U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTORIA TAYLOR and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

Docket No. 00-732; Submitted on the Record;
Issued August 15, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

On July 10, 1997 appellant, then a 43-year-old registered nurse, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that the previous work injuries to her neck and back[1] resulted in chronic pain and limitations on her physical activities, which resulted in anxiety attacks and severe depression. She was working light duty when the current condition arose. Appellant stopped working on June 4, 1997 and did not return.

Accompanying appellant's claim was a note from Dr. Daniel S. Shrager, a Board-certified psychiatrist dated July 11, 1997, attending physician's reports dated June 20 and July 21, 1997, prepared by Dr. Shrager, a personal statement from appellant and an employment description. He indicated in his note on July 11, 1997 that appellant was unable to return to work for a four-week period due to depression. Dr. Shrager's reports dated June 20 and July 21, 1997, indicated that appellant was suffering from a major depressive episode as a result of injuries incurred at the job and subsequent chronic pain. He indicated with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and noted that appellant's head and neck injury occurred at the job site.

Appellant's statement date stamped August 15, 1997, raised the following allegations: (1) the head operating room nurse requested appellant's peers to spy on her while she was working as an operating room nurse on light duty; (2) the head operating room nurse requested that appellant transfer to another light-duty position as she did not want appellant working in the operating room; (3) coworkers complained to appellant and the head nurse regarding appellant's

[1] Apparently, the following claimed injuries were accepted by the Office of Workers' Compensation Programs: a December 9, 1993 cervical muscle spasm; a July 25, 1994 head and neck injury and a June 11, 1996 injury to the neck, right arm and hand, upper right shoulder, back and left leg whereby appellant received continuation of pay. The records for these other claims are not currently before the Board.

work restrictions and ultimately refused to work with her; (4) the head nurse telephoned appellant's attending physician to discuss the status of appellant's condition including work limitations and restrictions without appellant's permission; (5) the head nurse complained that appellant left work for physical therapy three times per week which interfered with scheduling; (6) the head nurse changed appellant's physical therapy appointment without her knowledge, appellant left work as scheduled and was written up for being absent without leave; (7) appellant was given a temporary light-duty assignment, however, this position was not made permanent and appellant believed a permanent position had been promised to her; (8) appellant was given a light-duty position as a medical clerk which appellant believed to be menial work; (9) appellant was advised by the employing establishment that she could not continue to be paid as a nurse as she was unable to perform the duties of that position and was advised of her options including filing for disability retirement; and (10) appellant was upset and frustrated that she was no longer physically capable of performing the duties of a registered nurse. Appellant further asserted that limitations from her "original" injury caused her stress as she was no longer able to perform certain routine functions of everyday life.

In an August 4, 1997 memorandum, the employing establishment noted that appellant worked a number of light-duty positions since her injury in 1993. The employing establishment noted that the head nurse did not request that appellant's peers spy on her nor did she advise appellant that she was unwelcome in the operating room. Appellant was under the care of a rehabilitation nurse who authorized the head nurse to call appellant's physician as well as to change appellant's appointment to accommodate the operating room schedule. The employing establishment indicated that appellant's position at the Aspinwall clinic was temporary and never promised as a permanent position. The employing establishment also indicated that appellant was unable to perform light-duty nursing tasks and clerical duties as these caused discomfort in her neck, shoulders and wrists. The head nurse indicated that she explained the long term options for appellant outside of nursing since the numerous light-duty tasks and clerical tasks were too demanding for appellant's physical capabilities.

In a letter dated August 7, 1997, the employing establishment indicated that appellant sought the assistance of the head nurse in finding suitable work that she could perform. Appellant indicated to employing establishment personnel that "they keep putting me in these assignments and I can[no]t do them."

In a letter dated September 5, 1997, the Office advised appellant that the evidence submitted in support of her claim was insufficient to establish her claim. The Office advised appellant of the type of evidence she needed to establish her claim and requested that she submit such evidence.

Thereafter, appellant submitted notes from Dr. Shrager dated September 4 and 30, 1997, a personal statement dated September 17, 1997, a medical report from Drs. Shrager dated September 24, 1997 and a medical report from Ryon Hurh, a Board-certified physical medicine and rehabilitation, dated November 21, 1997. Dr. Shrager's notes indicated that appellant was undergoing therapy and would not be able to return to work for a four-week period. Appellant's personal statement indicated that appellant's chronic pain and physical limitations due to her work injuries caused appellant emotional stress and severe depression. She noted that her injury rendered her incapable of fulfilling the physical requirements of a registered nurse and for caring

for her infant. Appellant also noted that her emotional problems began after her initial injury in 1993 and ultimately led to her severe depression. Dr. Shrager's September 24, 1997 report, noted a history of appellant's condition and noted that, as a result of appellant's previous back and neck injury and her chronic pain as a result thereof, she has been unable to perform her job. He indicated that these factors along with pressure from appellant's supervisor to do the assigned job or quit, caused appellant to experience a major depression. Dr. Shrager noted that appellant's psychiatric condition along with her physical disabilities caused her depression. Dr. Hurh's letter dated November 21, 1997, noted that appellant had been under his care since July 12, 1994 and indicated that appellant's neck pain, weakness in the arm and radiating pain was directly related to appellant's original injury. He indicated that appellant could handle a modified light-duty job with restrictions on bending, standing or lifting more than 20 pounds.

In an October 3, 1997 letter, the employing establishment indicated that appellant had been placed in seven light-duty positions, which conformed to the limitations and restrictions specified by her physician, Dr. Hurh, however, appellant was unable to perform any of the assigned duties. The employing establishment indicated that appellant's coworkers were hostile toward her, however, they noted that this was a result of appellant discussing her extracurricular activities, which included bungee jumping, boating and visiting a petting zoo where appellant lifted her child to pet the animals. The employing establishment indicated that the hostile environment was self-imposed by appellant and related to her poor ethics and inefficient work habits.

By decision dated January 20, 1998, the Office denied appellant's claim for compensation on the basis that appellant failed to establish that the claimed injury occurred in the performance of duty.

By letter dated February 4, 1998, appellant requested an oral hearing before an Office hearing representative. In a letter dated June 20, 1999, appellant's attorney withdrew her request for an oral hearing and requested that the Office review the written record. No additional evidence was submitted.

By decision dated September 23, 1999, the hearing representative affirmed the decision of the Office dated January 20, 1998 and determined that appellant had not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

The Board finds that this case is not in posture for decision.

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 Federal Employees' Compensation Act.[2] On the other hand, the disability is not covered where it results from such factors as an

[2] 5 U.S.C. §§ 8101-8193.

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]

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

In this case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated September 23, 1999, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. 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's allegations that the head operating room nurse requested appellant's peers to spy on her while appellant was working in that department and that the head operating nurse requested that appellant transfer to another light-duty position because she did not want appellant working in the operating room are not supported by the facts presented in the record. Appellant presented no corroborating evidence, such as witness statements to establish that these actions actually occurred or that the statements were actually made.[8]

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

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

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

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

[7] *Id.*

[8] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

Appellant also alleged that harassment on the part of coworkers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment by coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[9] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[10] In this case, the employing establishment admitted that appellant was working within a hostile environment. The employing establishment indicated that this work environment was self-imposed. Appellant's alleged actions in helping to create a work environment where she is harassed does not necessarily preclude compensability. However, general allegations of harassment are not sufficient[11] and appellant has not detailed specific instances of harassment. Appellant has not submitted sufficient evidence to establish that she was harassed by her coworkers.[12] She alleged that coworkers made statements and engaged in actions, which she believed constituted harassment, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[13] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Many of appellant's allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[14] 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. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: the head nurse telephoning appellant's attending physician to discuss the status of appellant's condition including work limitations and restrictions without appellant's permission;[15] the head nurse complaining that appellant left work for physical therapy three times per week which interfered

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

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

[11] S*ee Paul Trotman-Hall*, 45 ECAB 229 (1993).

[12] *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).

[13] *See William P. George*, *supra* note 8.

[14] *See Thomas D. McEuen*, *supra* note 3.

[15] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

with scheduling;[16] the head nurse changing appellant's physical therapy appointment without her knowledge, appellant leaving work as scheduled and being written up for being absent without leave;[17] appellant being given a temporary light-duty assignment, however, this position was not made permanent and appellant believed a permanent position had been promised to her;[18] appellant being given a light-duty position as a medical clerk, which appellant believed to be menial work[19] and appellant being advised by the employing establishment that she could not continue to be paid as a nurse as she was unable to perform the duties of that position and was advised of her options including filing for disability retirement. The employing establishment has either denied these allegations or contended that it acted reasonably in these administrative matters. Appellant has presented no corroborating evidence to support these allegations. Thus she has not established administrative error or abuse in the performance of these actions and, therefore, they are not compensable under the Act. Thus appellant has not established any employment factors which may give rise to a compensable disability under the Act.

However, the Board notes that appellant has also attributed her emotional condition to chronic pain and limitations resulting from an employment injury. This could be a compensable employment factor.[20] However, the Board notes that the record regarding the other employment injuries is not before the Board on the present appeal. With respect to this opinion, the Board has held that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct."[21]

As the Office did not associate the occupational disease claim with appellant's prior claims, the Board will remand the case to the Office for consolidation[22] of Office files for the previously accepted claims to be followed by a *de novo* decision on the merits of the claim.

[16] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, *supra* note 15; *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[17] *Id.*

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

[19] *See Pervis Nettles*, 44 ECAB 623, 628 (1993).

[20] *See Clara T. Norga*, 46 ECAB 473 (1995) (an emotional condition due to chronic pain and other limitations resulting from an employment injury is covered under the Act).

[21] *See Larson, Workers' Compensation Law*, sections 13.00 and 13.11 pertaining to the basic rule regarding consequential injuries; *see also Frank Barone*, 30 ECAB 1119, 1125-26 (1979).

[22] Federal (FECA) Procedure Manual, Part 2 -- File Maintenance and Management, *Doubling Case Files*, Chapter 2.40000.8(c)(2-00) (February 2000).

The September 23, 1999 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
August 15, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member