness and irritability" and prescribed medication.

In a November 9, 1999 report, Dr. Thomas M. Ward, an attending physiatrist, recommended that appellant remain off work due to psychiatric concerns, but that his lumbar symptoms had improved.

In a November 24, 1999 letter, the Office advised appellant of the type of medical and factual evidence needed to establish his claim. The Office advised appellant to "[i]dentify any relevant dates, locations, coworkers, supervisors, *etc*.," regarding the claimed incidents of harassment by Mr. Crosby.

By decision dated December 30, 1999, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant had failed to establish his claims of harassment or any other compensable factor of employment.

Appellant disagreed with this decision and, in a January 12, 2000 letter, requested reconsideration. He also submitted new evidence.

In an undated statement, appellant described his back pain and gastric ulcer condition and alleged that these conditions were due to occupational stress.

In an undated statement, Larry Rome, a coworker, described a "constant" series of verbal altercations between appellant and Mr. Crosby. Mr. Rome noted that he could not "be specific as to the dates and the times of these conflicts because they happened so often…."

In an undated statement, Eddie Goodlon, a postal customer, recalled that, on an unspecified date, he witnessed Mr. Crosby yell to appellant to "shut up and hold it down."

In a July 29, 1999 fact-finding team inquiry report, the team found that there was sufficient evidence to document "[h]arassment of [appellant] by [Mr.] Crosby," but did not specify any incidents of harassment.

In a February 2, 2000 report, Dr. Broughton, noted treating appellant beginning on October 6, 1999 for "severe stress due to his unbearable work environment." He noted appellant's continued "depression and anxiety surrounding the entire ordeal of his job situation." Dr. Broughton continued to hold appellant off work.

By decision dated March 23, 2000, the Office denied modification of its prior decision on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that appellant's undated statement describing his medical conditions and the witness statements, were "insufficient to establish a factual basis for his claim." The Office further found that the fact-finding team inquiry did not document specific incidents of harassment and that Dr. Broughton's report was not relevant as appellant had established no compensable factors of employment to which a physician could attribute a psychiatric condition.

Appellant disagreed with this decision and, in a May 2, 2000 letter, requested reconsideration through his attorney. He submitted a January 12, 2000 letter requesting an extension of the 30-day time limitation for submitting additional evidence.

By decision dated August 23, 2000, the Office denied modification on the grounds of insufficient evidence. The Office found that appellant had established as factual that, on July 8, 1999, Mr. Crosby stated that appellant was "working the front window, not the front office" and asked appellant on July 14, 1999 if appellant was "after" him. However, the Office found these incidents to be noncompensable as Mr. Crosby's supervisor had been advised and took "reasonable steps" including a "threat assessment team" investigation. The Office found that appellant submitted sufficient evidence to "indicate that [he] had alerted [his] supervisor that" Mr. Crosby had harassed him, found that appellant had established harassment but found that because the supervisor took reasonable steps, the incident did not occur in the performance of duty. The Office modified its prior decision in part, changing the "fact of injury" denial to a "performance of duty" denial for the reason that the evidence established that the claimed harassment occurred but that it was not in the performance of duty.

In an October 19, 2001 letter, appellant's attorney stated: "There is a request for reconsideration of a claim originally filed October 28, 1999, two years ago. At your earliest convenience, please advise me of the status of the review in the above matter." Appellant also submitted a November 12, 2000 report from Dr. Ward, an attending physiatrist, noting that appellant's back pain had decreased significantly and recommended that appellant remain off work and continue to comply with the treatment prescribed by his psychiatrist.

By decision dated October 31, 2001, the Office denied reconsideration on the grounds that appellant's October 19, 2001 request was untimely. The Office found that the October 19, 2001 request for reconsideration was made more than one year following the August 23, 2000 decision. The Office conducted a limited review of the October 19, 2001 letter and Dr. Ward's November 12, 2000 report and found that these did not demonstrate clear evidence of error in the Office's August 23, 2000 decision.

By letter dated November 19, 2001, appellant's attorney advised the Office that his October 19, 2001 letter clearly stated that he was only requesting a status update regarding a pending request for reconsideration made in March 2001, within one year of the August 23, 2000 decision. He submitted copies of a 16-page brief and 2 notarized affidavits all dated March 23, 2001, along with a cover letter requesting reconsideration, to the Office at "525 Griffin Street, Suite 100, Dallas, Texas, 75202." Appellant's attorney contended that he mailed these documents to the Office in March 2001, within one year of the Office's August 23, 2000 decision, but that the Office apparently failed to associate the March 23, 2001 request for reconsideration with appellant's record. Appellant's attorney, therefore, requested that the October 31, 2001 decision be reversed and that appellant's case be reopened for merit reconsideration of the March 23, 2001 request for reconsideration and accompanying materials.

The Board finds that the October 31, 2001 decision was issued in error, as there was an outstanding March 23, 2001 request for reconsideration which remains unadjudicated.

The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of appellant's counsel's practice, is presumed to have arrived at the mailing address in due course.[2] This is known as the "mailbox rule." The Board has held that the presumption of receipt under the mailbox rule must apply equally to claimants and to the Office alike.[3] Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office.[4]

In this case, appellant, through his attorney representative, has submitted sufficient evidence to establish that the March 23, 2001 request for reconsideration was properly addressed to the Office and mailed in the due course of business. Appellant's attorney submitted copies of a 16-page brief and 2 notarized affidavits all dated March 23, 2001, along with a cover letter requesting reconsideration, addressed to the Office at "525 Griffin Street, Suite 100, Dallas, Texas, 75202." Appellant's attorney contended that he mailed these documents to the Office in March 2001.

The Office used the address "525 Griffin Street, Suite 100, Dallas, Texas 75202" on its decisions dated March 23 and August 23, 2000 and October 31, 2001. This is the identical address to which appellant's attorney addressed the March 23, 2001 request for reconsideration.

The record also establishes that the Office receives correspondence mailed to this address within a six-day period. Appellant's attorney's October 19, 2001 letter, addressed to the Office at 525 Griffin Street, reached the Office on October 23, 2001. Appellant's May 2, 2000 request for reconsideration was received on May 8, 2000. His January 12, 2000 letter was received on January 18, 2000.

Thus, the mailbox rule is applicable to the March 23, 2001 correspondence requesting reconsideration, as it was mailed during the ordinary course of business by appellant's attorney. Also, there is no evidence that the March 23, 2001 letter was returned as undeliverable.[5] Consequently, as the record establishes that the March 23, 2001 request for reconsideration was correctly addressed to the Office and that the Office should have received the request within six days, the Office is, therefore, presumed to have received the March 23, 2001 request for reconsideration.

Therefore, the case is remanded for review of the timely submitted March 23, 2001 request for reconsideration. Following such review and any other development deemed necessary, the Office shall issue a *de novo* decision in the case.

---

[2] *Dorothy Yonts*, 48 ECAB 549 (1997); *see Jeff Micono*, 39 ECAB 617 (1988).

[3] *Larry L. Hill*, 42 ECAB 596 (1991).

[4] *Id.*

[5] *See John A. Butcher*, 42 ECAB 934 (1991).

In the August 23, 2000 decision, the Office denied appellant's claim for an emotional condition based on the principle that "[w]hen harassment is coworker to coworker and the coworker's supervisor is advised and took reasonable steps … the incident is not in performance of duty and not compensable." The Board is aware of no such principle in federal workers' compensation law. The Office's procedures stated that "*[h]arassment or teasing of employees by coworkers* is a compensable factor of employment … provided that the reasons for the harassment … are not imported into the employment from the employee's domestic or private life."[6] This principle is based on an erroneous generalization of the Board's holding in *Joe N. Richards*.[7]

The Board specifically rejected the principle that management intervention removed a harassment victim from the performance of duty in *Roya D. Lofti*.[8] In *Lofti*, as in this case, supervisors counseled and reprimanded the harasser and attempted to create an environment in which the harassment would not continue. The Office denied appellant's claim on the grounds that management's interventions took appellant out of the performance of duty. The Board set aside the Office's decision and remanded the case for further development. The Board explained that coworker harassment could be considered compensable only "if the employing establishment is unaware of such harassment and fails to intervene" is an improper intermingling of the "doctrine of administrative error or abuse with the cause of action of harassment. An appellant is not required to establish administrative error or abuse as a prerequisite to establishing an emotional condition claim for harassment." Therefore, as applied to this case, management's actions against Mr. Crosby are irrelevant in determining whether the coworker harassment constituted a compensable factor of employment.

[6] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Ch. 2.804.12.a, *Performance of Duty*, (March 1994).

[7] *See Joe N. Richards*, Docket No. 91-836 (issued December 17, 1991).

[8] 48 ECAB 681 (1997).

The decision of the Office of Workers' Compensation Programs dated October 31, 2001 is hereby set aside and the case remanded to the Office for further development and issuance of a *de novo* decision consistent with this decision and order.

Dated, Washington, DC
March 25, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member