United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 07-639**
	)	**Issued: July 20, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, FRANK M. TEJEDA OUTPATIENT CLINIC, San Antonio, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2007 appellant filed an appeal of an April 21, 2006 decision of the Office of Workers' Compensation Programs denying his occupational disease claim and an October 31, 2006 decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained musculoskeletal or neurologic conditions in the performance of duty; (2) whether he has established that he sustained an emotional condition in the performance of duty; and (3) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On September 28, 2005 appellant, then a 58-year-old rating specialist, filed an occupational disease claim (Form CA-2), asserting that beginning in February 2005 workplace exposures to cold temperatures and high humidity caused his bodily tissues to "gell." From September 30 to November 22, 2005, he submitted a series of occupational disease claims asserting that he sustained petit mal and absence seizures, headaches, joint pain, fibromyalgia, lumbar pain, numbness, muscle cramping, stiffness, arthritis, photophobia, high cholesterol, anxiety and stress due to an involuntary schedule change from 7:00 a.m. to 3:30 p.m. to 8:00 a.m. to 4:30 p.m. which would expose him to increased rush hour traffic, fluorescent lights, computer problems, climbing stairs, low ambient humidity, high ambient humidity, excessive heat, a lack of handicapped parking spaces and commuting by car in slow traffic. Appellant also attributed his seizures to air conditioner humming, strobe lights, crowds of people conversing, machine noise, cloudy days, allergies, pollution, airplane noise, weather changes within 600 miles of his person and solar flares.

Appellant submitted numerous reports from 1966 to 2002 documenting the presence of petit mal and absence seizures, congenital malformations of the lumbar spine, lumbar spondylolisthesis, lumbar strains, generalized degenerative arthritis, osteopenia of the hands and sleep apnea. In a February 27, 2004 report, Dr. Hardeep Singh, an attending Board-certified internist, diagnosed depression. These reports did not mention work factors. Appellant also submitted a chronology of the development and treatment of his conditions.

In an October 14, 2005 letter, Ann Alvarez, a coworker, asserted that the building in Houston where she and appellant worked until January 2005 had humidity problems and a strong smell of urine due to leaking showers on an upper floor.

The employing establishment controverted appellant's claims. In a November 7, 2005 memorandum, it was asserted that a September 2005 inspection did not reveal any environmental concerns relevant to appellant's allegations. In a November 9, 2005 email, the employing establishment explained that it replaced his computer three times due to his complaints but, that, no specific problem was ever identified. In a November 30, 2005 letter, the employing establishment explained that, on August 21, 2005, appellant and his ten-team members were placed on a modified flex schedule of 8:00 a.m. to 4:30 p.m., one hour later than appellant's 7:00 a.m. to 3:30 p.m. schedule. The employing establishment affirmed that on one unspecified date appellant had to search for several minutes to find a handicapped parking space.

In a December 15, 2005 letter, the Office advised appellant of the additional evidence need to establish his claim. The Office emphasized the need for a detailed report from his attending physician explaining how and why work factors caused or aggravated the claimed conditions.

Appellant submitted reports from Dr. Thomas A. Castoldi, an attending osteopathic physician Board-certified in family practice. On December 19, 2002 Dr. Castoldi prescribed an

orthopedic chair due to appellant's spina bifida occulta and spondylolisthesis.[1] He opined that appellant was totally and permanently disabled due to back pain. In reports dated January 19 and February 20, 2004, Dr. Castoldi recommended that appellant work outside of Houston environment as wet, humid and cold weather worsened his arthritis. He recommended San Antonio as more stable and less polluted. On January 25, 2005 Dr. Castoldi stated that appellant needed to change positions every 30 minutes due to arthritis. In an April 11, 2005 report, he opined that appellant was permanently and totally disabled due to musculoskeletal pain. In an October 10, 2005 report, Dr. Castoldi stated that bright lights and humidity worsened appellant's fibromyalgia symptoms.

In a February 23, 2004 letter, the employing establishment granted appellant's request for a transfer from Houston to San Antonio.[2]

By decision dated April 21, 2006, the Office denied appellant's claim on the grounds that causal relationship was not established. The Office found that appellant submitted insufficient medical evidence explaining how and why the identified work factors would cause or aggravate the claimed musculoskeletal and seizure conditions. The Office further found that appellant submitted insufficient evidence to establish that he was exposed to heat, cold, humidity, fluorescent lights, strobe lights, crowds of people conversing, cloudy days, machine noise, allergens, pollution or airplane noise in the performance of duty. The Office noted that appellant submitted insufficient evidence to establish that he sustained an emotional condition in the performance of duty. The Office accepted as factual that the employing establishment granted appellant's request to transfer from Houston to San Antonio.

In a letter postmarked October 6, 2006, appellant requested a review of the written record by a representative of the Office's Branch of Hearings and Review.[3] He submitted October 2006 minutes from a union meeting that did not directly address his claim.

By decision dated October 31, 2006, the Office denied appellant's request for an oral hearing on the grounds that it was not timely filed within 30 days of the Office's April 21, 2006

[1] On January 3, 2003 appellant requested that the employing establishment provide him an orthopedic chair. The record does not indicate if the employing establishment did so.

[2] On September 15, 2005 the Office of Personnel Management (OPM) denied appellant's application for disability retirement. The Board has previously held that the decisions of other administrative agencies do not establish appellant's entitlement to benefits under the Federal Employees' Compensation Act. *See Daniel Deparini*, 44 ECAB 657 (1993). Appellant submitted February 16 and April 6, 2005 letters of counseling advising him of performance deficiencies in his work accuracy and productivity. He did not allege that these performance appraisals caused or aggravated any medical condition. The Board notes, however, performance appraisals are administrative, noncompensable matters unless error or abuse is shown. *Beverly A. Spencer*, 55 ECAB 501 (2004). Appellant also submitted the employing establishment's denial of his September 2005 request to use voice-operated dictation equipment. The employing establishment did not respond to his request to telecommute. Appellant did not assert that the employing establishment's actions caused or aggravated any of the claimed conditions. The Board notes that frustration over not being able to work in a particular environment is not compensable. *Peter D. Butt Jr.*, 56 ECAB ___ (Docket No. 04-1255, issued October 13, 2004).

[3] The record indicates that appellant also requested reconsideration on October 16, 2006. The Office does not appear to have taken any action on the reconsideration request.

decision. The Office found that appellant could pursue his request equally well by requesting reconsideration and submitting evidence establishing that he sustained an injury in the performance of duty.[4]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[7]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which 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. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medial 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 the claimant.[8]

ANALYSIS -- ISSUE 1

The Office denied appellant's claims for musculoskeletal and neurologic conditions on the grounds that the medical evidence submitted was insufficient to establish a causal

[4] Appellant submitted additional evidence accompanying his request for appeal. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final merit decision in the case. 20 C.F.R. § 501.2(c).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[8] *Solomon Polen*, 51 ECAB 341 (2000).

relationship between his work factors and the development of any medical condition. Appellant submitted numerous reports from 1966 to 2002 regarding his treatment for various musculoskeletal conditions and petit mal seizures. However, these reports do not mention his federal employment or otherwise address the causal relationship appellant asserted.

Dr. Castoldi, an attending osteopathic physician Board-certified in family practice, stated in reports from January 2004 to October 2005, that appellant's arthritis required a dry, warm weather work environment in which he could change positions frequently. He also stated that appellant's fibromyalgia symptoms were worsened by bright lights and humidity. However, Dr. Castoldi did not provide any pathophysiologic explanation of how and why humidity, cold or bright lights would cause or aggravate any diagnosed medical condition. Without such rationale, his opinion is of insufficient probative value to establish causal relationship in this case.[9]

In an April 11, 2005 report, Dr. Castoldi found appellant permanently and totally disabled due to musculoskeletal pain, but appellant was working at the employing establishment in April 2005. He did not explain why he found appellant totally disabled for work while he was clearly able to work. This discrepancy further diminishes the probative value of Dr. Castoldi's opinion.[10] The Board notes that, in a December 15, 2005 letter, the Office advised appellant of the critical need for a rationalized report from his attending physician explaining how and why work factors would cause or aggravate the claimed conditions, but appellant did not submit such evidence.

The Board finds that appellant has not established that he sustained a musculoskeletal or neurologic condition in the performance of duty, as he submitted insufficient rationalized medical evidence to establish causal relationship.

LEGAL PRECENT -- ISSUE 2

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[11] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[12]

[9] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[10] *Tammy L. Medley*, 55 ECAB 182 (2003).

[11] 5 U.S.C. §§ 8101-8193.

[12] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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.[13] 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.[14]

ANALYSIS -- ISSUE 2

Appellant alleged that he sustained stress and anxiety as a result of a number of employment incidents and conditions which the Office found to be noncompensable. The Board must review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

The Office accepted as factual that the employing establishment granted appellant's request for a transfer from Houston to San Antonio. However, appellant did not allege that the transfer caused or contributed to any claimed emotional condition. He alleged that frustration over other aspects of his work environment caused him stress and anxiety. The Office found that appellant did not establish these environmental and weather conditions as factual.

Appellant attributed his emotional condition, in part, to an involuntary work schedule change in August 2005. The employing establishment confirmed appellant's account of events in a November 30, 2005 letter. Appellant submitted sufficient evidence to establish that his work schedule was changed in August 2005. Generally, the assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[15] In this case, appellant expressed his frustration that a change in work schedule from 7:30 a.m. to 4:00 p.m. to 8:00 a.m. to 4:30 p.m. would expose him to increased rush-hour traffic. However, he did not allege that he could not perform his job at the new times, only that he preferred his previous schedule. The record does not demonstrate that the change in work schedule adversely affected appellant's ability to do his work. The Board, therefore, finds that his frustration over the new work schedule is self-generated and not compensable.

Appellant also attributed his condition to not finding a handicapped parking space quickly enough on one occasion. The Board finds that he submitted sufficient evidence that he once had difficulty finding a handicapped parking space. However, the circumstances of the incident are too vague to establish a compensable employment incident.

[13] *See Norma L. Blank*, 43 ECAB 384 (1992).

[14] *Id.*

[15] *Helen Allen*, 47 ECAB 141 (1995).

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as he failed to establish any compensable factors of employment. As he has not established any compensable work factors, the medical record regarding any psychiatric conditions need not be addressed.[16]

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[17] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[19]

ANALYSIS -- ISSUE 3

The Office denied appellant's claim by April 21, 2006 decision. Appellant's letter requesting an oral hearing was postmarked on October 6, 2006, more than 30 days after the April 21, 2006 decision. Thus, the Office properly found that his request for an oral hearing was not timely filed under section 8124(b)(1) of the Act and that appellant was not entitled to an oral hearing as a matter of right.

The Office then exercised its discretion and determined that appellant's request for an oral hearing could equally well be addressed by requesting reconsideration and submitting additional evidence establishing that the claimed musculoskeletal conditions were causally related to his federal employment. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[20] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request.

Thus, the Board finds that the Office's denial of appellant's request for a review of the written record was proper under the law and facts of this case.

[16] *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[17] 5 U.S.C. § 8124(b)(1).

[18] 20 C.F.R. §§ 10.616, 10.617.

[19] *Claudio Vasquez*, 52 ECAB 496 (2002).

[20] *Daniel J. Perea*, 42 ECAB 214 (1990).

CONCLUSION

The Board finds that appellant has not established that he sustained musculoskeletal or neurologic conditions in the performance of duty. It further finds that appellant has not established that he sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 31 and April 21, 2006 are affirmed.

Issued: July 20, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board