U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN SCOTT and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

Docket No. 95-440; Submitted on the Record;
Issued September 11, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded appellant's emotional condition claim as not arising in the performance of duty.

On September 6, 1990 appellant, then a 46-year-old mail clerk, filed a claim alleging she sustained an emotional condition the previous day which she attributed to questions by her supervisor pertaining to her starting time. A witness statement noted that appellant was questioned by her supervisor, Vivian L. Burns, on September 5, 1990 "about hitting the clock 15 minutes ahead of schedule."[1] Appellant stopped work on September 6, 1990 and did not return.[2] The employing establishment controverted appellant's claim.

Appellant submitted an October 1, 1990 attending physician's report and a September 13, 1990 handwritten note from Dr. Peter G. Kontos, an osteopathic physician. In the September 13, 1990 note, Dr. Kontos indicated that appellant contacted him by telephone on September 5, 1990 in a state of panic exacerbated by an incident induced by her supervisor's unnecessary questioning about her time. He advised that she was unable to return to work until he saw her on October 1, 1990. In the October 1, 1990 report, Dr. Kontos noted that appellant had sustained her first anxiety attack in 1988 and diagnosed an anxiety disorder with panic attacks which rendered her totally disabled for work. He indicated by checkmark that appellant's condition was caused or aggravated by her employment. Dr. Kontos listed a history of a "traumatic episode of unreasonable questioning and prior comments as to her time of work and limitations -

[1] The record indicates that appellant was sitting at a lunchroom table. The witness, Artis L. Dorsey, noted that upon questioning, appellant "jumped up from her seat and began to scream and complain that it did not matter what time she punched in."

[2] Appellant had been diagnosed with an anxiety disorder following a nonemployment-related automobile accident on July 20, 1989. She was working a three-hour schedule at the time of injury.

- of low stress environment -- by immediate supervisor which caused increased anxiety attack with regression." He indicated appellant's return to work was "unknown."

In an October 18, 1990 statement, Ms. Burns noted that on September 4, 1990 she had approached appellant concerning clocking into work prior to her 8:00 a.m. starting time. She stated that the following morning, as she was passing the time clock, she saw that appellant had again clocked in early and approached her to talk about the matter. Ms. Burns indicated that appellant became very upset, jumping from her seat and yelling at her. Ms. Burns stated that she left the room and went back to her office as appellant was upset. About 10 minutes later she returned to the workroom and could hear a heavy breathing sound coming from the lunchroom. She found it was appellant and asked if she needed medical assistance. Appellant responded that Ms. Burns should call her husband, who came and picked appellant up from work.

Appellant submitted a November 12, 1990 statement in which she reviewed her history of prior treatment for anxiety and noted that she was frequently depressed for no apparent reason. Appellant noted difficulty pertaining to prior claims for workers' compensation benefits and in being compensated for the five hours she did not work. She stated this caused her to become very nervous and explode. She stated that she had feelings of persecution pertaining to the injury compensation office at work and that she preferred to stay in bed most of the time.

In a November 12, 1990 report, Dr. Kontos noted that he had been contacted by appellant on September 5, 1990 for a state of panic with marked anxiety which was aggravated by the incident with her supervisor. He listed a diagnosis of anxiety and depressive disorder with panic disorder and indicated that appellant was treated with medication. Dr. Kontos noted that appellant worked under physical restrictions for her right hand and back and was placed under his restrictions for a low stress and noise environment. He found appellant remained totally disabled.

On December 6, 1990 the Office accepted that appellant sustained "an anxiety reaction due to the incident at work on September 5, 1990, when your supervisor questioned you on your starting time. This is the only factor being considered under this claim." The Office noted however, that payment of wage-loss compensation benefits would be deferred until Dr. Kontos provided a reasoned medical opinion on the extent of aggravation and disability due to the September 5, 1990 incident.[3] By letter dated December 6, 1990, the Office advised Dr. Kontos of its acceptance of the September 5, 1990 incident and requested his opinion on the extent of total disability resulting from this incident. He was requested to explain the nature of appellant's preexisting emotional disorder and the nature and extent of any aggravation or exacerbation of her condition.

In a report dated May 17, 1991, Dr. Kontos stated that appellant sustained an aggravation of her anxiety-panic disorder and depressive disorder as a result of the September 5, 1990 incident. He noted that, prior to the incident, appellant has a mixture of problems which were job related and difficulty with neurovegatative symptoms. Dr. Kontos stated that appellant had

[3] Appellant was advised she could file an occupational disease claim it she wished to pursue other problems in the work environment.

been clocking in early at work for a prolonged period to minimize her anxiety of waiting at the clock and she related that nothing was ever mentioned to her about this pattern of clocking in early. He related that appellant was confronted by her supervisor, who threw her time card at her which provoked a state of anxiety, defensiveness and anger. Dr. Kontos stated that, since September 5, 1990, appellant continued to feel anxiety, fear, panic, dysphoria, and lability and required ongoing medication therapy. He concluded that she had not improved to return to any type of sustained gainful employment and recommended that she be found totally disabled due to the combination of her physical and emotional conditions.

The Office requested that Dr. Kontos clarify his medical opinion. In a response dated April 16, 1992, he stated that appellant had not been able to make adequate recovery and remained totally disabled for work. He noted that she underwent hospitalization from February 10 to March 4, 1992. By report dated April 20, 1992, Dr. Kontos stated that, despite outpatient psychopharmacological therapy, she could not manage at home and required hospitalization for symptoms of anxiety-panic, lability, and depression "due to the stresses and conflicts associated with her former job and chronic pain due to the injuries on her job."

On October 1, 1992 the Office issued a notice of proposed termination.[4] Citing *William Cook*,[5] an Office claims examiner found that the requirement of appellant's employment to clock into work every morning was considered an administrative matter and not arising out of the course of her work and, therefore, the incident of September 5, 1990 in being counseled by her supervisor did not constitute a factor of employment giving rise to coverage under the Act. Appellant was advised to submit additional evidence or argument if she disagreed with the proposed action.

By decision dated January 6, 1993, the Office found that the evidence of record failed to establish that appellant's emotional condition arose while in the performance of her duties.

Appellant requested a hearing before an Office hearing representative. In a decision dated June 24, 1993, an Office hearing representative set aside the January 6, 1993 decision finding that no new or different evidence had been submitted to the record on which to base a rescission of the claim. He noted that the rescission was based solely on the determination that the original finding that the September 5, 1990 incident was a compensable factor of employment was incorrect. The hearing representative directed that the Office make a determination as to whether any compensation was payable to appellant for disability resulting from the September 5, 1990 incident and further develop the medical evidence.

[4] The Office noted that it had accepted a December 14, 1984 claim for myofascitis of the lower back, a February 1, 1986 claim for an acute sprain of the right thumb, a claim for thoracic outlet syndrome, a November 8, 1988 claim for superficial lacerations of the face and left leg and adjustment disorder for an assault that day, and a February 13, 1989 claim for a panic reaction when appellant was confronted by an unknown individual in the employing establishment parking lot. Her claim for a July 20, 1989 injury in an automobile accident while on the way to work was denied as not in the performance of duty.

[5] Docket No. 90-1343 (issued November 30, 1990).

On September 21, 1993 the Office issued another notice of proposed termination. The claims examiner noted that, while the hearing representative had found that no new or different evidence was submitted to the file to support rescission, the employing establishment's letter of controversion and appellant's claim for wage loss constituted new or different evidence sufficient to warrant reopening the claim for review. The claims examiner went on to find that the counseling by appellant's supervisor on September 5, 1990 was an administrative function and did not arise out of the course of appellant's day-to-day employment activities and did not constitute a compensable factor of employment.

By letter dated September 27, 1993, appellant objected to the notice, noting that the claim had been considered and the incident had been established as factual.

By decision dated October 27, 1993, the Office found that the evidence failed to establish that appellant's emotional condition arose while in the performance of duty.

In a letter dated November 16, 1993, appellant requested an oral hearing before an Office hearing representative.[6] Through her congressional representative, appellant forwarded a letter to change her request to a review of the written record.

By decision dated September 13, 1994, an Office hearing representative affirmed the October 27, 1993 decision. He found that appellant's emotional reaction on September 5, 1990 was in response to an administrative matter, the inquiry by her supervisor as to clocking in early, and that there was no evidence of record that her supervisor either erred or acted abusively in this matter. The hearing representative noted that rescission of appellant's claim was based on new legal argument.

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's emotional condition claim as not arising in the performance of duty.

The Board has noted that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in the manner provided by the compensation statute. Once the Office accepts a claim, it has the burden of proof of justifying the termination or modification of compensation benefits. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[7]

In the present case, appellant alleged that she sustained an emotional condition as a result of an incident on September 5, 1990 in which she was approached while in lunchroom by her supervisor, Ms. Burns, who inquired about why appellant clocked in at work 15 minutes ahead

[6] By letter dated May 19, 1994, appellant noted that she had been incarcerated following her conviction on March 17, 1994 for murder. She contended that she was totally disabled following September 5, 1990 and that her condition was responsible for the behavior which led to her incarceration.

[7] *Albert O. Gonzales*, 46 ECAB 684 (1995); *Alfred Arts*, 45 ECAB 530 (1994); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

of schedule. On December 6, 1990 the Office accepted that appellant sustained an anxiety reaction due to the September 5, 1990 incident, when she was questioned about her starting time. The Office noted, however, that payment of any compensation was deferred until Dr. Kontos provided further medical opinion on the nature and extent of any disability related to the incident. In a January 6, 1993 decision, the Office rescinded its acceptance of appellant's claim for an employment-related anxiety reaction on the grounds that appellant had not established the September 5, 1990 incident as a compensable factor of employment. This finding was made again in the October 27, 1993 and September 13, 1994 Office decisions.

In this case, the Office determined that the circumstances surrounding the September 5, 1990 incident did not constitute a compensable factor of employment. The Office introduced as a new legal argument the contention that clocking into work, while a requirement of the job, is an administrative and personnel matter not related to performance of the employee's day-to-day or specially-required duties. The Office found that the evidence of record was not sufficient to establish error or abuse on the part of Ms. Burns when she approached appellant on September 5, 1990 in the lunchroom to inquire about clocking in 15 minutes prior to the commencement of her work shift. The Board concurs in this finding.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from an employee's performance of his or her regular duties, these may constitute compensable employment factors.[8] But for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.[9] Mere perceptions of harassment or discrimination are not compensable under the Act.[10] In determining whether the employing establishment error or acted abusively in an administrative or personnel matter, the Board has examined the evidence to discern whether the supervisor acted reasonably.[11] Appellant alleged that she was subjected to harassment on September 5, 1990 when her supervisor, Ms. Burns, approached her and inquired as to the reason she clocked in at work 15 minutes before her scheduled 8:00 a.m. work shift. The evidence of record, reveals that appellant was approached by Ms. Burns in the employing establishment lunchroom. The statement of the witness, Artis L. Dorsey, notes that upon Ms. Burns making her inquiry, appellant "jumped up from her seat and began to scream and complain that it did not matter what time she punched in." This depiction of the incident supports the statement provided by Ms. Burns, who noted that she had previously counseled appellant on the matter of clocking in early prior to her 8:00 a.m. starting time. The evidence of record does not support appellant's allegations of harassment or the depiction of the September 5, 1990 incident she provided to Dr. Kontos, *i.e.*, that nothing had ever been mentioned to her about her pattern of clocking in early or that Ms. Burns threw appellant's time card at her on that date. The statement of the witness does not establish that Ms. Burns acted in an unreasonable manner on

[8] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[9] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[10] *Id.*

[11] *See Ruth S. Johnson*, 46 ECAB 237, 241 (1994); *Richard J. Dube*, 42 ECAB 916, 920 (1991).

September 5, 1990. For this reason, the Board finds that the Office properly rescinded acceptance of the September 5, 1990 incident as a compensable factor of employment.

On appeal, appellant notes that she had originally requested an oral hearing before an Office hearing representative following the October 27, 1993 decision. The Board notes that by letter dated November 16, 1993 appellant did request an oral hearing. However, the record also establishes that following her incarceration, on August 12, 1994 her congressional representative's office forwarded her letter requesting a review of the record. This was confirmed by a follow-up telephone call with Carol Henderson of the representative's office that a review of the written record would be conducted by the Office's Branch of Hearings and Review. Appellant has not demonstrated error by the Office in this regard.

The September 13, 1994 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 11, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member