

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

K.T., Appellant)
and) Docket No. 08-1370
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 2, 2008
Little Rock, AR, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 8, 2008 appellant filed a timely appeal from the August 14, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office hearing representative's March 11, 2008 nonmerit decision finding that appellant abandoned his request for a hearing.

ISSUES

The issues are: (1) whether appellant sustained an emotional injury in the performance of duty on December 7, 2006; and (2) whether appellant abandoned his request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

On May 14, 2007 appellant, then a 41-year-old building equipment mechanic, filed a claim alleging that he sustained a traumatic emotional injury on December 7, 2006 when his manager did not allow him legal representation during an interrogation by postal inspectors. He

added that the inspectors would not stop the interview.¹ The Office asked appellant to submit a statement detailing the incident and a medical report addressing his disability and causal relationship.

Memoranda from the U.S. Postal Service Office of Inspector General (OIG) stated that a forensic analysis of the employer's computer hard drives revealed that appellant had purchased controlled substances online, lawful possession of which required a valid prescription from a licensed physician. On December 7, 2006 appellant's manager told him to report to work and that he could not bring his lawyer with him. Once at work, appellant was represented by two union officials during an interview by the OIG. He was given a Kalkines Warning and signed a statement acknowledging his rights during the inquiry into possible administrative misconduct. The employer stated that appellant did not ask for the interview to be stopped. An OIG memorandum of the interview appears in the record.

On August 9, 2007 Dr. James M. Sims, the attending psychiatrist, related appellant's history. He noted that appellant complained of harassment by his supervisor and other employees. Dr. Sims did not address the December 7, 2006 OIG interview. He originally diagnosed adjustment disorder with mixed emotional features but was now considering a psychotic disorder, not otherwise specified. As appellant had no history of psychiatric problems, Dr. Sims concluded that appellant's "job and the stresses involved in that" were direct contributors to his current condition.

In a decision dated August 14, 2007, the Office denied appellant's claim for compensation. It found that the evidence was insufficient to establish that the incident occurred as alleged. The Office also found that there was no medical evidence providing a diagnosis that could be connected to the incident alleged.

On September 11, 2007 appellant requested an oral hearing before an Office hearing representative. On January 14, 2008 the Office notified him that his hearing was scheduled for February 13, 2008 at the U.S. Federal Building in Little Rock.

In a decision dated March 11, 2008, the Office hearing representative found that appellant had abandoned his request for an oral hearing. The hearing representative found that appellant received written notice in advance but failed to appear. The hearing representative also found no evidence that appellant contacted the Office either prior to or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² When

¹ On appeal, appellant explains that he has connected claims, including an occupational disease claim under OWCP File No. xxxxxx005, but that his claim under OWCP File No. xxxxxx019, currently before the Board is for a traumatic injury on December 7, 2006.

² 5 U.S.C. § 8102(a).

an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. By contrast, there are disabilities having some kind of causal connection with the employment that workers' compensation does not cover because they are not found to have arisen out of employment, such as when disability results from 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.³

Workers' compensation does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁴ As a rule, however, a claimant's allegations alone are insufficient to establish a factual basis for an emotional condition claim.⁵ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁶ The primary reason for requiring factual evidence from the claimant in support of his allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.⁷

ANALYSIS -- ISSUE 1

Appellant filed a claim attributing his emotional reaction on December 7, 2006 to the conduct of his employer. As a rule, such an emotional reaction falls outside the scope of the Act. There is only one exception that can bring this claim within the scope of coverage: appellant must submit probative evidence establishing that the employer's conduct towards him on December 7, 2006 was erroneous or abusive. He has submitted no such evidence.

Appellant contended that he sustained a traumatic injury on December 7, 2006, when his manager denied him a lawyer during the OIG interrogation. The evidence supports this allegation. According to a statement from the employer, appellant's manager asked him to come to work on December 7, 2006 and told him he could not bring his lawyer with him. However, appellant submitted no evidence to establish that this was erroneous. Appellant submitted

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566, 572-73 (1991).

⁵ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁶ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

⁷ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

nothing to establish that he had a right to have an attorney present during the interview, which was an inquiry into his possible administrative misconduct as an employee and which did not involve allegations of criminal conduct or the threat of criminal prosecution. Without a showing that he did, in fact, have the right to have an attorney present, the mere fact that appellant's manager told him he could not bring his lawyer is no basis to support a finding of error or abuse by the manager.

Appellant also alleged that the inspectors would not stop the interview, but the record does not support this allegation. The employer denied that appellant asked for the interview to be stopped and the OIG memorandum of the interview supports the employer's account of events. The Board therefore finds that the weight of the factual evidence does not support that the incident occurred as alleged, much less that it demonstrated error or abuse by the employer.

Appellant failed to submit probative evidence, prior to the Office's August 14, 2007 decision on his claim, showing error or abuse by the employer on December 7, 2006. The Board therefore finds that he has not met his burden of proof to establish that he sustained an emotional injury in the performance of duty that day. Because the evidence before the Office failed to demonstrate that his claim fell within the scope of the Act, the Board will affirm the Office's August 14, 2007 decision denying his claim for compensation benefits.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides the right to a hearing before an Office hearing representative:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.”⁹

Chapter 2.1601.6.e (1) of the Office's Procedure Manual explains when an employee is considered to have abandoned his hearing request:

“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.

⁸ The record contains much evidence submitted after the Office's August 14, 2007 decision. However, the Board's review of a case is limited to the evidence in the case record that was before it at the time of its final decision. Evidence not before the Office will not be considered by the Board for the first time on appeal. 5 U.S.C. § 501.2(c)(1).

⁹ 5 U.S.C. § 8124(b)(1).

“Under these circumstances, H&R [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 DO [District Office].”¹⁰

ANALYSIS -- ISSUE 2

Following the Office’s August 14, 2007 decision denying his claim for compensation, appellant requested an oral hearing before an Office hearing representative. On January 14, 2008 the Office notified appellant that his hearing was scheduled for February 13, 2008 at the U.S. Federal Building in Little Rock. Appellant did not request a postponement, he failed to appear at the scheduled hearing and he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As all three of the conditions for abandonment are met, the Board finds that appellant abandoned his request for an oral hearing. The Board will therefore affirm the hearing representative’s March 11, 2008 decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an emotional injury in the performance of duty on December 7, 2006. The Board also finds that appellant abandoned his request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2008 and August 14, 2007 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: December 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (1) (January 1999).