United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 08-1984**
	)	**Issued: March 25, 2009**
U.S. POSTAL SERVICE, BAYAMON BRANCH OFFICE, Bayamon, PR, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 9, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 16, 2008 and a May 8, 2008 merit decision denying his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty on February 16, 2008, as alleged; and (2) whether the Office, pursuant to 5 U.S.C. § 8128(a), properly declined to reopen appellant's case for further review of the merits of his claim.

FACTUAL HISTORY

On March 15, 2008 appellant, then a 41-year-old rural carrier, filed a traumatic injury claim alleging that on February 16, 2008 he sustained an emotional condition due to his supervisor requiring him to leave keys, scanners and registered mail at the employing

establishment in an unsecured area. The employing establishment controverted appellant's claim.

In support of his claim, appellant submitted a February 29, 2008 disability note by Dr. Jaime Del Toro, a treating physician; appellant's February 16, 2008 statement; a February 19, 2008 statement by Carmelo Alvarado, his father; and a February 19, 2008 certification of health care provider.[1] Dr. Del Toro opined that appellant was receiving psychiatric treatment and totally disabled due from working in the February 29, 2008 disability note. In his statement, appellant related that Andrew Zelsky, Brenda D. Rios Berrio and Junior Perez, managers at the employing establishment, ordered him to leave correspondence in an unsecured area while aware there was a cease and desist order from his attorney due to his mental condition and continuous harassment at work. In the February 19, 2008 statement, Mr. Alvarado noted that appellant constantly telephoned him regarding problems while at work and complained of work problems when at home. Appellant was diagnosed with adjustment disorder, which began August 1992 and was currently totally disabled from working in the February 27, 2008 health care certification form.

By letter dated April 4, 2008, the Office advised appellant that additional factual and medical evidence was needed to support his claim. Appellant was requested to provide a fuller description of the incident he alleged that caused his emotional condition. In addition, the Office informed appellant that the employing establishment controverted his claim as they stated that they were unaware of his psychiatric condition and any alleged cease and desist order. It explained that a physician's opinion on causal relation was crucial to his claim and allotted 30 days to submit the requested information.

On May 6, 2008 the Office received factual and medical evidence including appellant's May 2, 2008 statement detailing alleged harassment and discrimination from 2000 to 2008; statements from various witness dated 1991 through 2007; an April 7, 2008 certification of health care provider; a February 7, 2007 statement; a February 17, 2007 letter from the employing establishment regarding appellant's discrimination claim; a February 7, 2008 witness statement from an unidentified person; a January 30, 2008 information for a precomplaint counseling; a January 10, 2008 voluntary statement to postal police; a February 15, 2008 informational letter regarding appellant's leave request under the Family and Medical Leave Act; and an April 17, 2008 report and multiple disability notes during the period April 24, 2007 through February 12, 2008 by Dr. Del Toro. In an April 17, 2008 report, Dr. Del Toro diagnosed schizoaffective disorder. He reported that appellant related being discriminated against at work. Appellant also informed Dr. Del Toro that he had been subjected to harassment and retaliation at his workplace. In concluding, Dr. Del Toro opined that appellant was disabled from performing his usual work duties due to "the severity of this patient's emotional symptoms." He opined that appellant was unable to perform his usual work duties "due to the degrading and discriminatory working atmosphere" at the employing establishment.

[1] The signature of the psychiatrist is illegible.

By decision dated May 8, 2008, the Office denied appellant's claim on the grounds that he failed to establish any compensable factors of employment.[2]

On May 28, 2008 appellant requested reconsideration. In support of his request, he submitted his February 2, 2008 statement; a February 15, 2008 Family and Medical Leave Act application; certifications of health care provider dated a February 19 and April 7, 2008; and an April 17, 2008 report by Dr. Del Toro. In his February 2, 2008 statement, appellant noted an accident occurred, which destroyed approximately 10 to 14 mail receptacles and detailed instructions given by Mr. Perez, a supervisor. He also alleged that there was a cease and desist order which the employing establishment violated by harassing him.

By decision dated June 16, 2008, the Office denied appellant's request for reconsideration of the merits of his claim.[3]

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.[4] 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.[5] 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.[6] 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.[7]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Federal Employees'

[2] The Office adjudicated appellant's claim as a traumatic injury based on his claim form and initial allegation. A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors, which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(ee), (q); *Brady L. Fowler*, 44 ECAB 343, 351 (1992). The Board notes that appellant submitted evidence regarding his Equal Employment Opportunity claim of age and sex discrimination, which occurred over more than one day. Appellant is not precluded from filing an occupational disease claim based on his allegations of discrimination and harassment.

[3] The Board notes that, following the June 16, 2008 decision, the Office received additional evidence. Appellant also submitted additional evidence with his appeal. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[4] *L.D.*, 58 ECAB ___ (Docket No. 06-1627, issued February 8, 2007).

[5] *A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006).

[6] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *J.F.*, 59 ECAB ___ (Docket No. 07-308, issued January 25, 2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

Compensation Act.[8] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[9] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[10]

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.[11] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.[12] 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.[13]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition on February 16, 2008 as a result of his supervisor requiring him to leave keys, scanners and registered mail at the employing establishment in an unsecured area and harassment by his supervisor in refusing to follow a cease and desist order. The Office denied his claim on the grounds that he did not establish any compensable employment factors. The Board must, review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Federal Employees' Compensation Act.

An employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which supervisors exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Federal Employees' Compensation Act. This principle recognizes that a supervisor must be allowed to perform his duties and that employees will at times dislike actions taken.[14] Furthermore, the Board has held that discussions of job

[8] *See K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[9] *See M.D.*, 59 ECAB ___ (Docket No. 07-908, issued November 19, 2007); *William H. Fortner*, 49 ECAB 324 (1998).

[10] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[11] *D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006).

[12] *K.W.*, *supra* note 8.

[13] *Robert Breeden*, 57 ECAB 622 (2006).

[14] *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

performance by an employee's supervisor and the monitoring and assignment of work are administrative functions that do not fall under the coverage of the Federal Employees' Compensation Act absent a showing of error or abuse.[15] For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[16]

Although appellant alleged that supervisor required him to leave keys, scanners and registered mail at the employing establishment in an unsecured area on February 16, 2008, he submitted no evidence to establish that Ms. Rios Berrio erred in the exercise of her supervisory duties in instructing him where to leave the items he mentioned. He did not submit any evidence, such as a witness statement to support his version of what happened on March 21, 2007. Appellant therefore did not establish error or abuse in this administrative matter. 12

Appellant premised his claim based on an incident of February 16, 2008 involving Mr. Zelsky, Ms. Rios Berrio and Mr. Perez. As such, his claim is traumatic in nature as it was attributed to a single workday or shift.[17] The various witness statements appellant submitted predate the alleged February 16, 2008 incident and are of limited probative value as they do not address it. In addition, appellant's May 2, 2008 statement alleged various incidents of discrimination, but does not discuss the February 16, 2008 incident. These statements do not establish any harassment on the part of Mr. Zelsky, Ms. Rios Berrio and Mr. Perez with respect to the alleged February 16, 2008 incident. Appellant submitted no other evidence to establish his allegations. He therefore failed to establish a factual basis for his claim of harassment by his supervisors on February 16, 2008.[18] The Board finds that the record is not sufficient to establish harassment and suggests that appellant's feelings are self-generated and not compensable under the Federal Employees' Compensation Act.[19]

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act[20] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[21] The employee shall exercise this right through a request to the district Office. The

[15] *See L.C.*, 58 ECAB ___ (Docket No. 06-1263, issued May 3, 2007); *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

[16] *James E. Norris*, 52 ECAB 93 (2000).

[17] *See* 20 C.F.R. § 10.5(ee).

[18] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[19] *See Gregorio E. Conde*, *supra* note 7.

[20] 5 U.S.C. § 8101 *et seq.*

[21] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

request, along with the supporting statements and evidence, is called the application for reconsideration.[22]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[23]

An application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[24] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[25]

ANALYSIS -- ISSUE 2

In connection with his May 28, 2008 reconsideration request, appellant submitted his February 2, 2008 statement and resubmitted a February 15, 2008 Family and Medical Leave Act application; certifications of health care provider dated a February 19 and April 7, 2008; and an April 17, 2008 report by Dr. Del Toro.

However, the submission of this evidence does not require reopening of appellant's claim for merit review because he resubmitted medical evidence previously considered. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.[26] In addition, while appellant's February 2, 2008 statement is new, it is not relevant to his allegation regarding the events of February 16, 2008.

[22] 20 C.F.R. § 10.605.

[23] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[24] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

[25] *Id*. at §10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[26] *See L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Thus, he has not met the criteria to have the Office reopen his case for review on the merits.[27]

CONCLUSION

The Board finds that appellant failed to establish that he sustained an emotional condition in the performance of duty on February 16, 2008, as alleged. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 16 and May 8, 2008 are affirmed.

Issued: March 25, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[27] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).