U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE L. NOBLE and DEPARTMENT OF THE AIR FORCE, AIR MOBILITY COMMAND, TRAVIS AIR FORCE BASE, CA

Docket No. 00-1849; Submitted on the Record;
Issued April 23, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that appellant did not meet 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 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]

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.[3] This burden includes the submission of a detailed

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

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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.[5] 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.[6]

In March 1999 appellant, then a 56-year-old facility and equipment manager filed a claim alleging that she sustained an emotional condition as a result of a number of employment incidents and conditions.[7] By decision dated November 9, 1999, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.[8] The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that in October 1998 Sergeant James Ferrell, a supervisor, unfairly issued her a disciplinary letter informing her of a suspension from work for misuse of an office copying machine. She asserted that in December 1998 Sergeant Ferrell wrongly issued her a disciplinary letter informing her of a suspension from work for eavesdropping on his conversations and that, as a result, she had to "go outside in the rain and cold weather to enter other offices, mail boxes and cop[ying] machines."[9] She also generally alleged that she was wrongly denied leave and that the employing establishment improperly monitored her work.

Appellant's allegations that the employing establishment engaged in improper disciplinary actions, improperly denied leave and unreasonably monitored her activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to

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

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] Appellant had previously filed a claim (No. A13-1099540) alleging that she sustained an employment-related emotional condition. By decision dated February 27, 1997, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors and, by decision dated and finalized March 13, 1998, an Office hearing representative affirmed the Office's February 27, 1997 decision. This claim is not the subject of the present appeal before the Board which relates solely to appellant's claim filed in March 1999 (No. A13-1192053).

[8] By decision dated March 21, 2000, the Office denied appellant's request for a hearing.

[9] Appellant served this suspension in January 1999; she was also charged with wrongly releasing a confidential Equal Employment Opportunity (EEO) claim document.

the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[10] Although the handling of disciplinary actions, the denial of leave and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] 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.[12] Appellant did not, however, provide sufficient evidence to establish that the employing establishment committed error or abuse with regard to the above-described matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant alleged that on March 10, 1999 she was wrongly arrested at the employing establishment. Appellant did not further describe this alleged incident and the record reveals that appellant was not arrested on that date but rather was the subject of an investigation due to making physical threats against a supervisor.[13] The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[14] Appellant has not shown that the employing establishment committed error or abuse with respect to the investigation carried out on March 10, 1999 or that the matter was sufficiently related to her work duties to constitute a work factor.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. Appellant claimed that a coworker, Airman Paula Polfeit, harassed her by unfairly criticizing her for filing an EEO complaint against Sergeant Farrell. She further alleged that Ms. Polfeit harassed her with "sexually [sic] and religious statements and witchcraft in the office." Appellant asserted that Sergeant Ferrell committed harassment and discrimination by telling her that he was a racist. She claimed that in 1996 Colonel Braun, a supervisor, committed harassment and discrimination by calling her a racial epithet. Appellant also generally alleged that she was harassed on the telephone.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from

[10] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[11] *Id.*

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[13] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[14] As noted above, 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. *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

appellant's performance of her regular duties, these could constitute employment factors.[15] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[16] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[17] Appellant alleged that supervisors and coworkers made statements and engaged in actions, which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[18] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that she was unfairly transferred to work in "Zone 3" of the employing establishment.[19] However, the record reveals that the transfer was made at appellant's request in accordance with her physician's recommendation. Appellant has not shown that the employing establishment committed error or abuse in the administrative function of transferring her to another workplace. Moreover, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform her regular or specially assigned work duties but rather constitute her desire to work in a different position.[20]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[21]

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, 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

[15] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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

[17] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[18] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[19] She also alleged, that prior to the transfer, the employing establishment refused her transfer requests.

[20] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[21] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

claim before a representative of the Secretary."[22] 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.[23]

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 for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[24] 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 to a hearing,[25] when the request is made after the 30-day period for requesting a hearing,[26] and when the request is for a second hearing on the same issue.[27]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated November 9, 1999 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter dated January 20, 2000 and postmarked January 29, 2000.[28] Hence, the Office was correct in stating, in its March 21, 2000 decision, that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's March 21, 2000 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 21, 2000 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that her emotional condition claim could be addressed by submitting additional evidence and requesting reconsideration. The Board has held that 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 deduction from established facts.[29] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

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[22] 5 U.S.C. § 8124(b)(1).

[23] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[24] *Henry Moreno*, 39 ECAB 475, 482 (1988).

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

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

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

[28] The record contains a copy of a facsimile, sent to the Office on December 9, 1999, in which appellant requested and "extension" of her claim. The Office properly noted that this document did not constitute a request for a hearing.

[29] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated March 21, 2000 and dated and finalized November 9, 1999 are hereby affirmed.

Dated, Washington, DC
April 23, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member