

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

P.S., Appellant)
)
and)
)
U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Los Angeles, CA,)
Employer)

Docket No. 17-1172
Issued: November 14, 2017

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 8, 2017 appellant filed a timely appeal from an April 4, 2017 merit decision and an April 26, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has established an emotional condition in the performance of his federal employment, and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted evidence on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case has been before the Board on a prior appeal.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 12, 2015 appellant, then a 42-year-old mail handler, filed a traumatic injury claim (Form CA-1). He alleged that on March 27, 2012 he sustained an emotional condition as a result of being improperly placed on absent without leave (AWOL) status for March 27, 2012. On the claim form appellant indicated that his father had died on March 27, 2012. He also reported that he was subject to workplace harassment and bullying.

Appellant submitted a calendar for January to May 2012, showing various dates as "AWOL," including March 27, 2012. In an undated statement received on February 18, 2015, he asserted that he should have been placed on Family and Medical Leave Act (FMLA) leave for March 27, 2012, as he had a chronic low back condition and was seen by a physician on March 25 and 27, 2012.⁴ He also reported that March 27, 2012 was a scheduled vacation day, and that his father's death should have been considered as an emergency circumstance.

The employing establishment submitted a letter dated March 24, 2012 to appellant from his supervisor. The supervisor indicated that appellant had requested leave, but did not have enough work hours to qualify for FMLA. According to him, appellant would be placed in AWOL status until appropriate documentation was submitted to justify an absence. The letter reported that appellant had not complied with employing establishment regulations regarding absences, and therefore was charged with AWOL. To change the leave status to sick leave or other approved leave, it was necessary that appellant provide medical documentation.

The record contains an "investigative interview" form from appellant's supervisor, requesting an explanation regarding specific dates of absence from January 6 to May 12, 2012, including March 27, 2012. In a "notice of removal" dated June 4, 2012, the employing establishment alleged that appellant had violated a "last chance" agreement dated October 18, 2010 to maintain a satisfactory attendance record.⁵ Appellant submitted a decision dated August 26, 2012 from the California Unemployment Insurance Appeals Board. In an undated note, appellant argued that the decision showed that he did call the employing establishment on March 27, 2012 to explain his absence. The decision itself found that appellant had no documentary record or corroboration for calling the employing establishment from March 20 to April 14, 2012. Appellant also submitted a portion of a Merit Systems Protection Board (MSPB) decision, which found that the employing establishment's removal against appellant was sustained.

³ Docket No. 16-0711 (issued June 27, 2016).

⁴ The record contains a report dated March 25, 2012 from Dr. Anjum Sameena, a Board-certified family practitioner, which indicated that appellant was seen for back pain.

⁵ A grievance form filed with respect to the notice of removal reports that appellant was removed from the employing establishment on July 15, 2012.

An arbitrator's decision dated June 17, 2013 denied a grievance filed regarding appellant's removal, and found that appellant had violated a last chance agreement. As to March 27, 2012, the arbitrator found that appellant had subsequently been approved for funeral leave due to the death of his father.

By undated e-mail correspondence received on January 13, 2015, appellant's supervisor reported that appellant had a history of attendance issues. He indicated that he was not informed that appellant's father had passed away, and any unapproved leave during that period was due to attendance irregularities.

By decision dated April 27, 2015, OWCP denied the claim for compensation. It found appellant had not established a compensable work factor.

On May 6, 2015 appellant requested a review of the written record by an OWCP hearing representative. He argued that he believed the evidence showed error by the employing establishment in placing him on AWOL. Appellant submitted Board decisions that did not involve claims for emotional conditions.

By decision dated September 11, 2015, the hearing representative affirmed the April 27, 2015 decision which denied appellant's claim. She found appellant had not established a compensable work factor with respect to administrative error on March 27, 2012, or regarding an allegation of harassment and bullying.

On February 17, 2016 appellant filed an appeal with the Board. The Board affirmed the September 11, 2015 OWCP decision.⁶ The Board found appellant had not established a compensable work factor with respect to administrative error on March 27, 2012, or any allegation of harassment.

On July 20, 2016 appellant requested reconsideration. He submitted a copy of the September 11, 2015 OWCP decision, with handwritten notes asserting that he did not file a traumatic injury claim. Appellant submitted a copy of an April 27, 2015 OWCP decision, which found appellant had filed an occupational disease claim.⁷ In addition, he resubmitted the decision from the California Unemployment Insurance Appeals Board, denying the claim for benefits.

In an undated statement, appellant wrote that he was never asked about harassment or bullying by OWCP. He wrote that he did not submit evidence on harassment and bullying because the claim was being developed for his allegation regarding AWOL status on March 27, 2012. Appellant submitted additional medical evidence regarding treatment for conditions that included his back.

⁶ *Supra* note 3.

⁷ As the Board noted in the prior appeal, appellant filed a Form CA-1 traumatic injury claim on January 12, 2015. Appellant has also filed occupational disease or illness claims (Form CA-2) with respect to an emotional condition. With respect to the January 12, 2015 claim, OWCP has addressed the allegation of administrative error on March 27, 2012, and an allegation of harassment and bullying.

In another undated statement, appellant wrote that he was alleging that the employing establishment erred with respect to investigative interviews on May 15, 2012, regarding the March 27, 2012 administrative action. He asserted that he did call in on March 27, 2012, and again asserted that he was improperly placed in AWOL status. Appellant reiterated his belief that he had established a compensable work factor.

As to additional documents, appellant submitted an April 21, 2015 letter from the Office of Personnel Management (OPM) indicating his claim for disability retirement was approved. He wrote on the letter that if he was approved for disability retirement he should also be approved for workers compensation.

By decision dated April 4, 2017, OWCP reviewed the merits and denied modification. It found the evidence did not establish a compensable work factor and was insufficient to warrant modification of the prior decision.

On April 11, 2017 appellant requested reconsideration. He wrote on a copy of the April 4, 2017 decision that he was alleging there was no “big difference between a no call AWOL” and other AWOL status and it was not clear whether he was on AWOL status due to no call or denied leave.

By decision dated April 26, 2017, OWCP denied appellant’s request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a). It found the evidence was insufficient to warrant a merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Appellant has the burden of proof to establish by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.⁸ This burden includes the submission of detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁹ A claimant must also submit rationalized medical opinion evidence establishing a causal relationship between the claimed condition and the established, compensable work factors.¹⁰

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers’ compensation. These injuries occur in the course of the employment and have some kind of causal connection with it, but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee’s frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee’s

⁸ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁹ *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

¹⁰ *See Bonnie Goodman*, 50 ECAB 139, 141 (1998).

emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.¹¹

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.¹² Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively, or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish an emotional condition in the performance of his federal employment.

The Board notes that appellant has not asserted that his regular or specially assigned work duties caused his alleged emotional condition. In the present case, appellant alleges administrative error when the employing establishment placed him on AWOL for March 27, 2012. The record indicates that the employing establishment did subsequently approve leave based on his father's death.

Appellant's primary allegation is that he sustained an emotional condition as a result of actions by the employing establishment on March 27, 2012. He had alleged that it was error by the employing establishment to initially place him on AWOL for March 27, 2012. A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.¹⁴ Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively, or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.¹⁵ The evidence that was before OWCP at the time of the September 11, 2015 OWCP decision, discussed by the Board in its prior decision, failed to establish error or abuse by the employing establishment. The Board indicated that evidence showed appellant was placed on AWOL status until he submitted proper documentation as to the absence from work. After appellant submitted documentation regarding his father's death, he was granted leave. No evidence of error or abuse was presented.

Appellant has not submitted any additional evidence establishing a compensable work factor in this regard. He has submitted numerous statements, often on copies of decisions or other documents, reiterating his allegation of error, but no probative evidence establishes any error by the employing establishment on March 27, 2012. While appellant asserts that he did call

¹¹ *Lillian Cutler*, 28 ECAB 125 (1976).

¹² *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

¹³ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

¹⁴ *Supra* note 12.

¹⁵ *Supra* note 13.

in to the employing establishment, there was no contemporaneous evidence presented that he had notified the employing establishment of the reason for his absence on March 27, 2012.

The submission of evidence regarding an OPM decision on disability retirement does not establish an employment injury under FECA.¹⁶ Appellant also referred to investigative interviews on May 15, 2012. No evidence of error was submitted regarding any interviews in connection with appellant's absence on March 27, 2012.

With respect to any allegation of harassment or bullying, appellant submitted no probative evidence. He wrote that OWCP had not requested evidence, but it is appellant's burden of proof to submit evidence necessary to establish any claim of harassment or bullying.¹⁷ Appellant did not establish a compensable work factor regarding an allegation of harassment or bullying.

The Board finds that appellant has not established a compensable work factor. Since appellant has not established a compensable work factor, the claim is not established and the Board will not address the medical evidence.¹⁸

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁹ OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP."²⁰ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.²¹

¹⁶ See *S.S.*, Docket No. 15-0780 (issued September 3, 2015); *Daniel Deparini*, 44 ECAB 657 (1993).

¹⁷ *E.H.*, Docket No. 13-0559 (issued August 21, 2013).

¹⁸ See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

¹⁹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

²⁰ 20 C.F.R. § 10.606(b)(3).

²¹ *Id.* at § 10.608(b); see also *Norman W. Hanson*, 45 ECAB 430 (1994).

ANALYSIS -- ISSUE 2

The Board also finds that OWCP did not abuse its discretion by denying appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration appellant alleged that there was "no big difference between a no call AWOL status and other AWOL status." As discussed above, the underlying issue is whether there was administrative error in initially placing him on AWOL status for March 27, 2012. This is a legal issue.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. He made a general statement, expressing his own opinion, as to AWOL status without discussing a point of law or advancing a relevant legal argument regarding a compensable work factor in this case.

The Board also finds that appellant did not submit any evidence with his request for reconsideration. Therefore he did not submit any relevant and pertinent new evidence which would require a merit review.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to review the merits of the claim.

CONCLUSION

The Board finds that appellant has not established an emotional condition in the performance of his federal employment. The Board further finds that OWCP properly denied his request for reconsideration 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 April 26 and 4, 2017 are affirmed.

Issued: November 14, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board