

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEARLENA M. ASKEW and DEPARTMENT OF AGRICULTURE,
FOOD DISTRIBUTION PROGRAM, Atlanta, Ga.

*Docket No. 96-1855; Submitted on the Record;
Issued September 30, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on March 28, 1996.

Appellant alleged that she sustained an emotional condition because she was given an unfair performance rating by her second line supervisor when she questioned the unfair firing of a co-worker. The employing establishment only indicated that appellant had been having difficulty with her memory and concentration for some time. Appellant submitted newspaper articles documenting her duties for the employing establishment and the certificates of appreciation and awards she received while completing her duties. Appellant also submitted a copy of her performance appraisal.

On October 26, 1996 an employee assistance program counselor indicated that appellant was distraught because she was transferred to a different section at work. The counselor indicated that appellant had withdrawn her Equal Employment Opportunity Commission (EEOC) complaint due to the emotional impact she feared she would experience.

Appellant also submitted her performance appraisal indicating an unacceptable level of performance and a denial of a salary increase. The appraisal was supported by letters from co-workers indicating appellant had difficulty completing her duties due to memory loss and lack of concentration.

A May 27, 1994 affidavit from appellant's co-worker, Teresa Jared, was prepared for appellant's EEOC complaint. She alleged that appellant was intentionally harassed by her supervisors because appellant was black. This harassment included: isolating appellant from her professional community, preventing appellant from receiving training, limiting appellant to unimportant work, demeaning appellant in front of co-workers, withholding office equipment

from appellant, promoting less qualified and younger employees ahead of appellant, holding appellant to impossible deadlines, forcing appellant to put errors in her work, changing appellant's appraisal rating at the last second to prevent an appeal, and securing false statements against appellant for the purpose of firing her.

Appellant submitted a statement indicating that she experienced stress in 1991 when a younger, less qualified employee was promoted over her. Appellant indicated that she experienced additional stress when the employing establishment retaliated against her for filing an EEOC complaint. Appellant indicated that she subsequently withdrew the complaint to preserve her mental health.

On July 12, 1995 Dr. Joseph N. Saba, a Board-certified psychiatrist and neurologist, treated appellant for memory loss problems. He diagnosed post-concussive syndrome, manifested by severe post-traumatic headache, significant insomnia, amnesia, and memory loss. Dr. Saba repeated this diagnosis on July 25, 1995 and recommended a psychological evaluation.

On August 8, 1995 Dr. Nick A. DeFilippis, a clinical and neuropsychologist, conducted a neuropsychological evaluation. Dr. DeFilippis recorded that appellant received a negative job appraisal. He recorded a history of headaches and anemia. He also indicated that appellant was involved in a car wreck which resulted in dizzy spells, pain, a loss of memory, and an inability to concentrate. Dr. DeFilippis noted that appellant continue to complain of headaches, dizziness, vision problems, slowness of speech, forgetfulness, chest pain, back pain, leg pain, and difficulty with fine motor control. His testing showed that appellant had trouble concentrating and that appellant's intellectual decline was attributed to a combination of emotional and neurological deficits. He found that appellant had severe memory impairment and slowed sensorimotor functions. Dr. DeFilippis indicated that appellant had been depressed since her car accident and that she was depressed about her decreased level of functioning. He concluded that appellant had severe concentration and memory problems. He stated that her ability to problem solve was impaired and that her visual analytical skills were diminished. He stated that appellant was depressed and anxious. He related that appellant "did have a very traumatic event happen to her at work two years ago, which she is still struggling with." He concluded that appellant presented with a combination of emotional problems and a likely post-concussive syndrome, which is complicated by the emotional difficulties.

On October 10, 1995 Dr. DeFilippis indicated that appellant's current level of cognitive functioning, emotional problems, and significant anxiety directly affected her ability to work. He indicated that appellant suffered from a combination of emotional problems and a likely post-concussive syndrome.

On November 3, 1995 Dr. DeFilippis diagnosed cognitive disorder, with memory and organizational difficulty, secondary to concussion, atypical depression, with significant anxiety and hysterical personality traits. He again referred to a traumatic event appellant suffered at work two years prior. He noted that appellant was depressed prior to her concussion injury. He found that appellant's problems rendered her totally disabled.

By decision dated January 17, 1996, the Office denied appellant's claim on the grounds that she had not established a compensable factor of employment.

On February 12, 1996 appellant requested reconsideration. Appellant indicated that she had successfully completed her duties for 13 years and that she only received a poor appraisal after a disagreement with her supervisor. She stated that she withdrew her EEOC complaint for health reasons. She further stated that her emotional condition was solely due to an unfair performance rating.

Appellant then submitted an unsigned affidavit from her co-worker, Ms. Jared, which was to be given before an EEOC investigator. This documented repeated the allegations of harassment and discrimination made by Ms. Jared in her May 27, 1994 affidavit.

In a decision dated March 28, 1996, the Office found that the evidence submitted in support of the application for review was cumulative and repetitious in nature, and was insufficient to warrant review of the prior decision.

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

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 an 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 her 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.¹ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.²

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.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. 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.⁴

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁴ *Id.*

In the present case, appellant alleged that she sustained an emotional condition because she was given an unfair performance rating by her second line supervisor when she questioned the unfair firing of a co-worker. This allegation relates to an administrative or personnel matter unrelated to appellant's regular or specially assigned duties and does not fall within the coverage of the Act.⁵ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁶ In this case, the only evidence appellant submitted corroborating her allegation of error or abuse concerning her performance appraisal was the affidavit submit by Ms. Jared supporting appellant's EEOC complaint. Appellant's performance appraisal, however, indicates only that appellant's work was unacceptable because she lacked an ability to concentrate and a sufficient memory. The appraisal is bolstered by the statements of appellant's co-worker indicating that appellant had memory and concentration problems, and by the opinions of Dr. Saba, a Board-certified psychiatrist and neurologist, and Dr. DeFilippis, a clinical and neuropsychologist, who diagnosed severe memory and concentration losses beginning with a concussion injury. The Board therefore finds that the evidence of record fails to demonstrate that the employing establishment acted in error or abusively in rendering appellant's performance appraisal. Appellant therefore failed to allege a compensable factor of employment and failed to establish that she sustained an emotional condition in the performance of duty.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on March 28, 1996.

Under section 8128(a) of the Act,⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,⁸ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

⁵ See *Jimmy Gilbreath*, 44 ECAB 555 (1993).

⁶ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.138(b)(1).

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁹

In this case, appellant submitted no new argument supporting her claim. Moreover, the information contained in Teresa Jared's unsigned affidavit submitted with the application for review was previously considered by the Office when it reviewed her May 27, 1994 affidavit. The Office, therefore, properly found that this evidence was insufficient to warrant a merit review because it had previously been considered.

The decisions of the Office of Workers' Compensation Programs dated March 28, 1996 and January 17, 1996 are affirmed.

Dated, Washington, D.C.
September 30, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁹ 20 C.F.R. § 10.138(b)(2).