

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

H.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 06-743
Issued: August 3, 2006**

Appearances:
David Swimmer, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 19, 2005, denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. Appellant also timely appealed a May 5, 2005 decision, which denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 25, 2004 appellant, then a 39-year-old supervisor, filed a traumatic injury claim alleging that on February 22, 2004, he received multiple stab wounds to the back of his neck, the back of his right and left hands, his left eye and the left side of his nose. Appellant

alleged that the contusions were inflicted by employees he supervised and with whom he was involved in an arbitration case in 1999 and were in the performance of duty. Appellant stopped work on February 22, 2004.

In a February 25, 2004 investigative memorandum, D.L. Roberts, the postal inspector, confirmed that an investigation had been conducted into the conduct of full-time mail handler, Jeffrey Milliken and full-time mail carrier, Faith Myers. He indicated that a copy of a police report was obtained which described the February 22, 2004 incident in which appellant was assaulted and stabbed several times by Mr. Milliken at his home, shortly after midnight.

In a February 22, 2004 emergency room report, Dr. Robert Craig McKee, a Board-certified plastic surgeon, diagnosed appellant with multiple stab wounds to the neck, right palm and left hand and performed surgery to close the wounds.

Appellant also provided a February 24, 2004 statement in which he alleged that he had previous problems with Mr. Milliken and Ms. Myers in 1999, which resulted in arbitration. He alleged that on the night of February 22, 2004, both Mr. Milliken and Ms. Myers arrived at his home and alleged that he had been involved with Ms. Myers. Appellant denied that a personal relationship had ever occurred and during the course of the discussion, he bumped into Mr. Milliken and he was stabbed. He also submitted a statement from his wife, dated February 24, 2004, which confirmed his allegations.

The Office also received a February 22, 2004 incident report from the employing establishment, which noted that Ms. Myers had contacted the employing establishment to inform them that she and Mr. Milliken had gone to appellant's home to discuss personal matters. She alleged that an altercation had occurred such that appellant was transported to the hospital. Additionally, the Office received diagnostic reports and treatment notes related to stabbing and appellant's emergency room treatment on February 22, 2004.

In a letter dated March 4, 2004, the employing establishment controverted the claim and advised that the incident was "personal in nature. The stabbing had nothing to do with [appellant's] involvement in a 1999 arbitration case involving Mr. Milliken, the person who stabbed [appellant]...." The employing establishment noted that "the stabbing was precipitated by a belief by Mr. Milliken that his girlfriend had been sexually involved with [appellant]."

In a letter dated March 10, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim and requested that he submit additional supportive factual and medical evidence. Appellant was specifically advised that the evidence was insufficient to establish that appellant was injured while performing any duty of his employment.

The Office subsequently received a copy of appellant's February 24, 2004 statement and his claim form. They also received a statement from Faith Moran (Ms. Myers), which indicated that she and Mr. Milliken went to appellant's residence to discuss issues regarding "Herb's lies towards me." Ms. Moran indicated that an altercation arose between Mr. Milliken and appellant. Additionally, appellant's wife submitted a statement describing the altercation, which occurred at their home when Ms. Moran and Mr. Milliken arrived around 12:30 am. Appellant also provided a February 22, 2004 statement, which described the incident. He alleged that Ms. Moran and

Mr. Milliken came to his house to confront him regarding “stories/lies.” The Office also received a February 22, 2004 police narrative from Mr. Milliken, in which he indicated that he was involved in a heated argument at the victim’s house. Additionally, the Office received a February 22, 2004 offense report, which appellant was charged with possession of a fire arm and several other police statements.

In a March 10, 2004 investigative memorandum, from the employing establishment’s inspection service, the employing establishment inspector found that the altercation apparently arose as a result of personal relationships and was not related to appellant’s employment.

In a March 25, 2004 report, Dr. O. Basga-Bernard, a physician of unknown specialty, advised that appellant was being treated for wounds received subsequent to an attack at his home on February 22, 2004. He opined that appellant was incapacitated from February 22 to April 26, 2004.

In an undated statement received by the Office on April 14, 2004, appellant alleged that he believed his claim was work related because the assailant, Mr. Milliken, was on the clock at the time of the incident and that Ms. Moran was on sick leave. He alleged that they followed him home from work to “confront him regarding something stemming from the job.” He also alleged that Ms. Moran telephoned his wife several days earlier and alleged that Mr. Milliken thought that he “conspired to get him fired back in 1999...” Appellant alleged that he believed that they had targeted him since the arbitration. He also alleged that his association with Ms. Moran and Mr. Milliken was strictly work related and that he did not have a personal relationship with either or any contact with them, until they followed him to his home on February 22, 2004. He also denied a personal or sexual relationship with the perpetrators.

By decision dated April 16, 2004, the Office denied appellant’s claim on the grounds that he did not sustain an injury in the performance of duty on February 22, 2004.

By letter dated April 19, 2004 appellant, requested a hearing, which was held on February 17, 2005. During the hearing, appellant described the circumstances surrounding his injury, which occurred at his home. Appellant alleged that the incident occurred as a result of a 1999 incident between two employees whom he reported after an altercation and which resulted in an arbitration hearing. He also alleged that his credibility was damaged and that he feared for his family and their safety and alleged that they had relived the event, which was going to be with them for life. Appellant also alleged that the situation was stressful to his family and they had to be on the defense. Furthermore, appellant alleged that he wished to have his tour of duty changed to days instead of nights, but that his request was denied.

By decision dated May 5, 2005, the Office hearing representative affirmed the Office’s April 16, 2004 decision. The hearing representative also found that appellant had not established an emotional condition in the performance of duty.

On December 5, 2005 appellant requested reconsideration. He alleged that he “would not be in this position if [he] wasn’t a postal supervisor [doing] his duties.”

He also submitted a October 16, 2005 report from a social worker, which described appellant's history of injury at his home and which included diagnoses of post-traumatic stress disorder and major depressive disorder.

By decision dated December 19, 2005, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act¹ provides for the payment of compensation benefits for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The phrase "while in the performance of duty" in the Act has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."² In addressing this issue, the Board has stated:

"In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto."³

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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.⁴ 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.⁵

¹ 5 U.S.C. §§ 8101-8193.

² *Bernard D. Blum*, 1 ECAB 1 (1947).

³ *Allan B. Moses*, 42 ECAB 575 (1991); *Barry Himmelstein*, 42 ECAB 423 (1991); *Mary Keszler*, 38 ECAB 735 (1987).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Id.*

ANALYSIS -- ISSUE 1

In the present case, the Office found that appellant's injury occurred off the premises of the employing establishment, that he did not otherwise implicate compensable employment factors as a cause of his claimed injury and, therefore, his claimed injury did not occur in the performance of duty. Appellant alleged that he received multiple stab wounds at his home after two employees, Mr. Milliken and Ms. Myers, followed him to his home after work to confront him regarding a personal matter. They alleged that he had been personally involved with Ms. Myers, an allegation, which appellant denied. Appellant alleged that while he was at his home, an argument ensued and he was followed, assaulted and stabbed. He alleged that this personal animosity resulted from his participation in a 1999 arbitration hearing, which involved both Mr. Milliken and Ms. Myers. The Board finds that this evidence establishes that the alleged incident did not occur on the employing establishment premises.

Appellant has alleged that the assault arose out of his employment and would not have occurred but for his duties as a supervisor. In determining whether an assault arises out of employment, the Board has relied on Larson's treatise on workers' compensation law. Larson states the following:

"Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work.... Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor."⁶

The Board has held that when animosity or dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault does not arise out of employment.⁷ The evidence of record indicates that the assault on appellant arose at his home and resulted from personal animosity with Mr. Milliken and Ms. Myers. Essentially, the attack arose due to a personal nonwork-related matter, an allegation of an affair. There is no indication that work contributed to or facilitated the dispute which arose from personal reasons. While appellant alleged that the attack resulted from animosity related to an arbitration hearing in 1999, he has not shown how or why the assault in the present case resulted from work matters more than four years after the event. The record contains evidence related to personal matters, mainly an alleged affair and does not contain any suggestion that the assault was work related. Accordingly, the physical attack upon appellant did not arise out of appellant's employment.

The Board notes that this case has some similarity to that of *George A. Fenske, Jr.*⁸ In that case, a woman who had been dating the employee became offended by the actions and suspected actions of the employee while on a date one night. Approximately, one week later, she came to the employing establishment ostensibly to mail a package but, while the employee was

⁶ A. Larson, *The Law of Workers' Compensation* § 8.00 (2000).

⁷ See *Agnes V. Blackwell*, 44 ECAB 200 (1992); *Jean A. Kolinchak*, 43 ECAB 1138 (1992).

⁸ 11 ECAB 471 (1960).

waiting on her, threw a lye solution into his face. The Board held that the assault occurred only because of a personal relationship between the employee and the assailant outside of work and wholly apart from the employment. The Board pointed out that the only part the employment played in the assault was to place the employee at a location in a point in time where the assailant knew she could find him.

In the present case, the evidence shows that the assault arose from a personal relationship between appellant and Mr. Milliken and Ms. Myers. The employing establishment only came into play because appellant was a supervisor where both Mr. Milliken and Ms. Myers worked. There is no indication that appellant was on duty or doing any work-related activities at the time of the assault. Furthermore, the record reflects that the assault occurred at appellant's home and arose out of allegations related to an alleged affair. The Board finds that the assault on appellant was off the employment premises and was not related to any employment factors and, therefore, did not occur within the performance of duty.

Appellant also alleged an emotional condition resulting from the assault, which included fear for his family and stress as a result of the altercation. However, as noted above, the altercation did not arise in the course of appellant's employment. Likewise, any fear for the safety of appellant's family relates to this nonemployment-related incident. As noted above, the incident did not occur during working hours, at his work location or arise from his employment duties. In any event, the Board has held that the possibility of a future injury does not constitute an injury under the Act.⁹ Consequently, any emotional condition resulting there from did not occur in the performance of duty and is not compensable under the Act.¹⁰

As appellant failed to establish any compensable factors of employment, the Board finds that the Office properly denied appellant's claim.¹¹

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹² the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

⁹ See *Brenda L. Dubuque*, 55 ECAB ____ (Docket No. 03-2246, issued January 6, 2004).

¹⁰ See generally *Edye Ann Smith*, 48 ECAB 463 (1998).

¹¹ The Board also notes that as appellant has not established a compensable work factor, it is not necessary to address the medical evidence. *Barbara J. Latham*, 53 ECAB 316 (2002).

¹² 5 U.S.C. § 8128(a).

“(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 [the Office].”¹³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹⁴

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for an injury in the performance of duty and requested reconsideration on December 12, 2005. The underlying issue on reconsideration was whether appellant sustained an injury in the performance of duty. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he sustained an injury in the performance of duty.

In his request for reconsideration appellant essentially alleged that he would not be in this position but for his duties as a postal supervisor. However, appellant has previously alleged this reason in his prior statements in which he indicated that he believed the assailants followed him to his home after work. He alleged that the animosity arose out of a 1999 arbitration hearing. The Board notes that appellant merely reiterated his previous contentions regarding his belief that while the altercation occurred at his home, it was related to his employment. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.¹⁵ Appellant did not provide any relevant and pertinent new evidence to establish that he sustained an emotional condition in the performance of duty.

He also submitted an October 16, 2005 report from a social worker. However, this report is not relevant as the report did not contain any information to show that the injury occurred in the performance of duty. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law or

¹³ 20 C.F.R. § 10.606(b).

¹⁴ 20 C.F.R. § 10.608(b).

¹⁵ *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

¹⁶ *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

For the foregoing reasons, appellant has not met his burden of proof in establishing that he sustained an injury 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 under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 19 and May 5, 2005 are affirmed.

Issued: August 3, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board