

**United States Department of Labor
Employees' Compensation Appeals Board**

EVAN D. HENDERSON, Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Clearwater, FL, Employer

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Docket No. 04-523
Issued: June 23, 2004

Appearances:

*Evan D. Henderson, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 17, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 29, 2003 denying his emotional condition claim. He also appealed from a decision dated November 18, 2003 denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether appellant established that he sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On May 24, 2002 appellant, a 47-year-old city letter carrier, filed an occupational disease claim alleging stress due to harassment about his physical condition by employing establishment personnel since he returned to work on February 14, 2001.

In a May 23, 2002 report, Dr. Walter E. Afield, an attending Board-certified psychiatrist, noted that appellant had been on limited duty since May 2001 and that he suffered a head injury while serving in the Army. Appellant stated that Bob Reynolds, his supervisor, criticized his work, constantly made snide remarks and told appellant that he was too slow. Due to his anger, appellant indicated that he had not been able to work a full eight-hour day. He related that he took frequent breaks due to pain and that Mr. Reynolds followed him out and told him to get back to work. Dr. Afield diagnosed a traumatic brain injury by history, explosive personality disorder, severe depressive reaction, status post bilateral rotator cuff surgery by history and status post carpal tunnel syndrome by history. He stated:

“He has a history of violent behavior which is difficult to control because of the head injury in the 1980’s. In addition to this problem, patient is dealing with chronic pain and is taking a great deal of pain medication in order to overcome the pain and the work. The patient’s perceived unfair treatment has caused him to lose control and become very angry and very violent to the point where he is a threat to those with whom he works. Patient’s limited work status has brought about a torrent of perceived slights, on his part, bringing a very angry reaction and with his head injury and chronic pain, he is unable to deal with it. This is a direct cause from the workplace environment.”

On July 16, 2002 the Office received an undated statement from appellant, who alleged as follows:

“I returned to work on February 14, 2001 from an on-the-job injury. Immediately after returning on a limited-duty status I constantly had street observation, [was] made fun of and placed in humiliating situations, as well as derogatory statements made to me by my immediate supervisor (a complaint was filed on this and my immediate supervisor did apologize but the damage was already done, a copy of this is in writing). M[y] immediate supervisor began to deny me the same benefits afforded to other noninjured employees such as schedule changes. This continued up until I was referred to a psychiatrist by my treating physician. Continued harassment from my employer as stated above. I sought out EAP counseling through my employer over this problem and was explained by the counselor that I needed to seek professional help with my problem. As stated above the stressful situation was created when I returned to limited duty after my O.T.J.I [on-the-job injury] and was ridiculed as well as treated differently than other employees who were not subjected to an injury. I was placed in a hostile work environment during the entire time of my employment when I returned to work which amounted to roughly forty hours a week. A platform was made for me in order to accommodate my restrictions, which also made me the [butt] of ridicule as well as jokes by my coworkers and management.”

Mr. Reynolds, appellant’s supervisor, denied that appellant was humiliated and was subjected to derogatory statements. With regard to appellant’s allegation that he was denied

benefits afforded to other employees, Mr. Reynolds stated that he believed appellant was referring to overtime. He stated:

“He was a limited-duty employee and unable to case or carry mail for more than a few hours each day. He would always sign the OTDL and had grieved the issue in the past. He would submit a change of schedule each week, changing his [nonschedule] day to Saturday or Monday. I told him that I expected him to work his required schedule. I told him I would approve a change of schedule for the doctor or an important event but not every week.”

By letter dated September 9, 2002, the Office requested detailed factual and medical evidence, stating that the information submitted was insufficient to establish his claim. The Office requested that appellant describe in detail the employment-related incidents or conditions he believed contributed to his condition. The Office also requested that he provided a comprehensive medical report from a physician addressing the relationship of his claimed condition to specific employment factors. The Office afforded appellant 30 days to submit the requested information.

In an August 30, 2002 treatment note, Dr. Afield noted appellant’s anger at the employing establishment. Dr. Afield reported that diagnostic testing indicated “some organic impairment which may well be emotional in origin.” He concluded that appellant was unable to return to work as he would hurt someone. Dr. Afield opined that appellant’s “problems occurred at work” and were caused by work. Dr. Afield diagnosed an explosive personality disorder and severe depression and noted appellant “is quite paranoid and suspicious.”

The Office received additional progress notes from Dr. Afield from September 16 to December 6, 2002, detailing appellant’s treatment, his anger at the employing establishment and economic problems due to not working.

By decision dated January 29, 2003, the Office denied appellant’s claim on the basis that the evidence was insufficient to establish that his condition arose in the performance of duty. Subsequent to the decision the Office received additional progress notes from Dr. Afield for the period December 10, 2002 to August 25, 2003 and a July 12, 2002 magnetic resonance imaging test of appellant’s right knee.

In an August 21, 2003 report, Dr. Afield indicated that he started treating appellant on May 23, 2002 for employment-related injuries and that appellant had subsequent surgeries for carpal tunnel syndrome and a rotator cuff tear. He diagnosed a traumatic brain injury by history, explosive personality disorder, severe depressive reaction, status post bilateral rotator cuff surgery by history and status post carpal tunnel syndrome by history. Dr. Afield related that in August 2002 appellant could not return to work because he believed that appellant would hurt someone. Dr. Afield opined “[t]he problems were, clearly, work related. They were caused by his chronic pain.” In addition, he related appellant is paranoid and suspicious, is severely depressed and has an explosive personality disorder. In concluding, Dr. Afield attributed the aggravation of appellant’s depression and anxiety to his work and concluded that “all of his problems are work related.”

Appellant's representative requested reconsideration on October 7, 2003 and submitted progress notes dated July 30, September 10 and 30, 2003 by Dr. Afield with his request.

By decision dated November 18, 2003, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

To establish appellant's occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized 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.¹ Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.²

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 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 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 factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁴ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.⁵ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

¹ *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

² *Roger W. Robinson*, 54 ECAB ____ (Docket No. 03-348, issued September 30, 2003).

³ *Linda K. Mitchell*, 54 ECAB ____ (Docket No. 03-1281, issued August 12, 2003).

⁴ *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

⁵ *Linda K. Mitchell*, *supra* note 3.

ANALYSIS -- ISSUE 1

The first issue is whether appellant has established a compensable factor of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁶ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁷

Appellant attributed his emotional condition to harassment by his supervisor based upon his physical disabilities. However, no specific incidents of harassment were identified, no witnesses were noted, and no evidence was presented by appellant to substantiate that incidents of harassment by his supervisor occurred, as alleged.⁸ The only reference to specific incidents of harassment were identified by Dr. Afield. In a May 23, 2002 report, the physician described Mr. Reynolds, appellant's supervisor, as criticizing his work and making snide remarks to and about appellant. Mr. Reynolds told appellant that he was too slow in performing his work, followed appellant on his breaks from work and told appellant to return to work. For harassment or discrimination to give rise to a compensable disability, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.⁹ To establish that harassment has occurred appellant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁰ The Board has held that unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹¹ The Board finds that appellant has failed to submit any specific, reliable, probative and substantial evidence to support his allegations of harassment. Appellant has the burden of establishing a factual basis for his allegations, however, the allegations in question are not supported by specific, reliable, probative and substantial evidence. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them, and no harassment by these supervisors has been substantiated by the evidence of record.

As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment under the Act, the medical evidence of record need not be addressed.¹²

⁶ *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003).

⁷ *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2003).

⁸ *Jamel A. White*, 54 ECAB ____ (Docket No. 02-1559, issued December 10, 2002).

⁹ *Marlon Vera*, *supra* note 1.

¹⁰ *Kathleen A. Donati*, 54 ECAB ____ (Docket No. 03-1333, issued August 13, 2003).

¹¹ *Penelope C. Owens*, *supra* note 6.

¹² *Karen K. Levene*, 54 ECAB ____ (Docket No. 02-25, issued July 2, 2003).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁴ Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.¹⁵

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹⁶ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁷

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.¹⁸

ANALYSIS -- ISSUE 2

Under 20 C.F.R. § 10.606, a claimant may obtain review of the merits of his 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 relevant and pertinent evidence not previously considered by the Office.¹⁹ 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.

With respect to the medical evidence submitted, the Board notes that appellant had not substantiated a compensable work factor. Only when a compensable work factor has been substantiated does the medical evidence become relevant as to whether appellant has established

¹³ 5 U.S.C. § 8128(a) (“the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

¹⁴ *Raj B. Thackurdeen*, 54 ECAB ____ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁵ 20 C.F.R. § 10.608(a).

¹⁶ 20 C.F.R. § 10.606(b)(1)-(2); see *Sharyn D. Bannick*, 54 ECAB ____ (Docket No. 03-567, issued April 18, 2003).

¹⁷ 20 C.F.R. § 10.608(b).

¹⁸ *Id.*

¹⁹ *Roger W. Robinson*, *supra* note 2.

an employment-related emotional condition.²⁰ Dr. Afield's August 21, 2003 report attributed appellant's depression due to his chronic pain, which is not a factor alleged by appellant in his statements to the Office. The report is also repetitive of previous reports in which Dr. Afield concluded that appellant's depression was employment related. The Board finds that Dr. Afield's reports are not new and relevant evidence with respect to the issue of whether appellant has established a compensable factor of employment. 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. The Board finds that appellant did not meet any of the requirements of section 10.606(b)(2) and therefore the Office properly refused to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 18 and January 29, 2003 are affirmed.

Issued: June 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²⁰ See *Parley A. Clement*, 48 ECAB 302 (1997).