U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMA WINGATE and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 99-1717; Submitted on the Record;
Issued September 13, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that she sustained an emotional condition causally related to compensable factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely.

On October 3, 1997 appellant, then a 58-year-old postal supervisor, filed a claim alleging that she sustained stress causally related to her employment. By decision dated December 12, 1997, the Office denied her claim on the grounds that the evidence of record failed to establish an occupational disease as alleged.

By letter dated January 11, 1998, appellant requested a hearing and submitted additional evidence. In a supplemental statement dated December 3, 1997, she indicated that her claimed emotional condition was due to harassment by her supervisor, Jay Hemphill, whom she asserted created a harassing, humiliating and hostile work environment and this harassment was resumed by his replacement, Ms. Loskotoff. Appellant alleged several incidents which she asserted constituted harassment or discrimination. These included her perception that top managers had a dinosaur mentality wherein they do not concern themselves with the problems which affected the supervisors, carriers or customers. She asserted that Mr. Hemphill spent most of his time away from the building or in his office writing nasty grams; he will not talk to customers, even if requested, or answer the telephone. Appellant asserted that she was a level 16, delivery service supervisor and that after she returned from an eight-month detail, she was assigned to work at the Embarcadero Postal Center (EPC) as a relief supervisor, a position which she had left prior to her detail. She stated she filled in for other supervisors, working with approximately 40 different letter carriers and sometimes with as many as 200 to 240 different carriers on a weekly basis. Appellant stated that she has to deal with all the letter carriers personal and business needs along with all the requests and concerns of the customers in addition to the reasonable and unreasonable demands of her manager. She stated there is voluminous amount of paperwork and computer work with no extra hours of pay allowed. Appellant asserted that she had accepted the change of assignment from relief supervisor to supervising the Rincon East Station -- 94111, but

sometimes she was scheduled to supervise two stations on the same day and that she had trouble finishing all the paperwork as no extra hours were allowed.

Appellant alleged that Mr. Hemphill shared conversations about appellant wanting respect with Ms. Hepburn and that Ms. Hepburn stated that he wished he did not have to speak with her at all. She alleged that Mr. Hemphill would not acknowledge her presence or say good morning to her, but would acknowledge Ms. Hepburn, whose desk was approximately two feet away. Appellant indicated that the special delivery unit was dissolved on July 19, 1997 and, since there was no plan to effectuate delivery of express mail, the supervisors and clerks were asked to go out on the street to deliver the express mail. She asserted that Mr. Hemphill should stop making her responsible for things which were not her responsibility just because she was a supervisor. Appellant related an event whereby she rolled a U-cart to a late supervisor's office and told the late supervisor that there was express mail in the cart as a carrier who was supposed to deliver the express mail did not show up. The late supervisor told Mr. Hemphill about the undelivered express mail and Mr. Hemphill then started telling her what should have been done as she is a supervisor. Appellant stated that when she was replacing Main Office Station -- 94102, she did not call in a volume report because she could not locate the correct figures. She asserted that Mr. Hemphill brought the matter to the weekly supervisors' meeting, instead of discussing it with her privately.

Appellant alleged that she was often scheduled to work on her day off, she informed the replacing late supervisor that she was mentally drained and would not be able to work the following day. She asserted that Mr. Hemphill brought that to the weekly supervisors' meeting along with a threat that any supervisor who did not work his or her day off would receive the same discipline as the craft employees.

Appellant indicated that she was not assigned parking privileges as the other supervisors. She related that she had parked in Mr. Hemphill's parking space on her second day and was told "Do n[o]t ever park in my space again." She asserted that she was not included in the parking rotations. Appellant asserted that when she returned from vacation on September 9, 1997, acting manager Carlos Zidek gave her a letter from Mr. Hemphill denying her parking privileges along with a note concerning route examination information, which appellant asserted Mr. Hemphill had not provided adequate time to prepare. She stated that when she later asked Mr. Hemphill about his written response denying her parking in the supervisor area and, after Mr. Hemphill checked with another VIM supervisor, he stated that he would begin including her in the parking schedule. Appellant alleged that Mr. Zidek brought her a partially completed form 1769 and requested that she complete the accident report for a letter carrier which had happened the previous week while she was on vacation. She explained that she was on vacation when the injury to the employee occurred and was reluctant to complete the forms feeling that she should not be responsible for it. On October 3, 1997 appellant was issued a September 27, 1997 letter of warning for failure to follow instructions in completing the work injury form. She refused to sign the letter of warning and the manger went to find another supervisor to witness the refusal to sign. Appellant alleged that Mr. Hemphill spoke about her to other supervisors, making them aware of his dislike of her. She additionally asserted that Mr. Hemphill chose people who he knew would continue his harassment and, Ms. Loskotoff, his replacement, was continuing the harassment. Appellant asserted that Ms. Loskotoff demanded that she stop what she was doing

to read a document given to her two hours earlier and followed her around, including going into the bathroom and into the next stall. She stated that effective December 1, 1997, her new assignment was substituting for any absent supervisor at the Rincon East station.

By decision dated June 8, 1998, an Office hearing representative determined that the case was not in posture for a hearing and remanded the case to the district Office for additional development and a *de novo* decision concerning appellant's entitlement to compensation.

By decision dated September 1, 1998, the Office denied appellant's claim on the grounds that the evidence failed to establish an injury in the performance of duty. The Office found that the incidents which occurred in the performance of duty included: appellant was assigned as a relief supervisor at EPC and was then assigned to supervise the Rincon station, but was still asked to fill in for other supervisors; the Special Delivery Unit was dissolved in July 1997 and, on the day it was dissolved, supervisors and clerks were asked to go out on the street and deliver express mail; and, appellant had difficulty completing supervisory paperwork on time. The Office found that other incidents which appellant alleged to have occurred were either not accepted as factual or were not factors of employment.

Appellant requested an oral hearing on her claim. The attached envelope was postmarked November 27, 1998. In a decision dated January 19, 1999, the Office denied appellant's request for a hearing as untimely and found that the matter could be further pursued through the reconsideration process.

The Board finds that appellant has not established an injury in the performance of duty.

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment contributing to her condition. Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] When the evidence demonstrates feelings of job insecurity and nothing more, coverage

[1] *Lillian Cutler*, 28 ECAB 125 (1976).

will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[2] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to her assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[3]

In the present case, appellant has not established that she sustained an emotional condition while in the performance of duty. She alleged several incidents which she asserts constituted harassment or discrimination. Actions by coworkers or supervisors that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.[4] Mere perceptions or feelings of harassment, however, are not compensable. To discharge her burden of proof, a claimant must establish a factual basis for her claim by supporting her allegations of harassment with probative and reliable evidence.[5] Appellant failed to provide any such probative and reliable evidence in the instant case. There is no evidence to support appellant's perception that top managers have a dinosaur mentality wherein they do not concern themselves with the problems which affect the supervisors, carriers, or customers. There is also no factual basis for appellant's assertion that Mr. Hemphill spends most of his time away from the building or in his office writing "nasty grams"; he will not talk to a customer, even if requested; answer the telephone; or not acknowledge her presence or say good morning to her. There is no evidence to support appellant's allegation that Mr. Hemphill threatened supervisors with disciplinary action for not working on their day off. Furthermore, there is no evidence to support appellant's perception that Mr. Hemphill created and allowed a harassing, humiliating, and hostile work environment by talking about her with other supervisors or that Ms. Loskotoff engaged in any wrong doing. Accordingly, as appellant has failed to establish a factual basis for her assertions, these allegations are not accepted as factual.

Appellant also contends that she was subject to discrimination by being denied rotation in a supervisor's parking space; her transfer into an assignment not of her choosing; being held responsible for an incident involving undelivered express mail; having her failure to call in a volume report be brought up at a supervisor's meeting; the September 27, 1997 letter of warning; and the assignment back to being a relief supervisor. However, these issues are all administrative or personnel matters which are not covered under the Act.[6] The record is devoid of any evidence to establish error or abuse by the employing establishment with respect to these administrative matters. The letter of warning is a disciplinary action taken by the employing

[2] *Artice Dotson,* 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green,* 37 ECAB 374 (1985).

[3] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[4] *See Marie Boylan*, 45 ECAB 338 (1994); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

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

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

establishment in response to administrative matters concerning appellant's conduct. The September 27, 1997 letter of warning pertains specifically to appellant's delay in filling out and submitting management's portion of a FECA CA-1 form and OSHA 1769 form. Although appellant advised that the injury to the employee occurred while she was on vacation and accordingly she should not have been responsible for filling out the forms, there is no evidence demonstrating that the employing establishment erred, abused its authority or acted unreasonably. In addition, appellant's dissatisfaction with Mr. Hemphill's management style with respect to bring up the matter of not filing reports up in a supervisor's meeting, having a discussion regarding the undelivered express mail, or being assigned the job no one wants is also not within the performance of duty. Appellant's complaints concerning the manner, in which his supervisor performed his duties as a supervisor or the manner, in which he exercised his supervisory discretion fall, as a rule, outside of compensable factors of employment.[7] Appellant's complaints are analogous to frustration over not being allowed to work in a particular job environment and are, therefore, not compensable.

As noted above, the Office found that appellant's reaction to the actual performance of her duties of working at different stations as a relief supervisor, the events that occurred on the day the special delivery unit was dissolved, and that appellant had difficulties completing supervisory paperwork on time would be compensable under *Lillian Cutler*. In order to meet her burden of proof, however, there must be probative medical evidence establishing causal relationship between a compensable factor and a diagnosed emotional condition.[8] A duty status report dated October 3, 1997 diagnosed an acute anxiety reaction to a conflict with a manager following stress after receiving disciplinary action, a visit verification slip from Kaiser Permanente dated October 17, 1997 diagnosing acute situational anxiety and total disability The visit verification slips showed appellant underwent treatment for high blood pressure and acute situational anxiety but did not include a history or state whether the visits were industrial or nonindustrial. A November 18, 1997 medical report from Dr. Wendy F. Shearn indicated that appellant was a participant in a work stress group and requested that appellant be provided a job limiting exposure to stress for the next six weeks, but did not include any history or state any work factors. In a May 27, 1998 letter, Dr. Darrel Robbins provided a summary of appellant's visits to Kaiser Permanente, appellant's health provider. He indicated that appellant was seen on October 3, 1997 by Dr. Heffner, who noted appellant was under stress due to a situation at work wherein she believed that she was asked to do something dishonest. Because appellant felt unable to return to work until the situation was resolved, Dr. Heffner noted a plan to have appellant off work until October 17, 1997 and that she was to call the psychiatry department for follow-up. Appellant was seen by Dr. Chien on October 17, 1997. This visit was for thumb problems and hypertension. The work slip for this visit indicated that appellant was ill from October 17 through 24, 1997 with diagnoses of "high blood pressure" and "acute situational anxiety reaction." Appellant was again seen on October 23, 1997 for a hypertension follow-up. The visit verification dated October 23, 1997 indicates that appellant was ill from October 23 through November 25, 1997 with the same diagnoses as on October 17, 1997. As none of the

[7] *Donald E. Ewals*, 45 ECAB 111 (1993); *see also David W. Shirey*, 42 ECAB 783 (1991).

[8] *See Ruth S. Johnson*, 46 ECAB 237 (1994).

medical evidence of record pertains to a compensable work factor, appellant's condition cannot be said to have arisen from her regular or specially assigned duties.

The Board also finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[10] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[11]

In the present case, the Office issued its decision on September 1, 1998. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was postmarked November 27, 1998 and thus it is outside the 30-day statutory limitation. Since appellant did not request a hearing within 30 days of the September 1, 1998 decision, she was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[12] In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

[9] 5 U.S.C. § 8124(b)(1).

[10] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[11] *Sandra F. Powell*, 45 ECAB 877 (1994).

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

The decisions of the Office of Workers' Compensation Programs dated January 19, 1999 and September 1, 1998 are hereby affirmed.

Dated, Washington, D.C.
September 13, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member