

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

R.M., Appellant

and

**DEPARTMENT OF THE NAVY,
Washington, DC, Employer**

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**Docket No. 07-373
Issued: May 8, 2007**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 22, 2006 appellant filed a timely appeal of the August 30, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which found that he abandoned his request for an oral hearing and a merit decision issued on April 27, 2006. The Board has jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), as the last merit decision was issued on April 27, 2006.¹

ISSUES

The issues are: (1) whether appellant has established that he sustained an occupational disease in the performance of duty; and (2) whether he abandoned his request for a hearing.

¹ The record includes evidence received after the Office issued the April 27, 2006 decision. The Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c) (2004).

FACTUAL HISTORY

On October 18, 2005 appellant, then a 50-year-old auditor, filed a claim for an employment-related emotional condition. He described his condition as post-traumatic stress disorder, which he first became aware of on March 15, 2005. In an undated statement, appellant described how he felt while working in Baghdad, Iraq from March 2004 until January 2005.

“From almost the very first day in Iraq, you ask yourself is today going to be a good day? If so, there won’t be any mortars, if not; be ready to run for cover, because the tent you live in has no defense from rockets, mortars or even the occasional stray bullet. You hear the explosion; it is pretty close, and then the sirens. You put on your vest, helmet and shoes and wait. Finally, you get the all clear. How long did it take this time? 15 minutes? You don’t even want to think about if anyone got hurt or killed, but it is always on your mind. Will you be next?

“A couple of days go by and you begin to relax. No car bomb, no mortars and then a bomb explodes in a local market. Several soldiers you could have eaten lunch with are dead. You become very selfish. You pray for the dead soldier’s families, but you thank God it wasn’t you. You ask questions, but the answers don’t come....”

In an October 14, 2005 physician’s report, Dr. Harvey Fernbach, Board-certified in psychiatry, diagnosed post-traumatic stress disorder.

In a January 3, 2006 letter, the employing establishment controverted appellant’s claim. The employer noted that, while stationed in Baghdad, appellant lived under the same conditions as thousands of other civilians in the green zone. The employer also noted that, while there were four rocket or mortar explosions within the compound where appellant lived, appellant was not in the vicinity and could not have been injured. The employer stated that appellant was able to choose his living space after the initial three weeks in a tent, which he did, choosing to live in the Royal Palace and in a trailer. According to the employer, appellant failed to notify anyone that he was under stress, his supervisor observed him to be relaxed and adjusted and appellant actually volunteered to work in Iraq beyond his original tour of duty.

In a March 24, 2006 letter, the Office informed appellant that the information submitted was not currently sufficient and that he needed to provide additional factual and medical information.

In an April 27, 2006 decision, the Office denied appellant’s claim on the grounds that the evidence was insufficient to establish that events occurred as alleged.

On May 10, 2006 appellant requested an oral hearing. The envelope which contained the hearing request contained appellant’s return address.²

² 1318 Greenmount Drive, Waldorf, MD 20601.

In a May 18, 2006 letter, the Office informed appellant that his request for oral hearing had been received.

In a July 17, 2006 letter, the Office informed appellant of his scheduled oral hearing on August 16, 2006.

In an August 30, 2006 decision, the Office found that appellant abandoned his request for a hearing. The Office noted that appellant failed to appear at the hearing and that the record gave no indication that he had contacted the Office either prior or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

To establish that he sustained an emotional condition causally related to factors of his federal employment, appellant must submit: (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 condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that his emotional condition is causally related to the identified compensable employment factors.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless, does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁴ Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.⁵ 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.⁶

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of his employment condition of being located in Baghdad, Iraq. By decision dated April 27, 2006, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. Appellant's factual evidence of record consists of a Form CA-2 and a

³ See *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ See *Kathleen D. Walker*, *supra* note 3. Unless a claimant establishes a compensable factor of employment, it is unnecessary to address the medical evidence of record. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

statement. In his statement, appellant describes the stress he felt from being in Iraq but only references “the sights and sounds I witnessed in Iraq” and “soldiers you *could* have eaten lunch with are dead.” (Emphasis added.) Appellant did not provide specific details of incidents contributing to his emotional condition such as dates, locations, individuals involved and what occurred. The Board finds that appellant did not submit specific information pertaining to his allegations. His allegations are general in nature and do not constitute a compensable factor of employment.

Appellant’s job duties were those of an auditor. He has not explained how any of his assigned job duties caused or contributed to his alleged emotional condition. Rather, appellant’s focus is the environment in which he worked. Preference for a different work environment is not a compensable work factor. Appellant’s supervisor has explained that he was never in the vicinity of any attacks and that he volunteered to continue to work in Iraq beyond his original tour of duty. The allegation that he worked in Iraq is not, in and of itself, compensable.

Appellant stated that he felt fear and anxiety from watching the news. The fact that an employee learns of a tragedy, no matter how horrific and sustains an emotional condition during working hours does not in and of itself provide the necessary nexus to establish that the emotional condition occurred while in the performance of duty, as required by the Act.⁷

Appellant bears the burden of proof to identify the factors of his claim. In this case, he has failed to adequately identify any employment factors that allegedly caused his condition. The Board finds that appellant has failed to discharge his burden to establish employment factors which caused his emotional condition.

LEGAL PRECEDENT -- ISSUE 2

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office’s procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office]....

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

⁷ 5 U.S.C. § 8102

“This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”⁸

Section 10.617(b) of the Office’s regulations provides that unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the oral hearing to the claimant and any representative at least 30 days before the scheduled date.⁹ The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.¹⁰

ANALYSIS -- ISSUE 2

In finding that appellant abandoned his May 9, 2006 request for a hearing, the Office noted that a hearing had been scheduled in Washington, DC on August 16, 2006. The record shows that the Office mailed appropriate notice to appellant at his last known address. Although appellant argues on appeal that he did not receive notification, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹¹ There is no evidence in the record that appellant notified the Office of a change in address. All correspondence from the Office to appellant has been to the address of record as listed on the Form CA-2. Additionally the envelope which contained appellant’s hearing request had the identical address as the address of record.

Appellant received written notification of the hearing 30 days in advance but he failed to appear for the hearing. The record contains no evidence that he contacted the Office to request postponement of the hearing. Appellant failed to appear at the scheduled hearing or to provide any notification for such failure within 10 days of the scheduled hearing. As this meets the criteria for abandonment specified in the Office’s procedure manual, the Board finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an emotional condition in the performance of duty and that appellant abandoned his request for an oral hearing.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); see also *Claudia J. Whitten*, 52 ECAB 483, 484-85 (2001).

⁹ 20 C.F.R. § 10.617(b).

¹⁰ *Nelson R. Hubbard*, 54 ECAB 156 (2002). In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient. *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the mailbox rule. *Id.* It arises when the record reflects that the notice was properly addressed and duly mailed. *Id.*

¹¹ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to an appellant, it must be presumed, absent any other evidence, that the claimant received the notice).

ORDER

IT IS HEREBY ORDERED THAT the August 30 and April 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 8, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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