U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY S. HOBBS and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

Docket No. 98-2597; Submitted on the Record;
Issued April 17, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty causally related to the factors of her federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits constituted an abuse of discretion.

On January 12, 1998 appellant, then a 43-year-old limited-duty letter carrier, filed a notice of traumatic injury, Form CA-1, alleging that on December 30, 1997 she sustained an emotional conditional due to her employment. Appellant attributed the emotional condition to a December 30, 1997 meeting with Joyce White, her supervisor, regarding a December 19, 1997 letter of warning for unsatisfactory work performance/failure to maintain a regular schedule. As a result of the meeting, appellant claimed that she developed stress and undue pain in her head and neck, with pain escalating and causing headaches. Appellant stopped work on January 3, 1998 and has not returned.

Dr. D.G. Edwards, a Board-certified family practitioner, examined appellant on January 9, 1998 and reported that she had been subject to stress on the job. Appellant told him that her supervisor had been harassing her and was singling her out. Dr. Edwards reported that appellant "felt like doing something bad to her [supervisor]." Dr. Edwards diagnosed stress syndrome and reactive depression and indicated that appellant sustained a new injury on January 5, 1998. The physician recommended that appellant be off work for two weeks and prescribed medication.

On February 3, 1998 the employing establishment controverted the claim. In support, the employing establishment submitted a December 19, 1997 letter of warning regarding appellant's

poor attendance.[1] The employing establishment also provided a January 26, 1998 statement from Ms. White, appellant's supervisor, regarding the grievance appellant filed in response to the letter of warning. Ms. White described the December 30, 1997 step 1 meeting with appellant and Roy Davenport, the union steward. Ms. White stated that appellant refused to resolve the grievance at step 1 and told her that she would take her chances at the step 2. Ms. White stated that "at no time during the conversation did [appellant] mention anything about feeling pain nor did she appear to be in any distress."

In a statement dated February 19, 1998, appellant described her account of the December 30, 1997 meeting. Appellant explained that Ms. White had been harassing her since October 22, 1997 and asked her to stop. Appellant also said that Ms. White started lying and "there was a[n] upsetting and heated discussion." Ms. White told her that if she did not stop talking, she would end the meeting. Mr. Davenport told appellant that resolution was not possible and that she would have to go to the next step. Appellant stated that as a result of this meeting, she started having migraine headaches and neck, shoulder and chest pain. She further reported that she broke out in a rash and started to have panic attacks every time she went to work. Appellant noted that she had filed six Equal Employment Opportunity (EEO) claims against Ms. White for personal harassment and mental stress.

By letter dated March 6, 1998, the Office indicated that, based on appellant's statement, her claim was being converted from a CA-1, notice of traumatic injury to a CA-2, notice of occupational disease. The Office further requested more information regarding the alleged incidents from appellant.

The employing establishment submitted an April 1, 1998 statement from Ms. White regarding appellant's claim. Ms. White stated :

> "At no time during this conversation (Step 1) did she mention anything about feeling pain nor did she appear to be in any distress. As for her claim that I had been harassing her since October 1997 this claim is not true. I had spoken with [appellant] about her attendance (in October)…. I also spoke to all the other limited[-]duty employees about their attendance…."

By decision dated June 24, 1998, the Office found that appellant failed to sustain an emotional condition in the performance of duty. The Office found that the discussion of performance, lacking evidence of error or abuse on the part of the employing establishment, did not constitute a factor of employment and that appellant had not established that she was harassed. The Office, therefore, did not address the medical evidence.

On April 24, 1998 appellant filed a request for reconsideration. In support, she submitted a December 9, 1998 letter from Dr. D.G. Hobbs, who wrote: "[Appellant] was seen in my office today and [sic] I have taken her off work, due to job-related stress." Appellant also submitted a January 15, 1998 work capacity evaluation form from Dr. Hobbs. Dr. Hobbs indicated that

[1] The employing establishment also submitted a computer print out of her seven other workers' compensation claims.

appellant had been under stress for over two years. He further stated that her stress syndrome was out of control and that she was unable to please her supervisor. The physician determined that she was unable to work.

By decision dated August 4, 1998, the Office denied appellant's request for a merit review. The Office found that the newly submitted evidence was irrelevant and immaterial.

The Board finds that appellant has not met her burden of proof in establishing 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 his or 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.[2] 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.[3]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[4] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[5]

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. These working conditions should be considered by a physician when providing an opinion on causal relationship. Working conditions not deemed factors of employment, may not be considered.[6] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *Lillian Cutler*, 28 ECAB 125 (1976); *see also Thomas McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[7]

Appellant contends that Ms. White has harassed her since October 27, 1997. For harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions alone of harassment are not compensable under the Act.[8] In the instant case, the record contains no factual or corroborating evidence of any harassment. Thus, as appellant has not provided any corroborating evidence that the alleged harassment did, in fact, occur she has not established a compensable employment factor.

Regarding appellant's contention that she sustained an emotional condition as a result of the December 30, 1997 step 1 meeting with her supervisor and union steward, the Board finds that these allegations are not compensable for several reasons. First, the Board has held that matters pertaining to union activities are not deemed employment factors.[9] Second, allegations involving attendance, the underlying reason for the letter of warning and grievance meeting are related to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[10] Where the evidence demonstrates that the employing establishment neither erred nor acted abusively in the administration of personnel matters, coverage will not be afforded.[11] Although the handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] The Board finds that appellant has submitted no evidence establishing error or abuse with respect to the handling of the attendance matters. Finally, the Board has held that an employee's emotional reaction to a disciplinary action is generally not covered under the Act. Thus, a letter of warning regarding her attendance does not constitute a compensable factor of employment.[13] This also is an administrative matter and is not a duty of the employee. Although the parties resolved appellant's grievance on January 15, 1998 by allowing her 60 more days in order to improve her attendance, this resolution does not reveal that the employing establishment erred or abused its administrative functions. The mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.[14] The Board finds that appellant has submitted no probative evidence establishing error or abuse

[7] *Id.*

[8] *Parley A. Clement*, 48 ECAB 302, 304 (1997).

[9] *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *George A. Ross*, 43 ECAB 346, 353 (1991).

[10] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[11] *Carolyn S. Philpott*, 51 ECAB ___ (Docket No. 98-760, issued November 18, 1999).

[12] *See Jimmy Gilbreath, supra* note 10.

[13] *Diane C. Bernard*, 45 ECAB 223 (1993).

[14] *See Michael Thomas Plante, supra* note 10; *Richard J. Dube*, 42 ECAB 916, 922 (1991).

by the employing establishment in issuing the letter of warning. Therefore, appellant has not established a compensable factor of employment.[15]

The Board further finds that the refusal of the Office to reopen appellant's claim for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Section 8128(a) of the Act[16] does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[17] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[18] By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

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

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

(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[19]

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.[20]

[15] As appellant has not established a compensable factor of employment, it is not necessary for the Board to address the medical evidence; *see Margaret S. Krzycki*, *supra* note 6.

[16] 5 U.S.C. § 8128(a).

[17] *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

[18] *Id.*

[19] 20 C.F.R. § 10.138(b)(1).

[20] 20 C.F.R. § 10.138(b)(2).

Evidence, which does not address the particular issue involved, or evidence, which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[21] However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence, which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[22]

In support of her request for reconsideration, appellant submitted a December 9, 1998 letter and a January 15, 1998 work capacity evaluation from Dr. Hobbs.[23] As noted above, the Office properly found that appellant failed to establish a compensable employment factor; therefore, it is premature to address the medical evidence. Consequently, since all of the newly submitted evidence was medical in nature, the Office properly determined that this new evidence did not constitute a basis for reopening the case.[24]

Appellant has, therefore, not established that the Office abused its discretion in its August 4, 1998 decision by denying appellant's review on the merits of its June 24, 1998 decision, under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or fact not previously considered by the Office, or that she submitted relevant and pertinent evidence not previously considered by the Office.[25]

[21] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[22] *Id.*

[23] On appeal, appellant submitted a new medical report from Dr. Edwards dated November 5, 1998. The Board cannot consider evidence on appeal that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).

[24] *See Alton L. Vann*, 48 ECAB 259, 269 (1996) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

[25] 20 C.F.R. § 10.138(b)(1).

The decisions of the Office of Workers' Compensation Programs dated August 4 and June 24, 1998 is hereby affirmed.

Dated, Washington, D.C.
April 17, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member