U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS ROGERS and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AK

Docket No. 03-1574; Submitted on the Record;
Issued December 17, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are whether: (1) appellant sustained an emotional condition in the performance of her federal duties; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On July 6, 2001 appellant, then a 46-year-old postal clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that she suffered from depression as a result of her federal employment. Specifically, she alleged in her CA-2 form that Bob Gaddis, a supervisor, insisted that she work outside her medical restrictions and Al Alexander, a marketing manager, felt that injured workers should perform core duties without adequate pay.[1] Appellant indicated that she was sleepy all the time, felt worthless and that she could not please her managers. She stopped work on August 15, 2001 and has not returned.

In support of her claim, appellant submitted a July 18, 2001 report from Dr. Bradley Diner, a Board-certified psychiatrist, who wrote that she was being hospitalized for major depression. She also submitted a July 3, 2001 report from Dr. Maria Hixson, an orthopedist, who wrote that appellant underwent a carpal tunnel syndrome (CTS) release in 1986 and has been under permanent work restrictions since 1996. She further noted that appellant said that she has been asked to work outside her medical restrictions and as a result has experienced tingling, numbness, swelling and pain in her hands.

In an August 13, 2001 letter to appellant, the Office requested more information. In an August 20, 2001 letter, appellant wrote that her supervisors had abused her for several years, that coworkers knew of the abuse but feared retaliation if they publicly said anything. Appellant submitted documentation of a seven-day suspension she received in 1990 for allegedly causing a

[1] Appellant sustained a work-related carpal tunnel syndrome condition in 1990. She stopped work on May 8, 1990 and returned to modified position on July 21, 1990.

backlog. Appellant had filed an Equal Employment Opportunity (EEO) complaint over the suspension alleging discrimination. The complaint was ultimately settled when appellant withdrew her complaint and the employing establishment paid her $150.00 and reduced the discipline to an official discussion and agreed to cooperate with her desire for upward mobility in marketing and communications. Both parties agreed that appellant's advancement would have to be consistent with her training and skills and that there had been no admission to discrimination or wrongdoing by the employing establishment.

In an October 2, 2001 letter, appellant wrote that Mr. Gaddis, the retail manager, and Mary Nell Engel, another supervisor, looked upon her as an injured worker and had mistreated her for years. Appellant noted that she once worked an hour of overtime and was not paid for it, that she worked for three years in a clerk position in consumer affairs at lower pay and grade than others in the same position, and that when she asked to be promoted she was told she could not be promoted because of her medical restrictions and because she could not work without supervision. Appellant alleges this was actually retaliation for filing EEO complaints in the past. Appellant also noted that she has filed five EEO complaints since 1989 but, with the exception of the 1990 claim for the suspension, little came of them. Appellant also submitted several letters that she had written in the 1990s requesting training opportunities, details, promotions and pay raises -- each referencing the 1991 EEO settlement agreement.

On May 31, 2001 Mr. Gaddis asked appellant to key information into a computer, a request that she felt was outside her work restrictions. Appellant said that she told Mr. Gaddis that the work was outside her work restrictions but that she would do it for more money; but he refused to increase her pay. Appellant also wrote that her supervisors think that if it appears they are catering to injured workers then that will send a negative message. Appellant wrote that she cannot accept that she is being treated different from others; that Mr. Gaddis and Ms. Engel both directly and indirectly harassed her by telling others of her past EEO complaints, yet they told appellant that they have no problem with her. She wrote that she believed they had told Mr. Alexander about her previous EEO complaints and that information led him to speak to her in a harsh, intimidating voice and caused her to be assigned to consumer affairs where she previously had problems.

Appellant alleged that she was not hired for a consumer affairs/complaints clerk position and that management watched her more closely than they watched other workers and used rumors that appellant was going to be reassigned as a scare tactic. She also submitted a hearing transcript from the 1991 EEO hearing in which several coworkers testified at that time that appellant was a competent worker who could work without supervision.

In response to appellant's allegations, Mr. Gaddis wrote on the CA-2 form that he did not ask, nor was he aware of anyone asking, appellant to work outside her medical restrictions. In a September 13, 2001 letter, Mr. Gaddis again denied that he had asked appellant to work outside her restrictions. He wrote that he actually had told her not to work outside her restrictions. He also noted that the data input he asked appellant to perform was well within her restrictions and that she offered to do the extra keying, but only if she was paid more.

In a January 22, 2002 decision, the Office denied appellant's claim finding that she had not established that her condition arose from compensable employment factors. In a January 30,

2002 letter, appellant requested a review by the Branch of Hearings and Review. In support of her request, she repeated her previous allegations but submitted no new evidence.

In a June 21, 2002 decision, the hearing representative affirmed the January 22, 2002 decision finding that appellant had not established a compensable factor and that appellant had not established that the employing establishment committed error or abuse.

In a September 3, 2002 letter, appellant requested reconsideration. She argued that she had met the legal standards necessary to meet her obligations and restated a number of her prior arguments. Appellant submitted copies of Board and Supreme Court cases that she said supported her position. She also submitted numerous documents, including previously submitted medical evidence journal entries from 1992 -- 1996 and EEO documents.

In a December 18, 2002 decision, the Office denied a merit review finding that appellant submitted no new evidence or raised a new legal argument.

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of her federal duties.

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.[2] 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.[3]

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.[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

[2] 5 U.S.C. §§ 8101-8193.

[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).

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 the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated January 22 and June 21, 2002, 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.

Regarding appellant's allegations that the employing establishment assigned work duties that were beyond her medical restrictions, she was inadequately paid for her work in consumer affairs or for one hour of overtime and incorrectly issued disciplinary actions the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[8] Although the handling of the assignment of work duties 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.[9] 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.[10] However, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. The employing establishment denied that they had asked appellant to work outside her medical restrictions and appellant has not submitted corroborating evidence to support her allegations of abuse, retaliation or the use of rumors as scare tactics. The witness statements appellant submitted were related to a 1991 EEO allegation and they did not refer to any specific abuse or disparate treatment of appellant. Instead they were general statements about appellant. The EEO settlement, at which appellant received $150.00, specifically states that no wrongdoing occurred. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

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

[7] *Id.*

[8] *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).

[9] *Id.*

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

The mere fact that personnel actions, such as the 1991 seven-day suspension, was later modified or rescinded, does not in and of itself, establish error or abuse.[11]

Appellant has also alleged that harassment and discrimination on the part of her supervisors contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[12] 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.[13]

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination for filing EEO complaints and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[14] Appellant alleged that supervisors Mr. Gaddis and Ms. Engel spread rumors or told fellow managers that she had a history of filing EEO complaints, but she offered no evidence to establish this allegation as factual. Appellant also alleged that her supervisors engaged in actions, denying her promotions or details, that 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.[15] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Regarding appellant's allegation of denial of promotions, details and pay raises consistent with her settlement agreement and job transfers, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[16] Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's allegation that she developed stress due to insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity,

[11] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

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

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

[14] *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).

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

[16] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

including fear of a reduction-in-force, is not a compensable factor of employment under the Act.[17]

An employee's dissatisfaction with holding a position in which she feels underutilized, performing duties for which she feels overqualified or holding a position which she feels to be unchallenging is not compensable under the Act.[18]

An employing establishment's refusal to give an employee training as requested is an administrative matter, which is not covered under the Act unless the refusal constitutes error or abuse.[19]

The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[20] In the present case, the employing establishment denied asking appellant to work beyond her medical restrictions and she has not submitted corroborating evidence to support her allegation. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[21] Appellant has alleged that Mr. Alexander spoke to her in an intimidating manner but she has not submitted evidence corroborating that allegation.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.[22]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a merit review pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[23] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[24] To be entitled to a merit review of an Office decision

[17] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

[18] *See Purvis Nettles*, 44 ECAB 623, 628 (1993).

[19] *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[20] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

[21] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

[22] 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).

[23] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[24] 20 C.F.R. §§ 10.606(b)(2).

denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[25] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[26]

In the present case, appellant has not established that the Office abused its discretion in its December 18, 2002 decision by denying her request for a review on the merits of its June 21, 2002 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office. In support of her September 3, 2002 request for reconsideration, appellant reargued her previous allegations of retaliation, abuse and denial of promotions, details and raises and submitted medical evidence already in the record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[27]

Appellant also submitted copies of the Board and Supreme Court cases but failed to show how these cases applied to her case. Lacking an explanation, this material, though new, is not relevant to her specific case. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[28] Thus the Office did not abuse its discretion in denying appellant a merit review.

[25] 20 C.F.R. § 10.607(a).

[26] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[27] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[28] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The Board finds that the decisions by the Office of Workers' Compensation Programs dated December 18 and June 21, 2002 are affirmed.

Dated, Washington, DC
December 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member