U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGUERITE J. TOLAND and SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS & APPEALS, Voorhees, NJ

Docket No. 99-1989; Submitted on the Record;
Issued March 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant established that she developed an emotional condition in the performance of duty.

On July 27, 1998 appellant, then a 41-year-old attorney, filed an occupational disease claim alleging that employment-related stress due to harassment and inappropriate criticism caused chest pain, palpitations, shortness of breath and difficulty sleeping. She stopped work on June 30, 1998 and returned to work on July 6, 1998. The employing establishment controverted the claim. By decision dated November 9, 1998, the Office of Workers' Compensation Programs denied the claim, finding that while appellant had established one compensable factor of employment, she had not submitted sufficient medical evidence to establish that she sustained an emotional condition due to this factor.

On December 7, 1998 appellant requested reconsideration and submitted additional evidence in support of her claim. In a decision dated January 20, 1999, the Office found the evidence insufficient to warrant modification of the prior decision. Appellant again requested reconsideration on March 3, 1999 and by decision dated March 19, 1999, the Office denied modification of the November 9, 1998 decision. The instant appeal follows.

In support of her claim, appellant submitted statements in which she indicated that the stress began in September 1997 when the supervisory judge for whom she drafted decisions accused her of deliberately trying to sabotage a government social security matter and unfairly highlighted mistakes in a draft which was then circulated through the clerical staff in an attempt to humiliate and belittle her. Appellant also asserted that on February 8, 1998 the supervising judge issued a formal memorandum unfairly indicating that her work was unacceptable and that she did not have an adequate basis of the various regulations necessary to complete the case. Appellant stated that when she complained about this treatment to her immediate supervisor, the response was an implied threat to her job. Appellant also alleged that on June 2, 1998, her immediate supervisor insulted her work product; criticized her work production, despite the fact that she was physically handicapped, born without a left hand and had requested reasonable accommodation; told her that if she did not like her job she should leave; and later shouted at her

when she looked at a case on his desk that she thought was hers. Appellant also asserted that on June 29, 1998, her supervisors knowingly caused her emotional distress by using discriminatory practices to demote her from a previous salary level without reason and that on July 14, 1998, in a willful attempt to harass her, her supervisor presented her with a job announcement in Portland, Oregon, even though he knew she could not relocate due to family obligations. Appellant noted that she had filed an Equal Employment Opportunity (EEO) claim against her employers, which had been found meritorious.

In statements dated July 31 and September 23, 1998, Mr. Philip J. Press, appellant's supervisory staff attorney, refuted appellant's allegations. Mr. Press advised that appellant's job had no work quota, no intense assignments, no travel requirements and allowed appellant to work at her own pace. In addition, appellant had a private office, worked at home one day a week and was free to choose between dictation, handwriting and computer usage in drafting her decisions. Regarding the events of September 1997 and the allegation of sabotage, Mr. Press explained that in reading a draft decision written by appellant, the supervisory administrative law judge almost missed certain statements that had been assimilated into the draft by appellant. The supervisory judge advised appellant that he would prefer such statements to be written on a separate piece of paper attached to the draft, rather than included in the decision itself. He further stated that appellant's allegations of public humiliation and professional degradation were not consistent with what was actually a difference of opinion regarding how one should approach correcting a draft opinion.

Regarding appellant's assertions that on February 8, 1998, an implied threat was made to her job, Mr. Press stated that on that day appellant had expressed anger over the fact that the office chief administrative law judge had indicated that appellant had not followed instructions. Mr. Press said that he reminded appellant that the judges did have a right to have decisions done according to their instructions and that it was appellant's job to do so, but did not threaten her job in any way. Mr. Press further stated that with respect to the events of June 2, 1998, this was another instance when he found it necessary to remind appellant that the judges had the right to have decisions written according to their instructions and although it was fine for appellant to disagree with the judge, she was still required to draft the decision in accordance with the judge's wishes. Mr. Press stated that he told appellant that this was a requirement of the job and that if she had extreme difficulty with this job element, perhaps this was not the job for her. Mr. Press also stated that on that day appellant did pick up a case file from his work table and that this case had a memorandum attached to it, addressed to himself, regarding the quality of the decision written by another attorney. Mr. Press said that he asked her on four occasions to put the case file down and not to look at the memorandum, but that appellant ignored each request and refused to comply until she had finished reading the memorandum, in violation of the privacy of the other parties to whom the memorandum pertained.

With respect to appellant's assertion that she was demoted from her position on June 29, 1998, Mr. Press explained that appellant had in fact been filling a temporary position which expired on June 30, 1998. He submitted into the record a copy of appellant's job description, which clearly indicates that the position was a time-limited promotion which could be terminated at any time. Finally, regarding appellant's allegation that on July 14, 1998 she was offered a position in Portland, Oregon in a deliberate attempt to harass and humiliate her, Mr. Press stated that the chief judge had directed him to ask all of the employees whether they wished to work in Portland as a senior attorney and that the proposed position was not a direct attack on appellant.

The record indicates that on September 29, 1998 appellant sought EEO counseling and filed a complaint alleging harassment and demotion on the basis of her sex and her physical handicap. Contrary to appellant's assertion that the claim had been found meritorious, a letter dated November 17, 1998, from the employing establishment notes only that appellant's complaint had been accepted for further investigation. A final agency decision is not contained in the record.

The Board finds that appellant has not established that she developed an emotional condition in the performance of duty causally related to factors of employment.

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 his 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.[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 his 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 he claims compensation was caused or adversely affected by employment factors.[3] 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.[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]

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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).

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

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

[6] *Id.*

In the present case, appellant has alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.

Appellant attributes her emotional condition to harassment by Mr. Press, her acting supervisor, and by the supervisory administrative law judge, between September 1997 and June 29, 1998, when her position expired. To the extent that disputes and incidents alleged as constituting harassment by coworkers and supervisors are established as occurring and arising from appellant's performance of her regular or specially assigned duties, these could constitute employment factors.[7] Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment.[8]

In the instant case, the evidence does not establish harassment or verbal abuse by either Mr. Press of the supervisory administrative law judge. With respect to the incident on June 2, 1998, appellant alleged that Mr. Press repeatedly shouted at her "Don't look at that" when she inadvertently picked up a file she thought was hers. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[9] Mr. Press has specifically explained the reasons for asking appellant not to look at the file and appellant has not provided any witness statements regarding this event, nor has she explained how these comments by Mr. Press would rise to the level of verbal abuse or otherwise fall within coverage of the Act.[10]

Regarding appellant's allegations of harassment and discrimination, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.[11] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment,[12] and an employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[13] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[14] In the present

[7] *See Christophe Jolicoeur*, 49 ECAB 553 (1998); *Pamela R. Rice*, *supra* note 3.

[8] *Id*; *David W. Shirey*, 42 ECAB 783 (1991).

[9] *See Leroy Thomas, III*, 46 ECAB 946 (1995).

[10] *See Christophe Jolicoeur*, *supra* note 7; *see, e.g. Alfred Arts*, 45 ECAB 530 (1994) and cases cited therein (finding that the employee's reaction to coworkers comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

[11] *Sheila Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[12] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

[13] *William P. George*, 43 ECAB 1159 (1992).

[14] *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

case, appellant has not submitted evidence corroborating her various allegations of harassment by supervisors at the employing establishment. Therefore, in the absence of evidence substantiating her claims, appellant did not establish that harassment or discrimination occurred.

Furthermore, a review of appellant's other allegations and statements reveal that appellant's frustration was not related to the performance of her regular or specially assigned duties, but rather to her interactions with her supervisors regarding the performance of supervisory functions. An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.[15] This principle recognizes that a supervisor or manager in general must be allowed to perform his duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[16] In the instant case, appellant has not submitted evidence of error or abuse sufficient to substantiate that her supervisors acted unreasonably in the performance of their duties.

As appellant has not submitted the necessary factual evidence to establish that her allegations are compensable under the Act, appellant has not met her burden of proof in this case.

The decisions of the Office of Workers' Compensation Programs dated March 19 and January 20, 1999 and November 9, 1998, are modified to the extent that there are no compensable factors of employment and are affirmed in the result.

Dated, Washington, DC
March 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[15] *Abe E. Scott*, *supra* note 10.

[16] *Id*.