U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVENIA E. BELL and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AIR TRAFFIC CONTROL TOWER, Corpus Christi, TX

Docket No. 98-1813; Submitted on the Record;
Issued October 6, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for major depression.

On April 4, 1995 appellant filed a claim for job-related stress and anxiety, pains in her chest, difficulty breathing, severe headaches, stomach pains and crying. In a statement accompanying her claim form, appellant attributed these conditions to: discrimination by the employing establishment in depriving her of the opportunity to train other air traffic control specialists; retaliation for filing an Equal Employment Opportunity (EEO) complaint in December 1994; and her referral to the Employee Assistance Program (EAP) on March 22, 1995.

By decision dated August 8, 1995, the Office found that the evidence failed to establish an injury in the performance of duty, as appellant had not established the existence of the factors to which she attributed her condition. Appellant requested a hearing, which was held before an Office hearing representative on March 25, 1996. By decision dated July 25, 1996, the Office hearing representative found several covered factors of employment, namely that appellant had not been allowed to train others as an on-the-job instructor, that negative statements concerning appellant's performance were not supported by evidence and that she reacted to events she deemed discriminatory. The hearing representative further found that the medical evidence supported that work factors caused her to become depressed and anxious. By letter dated August 9, 1996, the Office accepted her claim for major depression. On August 12, 1996 appellant filed for a recurrence of disability.[1]

The employing establishment offered new evidence. The Office reopened the claim for further review. By decision dated November 6, 1996, the Office found that appellant failed to

[1] Appellant returned to work April 29, 1996 after an extended absence and worked until August 1, 1996.

substantiate her allegations of discrimination and the evidence failed to establish that the employing establishment erred or acted abusively in performing administrative matters.

By letter dated December 2, 1996, appellant requested a review of the written record. By decision dated May 16, 1997, an Office hearing representative found that appellant had not submitted sufficient evidence to establish discrimination by employing establishment personnel, that management mishandled the EAP referral or that the employing establishment acted unreasonably in the administration of personnel matters.

In a letter dated March 2, 1998, appellant requested reconsideration and submitted additional evidence. By decision dated April 20, 1998, the Office denied modification of its decisions.

The Office accepted that appellant's emotional condition arose in the performance of duty. To justify rescinding that acceptance the Office must establish, through new evidence, legal argument or rationale that appellant's injury did not arise in the course of employment.[2]

The Board finds that the Office met its burden in rescinding its acceptance of appellant's claim.

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 when an injury or illness has some connections with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's 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. 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.[3]

In this case, appellant alleged that she was not allowed to perform on-the-job training between 1991 and 1995. There is evidence in the record, however, that during 1991 and 1992 she required constant supervision as she had not displayed the necessary expertise in the radar facility. Appellant's supervisor recommended her for instruction in the tower only. Another supervisor stated appellant became combative, moody and disrespectful to peers and managers; that she was given a letter of leave abuse and did not like management decisions that affected her. In 1993, appellant trained a new person. Between 1994 and 1995 appellant was allowed to train for 9 hours and 59 minutes.

An employing establishment investigation determined appellant was not used as a trainer because of nonavailability due to her election to work a nonrotating shift in 1995. In 1995, the record shows appellant was not selected for on-the-job training by a committee set up to make

[2] *Michael A. Vestuto,* 47 ECAB 632, 636 (1996); *Elizabeth Pinero,*46 ECAB 123 (1994).

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

selections. The committee believed she did not meet the criteria for on-the-job training. Notwithstanding the selection committee's recommendation appellant's supervisor overrode the committee recommendation and suggested she be selected. Appellant refused. The Board has held that an employee's dissatisfaction with management decisions constitutes frustration at not being permitted to work in a particular environment or to hold a particular position.[4] That principle is applicable in this case. Appellant charged the employing establishment with discrimination in not making her an on-the-job trainer. Appellant's allegation that she was discriminated against is not, by itself, determinative of her claim. There must be evidence discrimination did, in fact, occur. Mere perceptions of discrimination are not compensable under the Act.[5] In the present case, the evidence demonstrates the employing establishment had adequate reasons for not allowing appellant to train others on the job. The claimant was counseled for incidents of misconduct between 1991 through 1994. The record establishes that appellant lacked on-the-job training opportunities, not due to discrimination, but due to her job performance, lost time from work, her schedule and treatment toward peers and managers.

Appellant also alleged that she was given an EAP referral in retaliation for filing an EEOC complaint. The reasons given for the reference were walking out of an OTJ class, a complaint made by a manager concerning possible operational error and having to be relieved from the position failure to accept more than two aircraft in a touch and go position and attendance problems. The Board finds that appellant's referral to EAP was an administrative function. The Board has 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 employment establishment erred or acted abusively the Board has examined whether the employing establishment acted reasonably.[6] The Board finds that the referral of appellant to EAP did not constitute abuse or error on the part of the employing establishment.

The Board finds therefore, that appellant has failed to establish a compensable employment factor as a cause for her emotional conditions. Where a claimant fails to establish a compensable factor, it is unnecessary to address the medical evidence of record.[7]

For the reasons stated herein the Office met its burden of proof to rescind acceptance of appellant's claim based on new evidence submitted to the record.

[4] *Michael Thomas Plante*, 44 ECAB 510 (1993).

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

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

[7] *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

The decision of the Office of Workers' Compensation Programs dated April 20, 1998 is affirmed.

Dated, Washington, DC
October 6, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member