U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY M. CURTIS and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 99-13; Submitted on the Record;
Issued May 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124 (b)(1).

On May 14, 1998 appellant, then a 42-year-old distribution clerk, filed a claim alleging that on May 11, 1998 she experienced severe debilitating stress when an employing establishment manager, Mildred P. Martinez, refused to open a locked rest room door for appellant, and she experienced "loss of bladder control."[1] She explained that on May 11, 1998 at approximately 4:45 p.m. she requested the number code to open the ladies rest room on the seventh floor from Rita Scott, who evidently gave appellant the code, but appellant was unfamiliar with the operation of the key code to open the rest room, and she was also anxious as the incontinence pad that she was wearing was saturated, such that she was unable to successfully open the door. Appellant claimed that she was standing in the hall unfastening her clothes in anticipation of using the rest room, shaking with anxiety and starting to cry because she could not open the door, when manager Ms. Martinez left her office down the hall and appellant asked her to please open the rest room door for her. She stated that she was in a panic because she had a strong fear of embarrassment from "fouling herself," when Ms. Martinez informed her that there was a rest room available on the first floor.[2] At that point appellant's clothes were almost off and urine was running down her leg into her shoe. Appellant then begged Ms. Martinez to open the rest room door, which Ms. Martinez did by pushing the correct sequence of numbers and appellant was able to go into the rest room and clean herself up.

[1] Appellant did not have control of her bladder as she had undergone bladder surgery on February 3, 1998 and had postoperatively worn a catheter for 30 days. When she returned to work in April 1998 appellant was wearing incontinence pads, and had to change them frequently to prevent overflow and odor.

[2] Appellant worked on the first floor in the distribution center.

Thereafter appellant stated that she returned to her duty station but was obviously upset and began screaming that they should just kill her because all she asked was the use of the rest room, but that because she worked in the distribution center and not in administration, she was supposed to use a public rest room and not an employee rest room. At that point appellant's coworkers took her to the nurse's station where she was so upset that her teeth were chattering and she was perspiring profusely, and she had to take an additional half of her anxiety medication, Lorazepam, and try to calm down. The nurse then took appellant to the Veterans Administration (VA) Hospital emergency room after her blood pressure and heart rate had stablized.

Medical evidence of record also implicated that appellant was very distressed at being put on a shift which made it impossible for her to be at home with her teenage daughter about whom she was concerned. It further revealed that appellant felt humiliated by her present position as a distribution clerk because she was a trained graphic artist and would have loved to be doing that type of work at the employing establishment. The evidence additionally noted that appellant had chronic anger at the employing establishment administration for not respecting her abilities or treating her with consideration for a number of years.

In a May 27, 1998 statement, Ms. Martinez explained that on May 11, 1998 as she left her office, a lady standing at the rest room door called out to let her into the ladies' room. She stated that from a distance she did not recognize appellant as an employee, and replied that there was a public rest room on the first floor. Ms. Martinez noted, however, that as she walked toward the lady she recognized her as the appellant, apologized to her explaining that she did not recognize her from a distance, and opened the door to let her into the rest room without delay. She emphasized that the locks were on the rest room doors for tenants' protection.

By letter dated June 15, 1998, the Office requested further information in support of appellant's claim including her medical and psychiatric history, medications taken and an explanation as to why she felt job activities contributed to her condition.

Appellant responded on June 19, 1998 that she had been and was currently under the care of a psychiatrist for stress, depression, anxiety and a panic disorder. She further noted that she suffered from severe insomnia which caused depression and anxiety, that she had gone through a wide spectrum of treatment through chemical therapy and counseling, and that she was a patient at the VA post-traumatic stress disorder clinic for anxiety and depression. Appellant indicated that she had been treated for anxiety and depression while hospitalized for service-connected injuries and for bladder surgery. She further noted that her medications were not limited to anti-depressants and anti-anxiety drugs but included Valium, Prozac, Lithium, Zoloft, Lorazepam and a wide spectrum of sleeping medications.

By decision dated July 29, 1998, the Office rejected appellant's emotional condition claim finding that she had failed to implicate any compensable factor of employment. The Office found that there was no evidence of error or abuse on the part of Ms. Martinez and that dissatisfaction concerning the physical layout of the employing establishment did not arise in the performance of duty.

By letter dated August 22, 1998, but not postmarked until September 3, 1998 appellant requested an oral hearing.

By decision dated September 25, 1998, the Office noted that appellant's oral hearing request was not timely made as the decision in question had been rendered on July 29, 1998, but the request for a hearing had not been postmarked until September 3, 1998, which was more than 30 days after the original decision. The Office rejected appellant's hearing request finding that the issue could be equally well addressed by requesting reconsideration from the Office and by submitting additional evidence which established that she developed an emotional condition causally related to compensable factors of her federal employment.

The Board finds that appellant has failed to establish that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[3] Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[4]

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 concept of workers' compensation. These injuries 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 the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.[5] Conversely, if the employee's emotional reaction stems from employment 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 the

[3] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] *Id.*

[5] *Donna Faye Cardwell*, *supra* note 3, *see also Lillian Cutler*, 28 ECAB 125 (1976).

coverage of the Act.[6] Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."[7]

In *Thomas D. McEuen*[8] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[9] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

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, and which working conditions are not deemed factors of employment and may not be considered.[10] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[11] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.[12] If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

In the present case, the Office properly found that none of the causative factors appellant alleged were compensable factors of employment.

Appellant's primary allegation was that a manager's refusal to let her into the seventh floor rest room caused her to lose control of her bladder which resulted in her alleged emotional condition. However, the Board notes that appellant was not refused access to the seventh floor rest room. Ms. Scott gave appellant the code to open the door upon her request, but appellant was unable to make it work. Appellant admitted that at that time she was already anxious because she needed to change her incontinence pad and that she became upset when she could

[6] *Id.*

[7] *See Joseph Dedenato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

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

[9] *See Richard J. Dube*, 42 ECAB 916 (1991).

[10] *See Barbara Bush*, 38 ECAB 710 (1987).

[11] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[12] *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

not open the door. These emotions did not arise out of appellant's regular or specially assigned duties or her fear regarding her ability to carry out such duties, but were self-generated, based upon appellant's personal needs. When appellant called to Ms. Martinez down the hall asking for her to open the rest room door for appellant, the evidence of record supports that Ms. Martinez did not recognize appellant as an employee, and therefore directed her to the public rest rooms on the first floor, in accordance with security policies. There is nothing abusive or discriminatory about this direction, and as it falls into the classification of an administrative directive to someone not identified as an employee, based upon security concerns, there is no error or abuse demonstrated. However, after Ms. Martinez got close enough to identify the requesting person as appellant, she opened the rest room door, explained why she had given her earlier response and apologized to appellant. Therefore, appellant was not denied access to the seventh floor rest room. The fact that appellant's incontinence pad needed changing was personal to appellant, and the timing for changing it was also personal to appellant and dependent upon appellant's planning. No employment factor has been demonstrated as causing appellant's incontinence pad to overflow. Accordingly, any emotional reaction to the timing of being assisted in accessing the seventh floor rest room is self-generated by appellant, and is based entirely upon appellant's personal needs. Consequently, nothing surrounding the alleged May 11, 1998 rest room "incident" can be considered a compensable factor of appellant's employment.

Other employment factors also implicated in the medical evidence of record include appellant's frustration at being a distribution clerk instead of a graphic artist, and her displeasure at being assigned the shift she was placed on upon her return to work. The Board has frequently explained that an emotional condition related to frustration or depression from not being permitted to work in a particular environment, such as working on a particular shift or holding a particular position, does not arise in the performance of duty within the meaning of the Act.[13] Further, the assignment of a work schedule is an administrative function, and is therefore not considered to be a work factor, absent a demonstration of error or abuse on the part of the employing establishment.[14] No such error or abuse has been established in this case. Therefore, these factors are not compensable factors of employment for compensation purposes.

As appellant has failed to implicate any compensable factors of her federal employment in the causation or aggravation of her emotional condition, she has failed to establish her emotional condition claim.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

[13] *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

[14] *Alice M. Washington*, 46 ECAB 382 (1994).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[15]

The Office's procedures implementing this section of the Act are found in Title 20 of the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[16]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[17] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right for a hearing,[18] when the request is made after the 30-day period for requesting a hearing[19] and when the request is for a second hearing on the same issue.[20] In these instances, the Office will determine whether a discretionary hearing should be granted of, if not, will so advise the claimant with reasons.[21] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[22]

In the present case, the Office issued its most recent merit decision denying appellant's claim on the issue in question on July 29, 1998. Appellant requested a hearing in a letter

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[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. § 10.131(a).

[17] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[18] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[19] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[20] *Johnny S. Henderson*, *supra* note 17.

[21] *Id.*; *Rudolph Bermann, supra* note 18.

[22] *See Herbert C. Holley, supra* note 19.

postmarked September 3, 1998. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[23] Since appellant did not request a hearing within 30 days of the Office's July 29, 1998 decision, she was not entitled to a hearing under § 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its September 25, 1998 decision, and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence supporting that the position that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[24] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 25 and July 29, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 4, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[23] 20 C.F.R. § 10.131(a).

[24] *Daniel J. Perea*, 42 ECAB 214 (1990).