

File Number:
HR10-D-H

RECEIVED MAR 01 2019

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 11/29/2018. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Philadelphia District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 3 PHI
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, February 22, 2019

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
Claimant; Employed by _____ Case No. _____
A telephone hearing was held on November 29, 2018.

The issue for consideration is whether the claimant has established an injury or condition in the course of performing his duties.

On October 11, 2017, the claimant, _____ born _____ filed a notice of occupational disease claiming that he was diagnosed with bipolar disorder, major depression, panic disorder, generalized anxiety disorder and ADD, which he considered to be a result of and/or due to his _____ duties. The claimant stated that on March 10, 2017, he submitted a reasonable accommodation (RA) request and although he was certified to have a disability under the Americans with Disability Act, the agency failed to respond to his RA request with an approval or denial. He stated that the delay to respond to his request had exacerbated his condition. The claimant stated that he first became aware of his condition on May 3, 2016, and he realized that his condition was due to the employment as of September 12, 2017.

Following development of the record evidence, the District Office denied the claim in a May 9, 2018 decision. The Office found that the claimant being a supervisor and the fact that he had applied for reasonable accommodations on March 3, 2016, were compensable work factors, however, explained that the agency's failure to respond to the RA request until March 17, 2017, was not a compensable factor. The Office explained that there was not sufficient medical evidence to establish an injury or condition causally related to the accepted work factor(s). The claimant disagreed with the decision and through his attorney requested a hearing with an OWCP representative.

A telephone hearing was held on November 29, 2018, where Paul Felser presented argument as the claimant's attorney. Attorney Felser explained that the claimant began working with the agency in March 1995, starting in the drug unit, moved to the pre-release unit and then transitioned into the high intensity supervision unit in 2001. Attorney Felser stated that he understood that the high intensity unit is a very stressful and highly intensive work environment. He explained that the claimant reported that he was responsible for supervising on a pretrial basis overseeing cases of murderers, rapists and terrorists, and having to report to the court on an instantaneous basis regarding violations, public risks by the violators, and supervising violator's release and whereabouts. Referencing witness statements from _____ and _____ Attorney Felser commented regarding the stress in the course of the work. He stated that the claimant began experiencing anxiety, stress and other difficulties while performing his duties at which time he requested a workplace accommodation. He explained that the claimant has been out of work since October 2017, and applied and approved for disability retirement as of August 2018.

The agency did not submit comments following the hearing. In his December 12, 2018 statements, the claimant presented an account regarding the claimed work factors and his allegations of the agency's wrongful (in-)action and the impact on his condition, as a foundation of his claim.

Workers' compensation law does not apply to each and every 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 concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹ On the other hand, there are injuries that occur in the course of employment and have some kind of causal connection with it, but are not covered because they do not arise out of or in the course of the work. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Act,² specifically, if the employee's reaction stems from work matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within coverage of the Act.³ Perceptions and feelings alone are not compensable.⁴ To establish entitlement to benefits, a claimant must establish a basis in fact for the claim by supporting his or her allegations with probative and reliable evidence.⁵

Non-compensable factors of employment include administrative and personnel actions which are matters not considered arising in the performance of duty.⁶ However, to the extent that the evidence demonstrates that the agency either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable factor.⁷ However, where the evidence demonstrates that the agency either erred or acted abusively in the administration of a personnel matter, a condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.⁸

In cases involving emotional conditions, the Employees' Compensation Appeals Board (the Board) has held that when working conditions are alleged as factors in causing 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.⁹ If a claimant implicates a factor of employment, the Office should then determine whether the evidence of record substantiates that factor(s). When the matter asserted is a compensable factor of employment and the evidence of record establishes that the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁰

In its decision, the Office found that the claimant had established a compensable work factor, the fact that he was employed as a _____ in _____ and the fact that he applied for reasonable accommodations. There was no explanation as to why the factors were considered compensable work factors rather, however, I do not find that there has been any evidence to establish the identified factors as compensable work factors to establish or consider a factual basis in the claim of a work-related injury. The identified factors wouldn't be part of the claimant's regular or specially assigned duties and there was no evidence of a finding or formal statement indicating agency error or abuse with respect to the claimant being employed as a _____ or the fact that he filed for work accommodations.

¹ 5 USC 8101-8193.

² *Id.*

³ *Id.*

⁴ See _____ 44 ECAB 323 (1993); _____ 42 ECAB 654 (1991).

⁵ See _____ 44 ECAB 751 (1993).

⁶ See _____ 39 ECAB 1260 (1988).

⁷ See _____ 51 ECAB 604 (2000).

⁸ _____ 41 ECAB 387 (1990), *reaff'd on recon*, 42 ECAB 566 (1991).

⁹ _____ 43 ECAB 384 (1992).

¹⁰ _____ 54 ECAB __ (Dkt. No. 05-482, iss'd July 13, 2005).

While it is found that the Office was premature in identify the factors as compensable in consideration of causal relationship of a condition due to the work, the Office rightfully discussed the claimant's allegation that the agency failed to address his reasonable accommodation request until March 2017, and made a determination that a compensable work factor had *not* been established based on the evidence of record.

In review of the evidence, the claimant's initial statements only offer a minimal account of his work duties as factors leading to the necessity for reasonable accommodations, which appears as the basis of the claim. During the hearing, however, the attorney presented a more detailed discussion of the claimant's *actual* duties as resulting in the necessity for his reasonable accommodation request and the fact that the request was not adequately addressed by the agency and subsequently denied. Following the hearing, the claimant submitted additional statements clarifying his allegations and discussion regarding the claimed work factor(s) in consideration of a work-related medical condition.

Although it is found that the evidence is not sufficient to establish that the claimant was a _____ and that he filed for a reasonable accommodation as compensable work factors, I do find that the additional evidence received by the Office warrants further review regarding compensability of the alleged work factors.

Prior to any further review of a work-related injury claim on appeal, the Office must review the record evidence in total and make a determination of the evidence in consideration of fact of injury and performance of duty. It is also noted that the Office received an October 13, 2017 decision of the Equal Employment Opportunity Commission, which should be reviewed in its entirety. After preparing a detailed finding of fact concerning the alleged events, allegation(s) or incident(s), and performing any other development deemed necessary, the Office should provide the claimant with a new decision explaining the basis of or ruling out of compensability for any specific factor in review of performance of duty and discuss causal relationship, if applicable.

Consistent with the above findings, the District Office's May 9, 2018 decision is set aside and the case is **remanded** to the Office for further development as outlined above and a *de novo* decision.

Issued:

Washington, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of
Workers' Compensation Programs

Washington DC, February 22, 2019