

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NHIEM T. NGUYEN and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, SAN BERNADINO OFFICE,  
San Bernadino, CA

*Docket No. 03-526; Submitted on the Record;  
Issued July 24, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty as alleged.

On December 27, 2000 appellant, then a 50-year-old revenue agent, filed a notice alleging that she sustained schizoaffective disorder (depressive type), and dependent and borderline personality disorders in the performance of duty.<sup>1</sup> Appellant stopped work on March 25, 1999 and did not return.

In an October 5, 1999 statement, appellant described work factors alleged to have caused or contributed to her claimed condition. She explained that her supervisor, Diann Kisselburg, “shocked” her by issuing her a September 22, 1998 numeric interim rating of 2.09 out of 5, as the numeric format indicated that it was a binding rating of record, and not a narrative format interim evaluation. The rating also indicated that appellant had failed all critical elements. Appellant explained that she “began to believe even more that [she] could not perform the job the way Diann [Kisselburg] wanted....” Appellant alleged that when she asked Ms. Kisselburg for written audit guidelines, Ms. Kisselburg derisively asked appellant’s coworker G. Terry Culmer if he knew what the basic audit steps were, then wrote out a set of simple steps for appellant. Appellant alleged that, on September 23 or 24, 1998, she overheard coworkers Nonie Kleinhans and Mr. Culmer talking about an agent who bribed a manager to get a higher performance rating. Appellant believed that they were talking about her, although Ms. Kleinhans and Mr. Culmer explained that they were talking about another employee. Appellant also alleged that Mr. Culmer began to treat her differently, and that people talked about her derisively, “being entertained at [her] expense.” Appellant alleged that she overheard Mr. Culmer ask coworker William (Bill) Gustafson if Ms. Kisselburg was a “nice” manager, and

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<sup>1</sup> The record indicates that the Office accepted appellant’s claim regarding an October 22, 1998 motor vehicle accident under Claim No. 13-1174875. This claim is not before the Board on the present appeal.

Mr. Gustafson said that Ms. Kisselburg was nice to everyone but appellant. Appellant also alleged that coworker Rosalind Villasenor remarked to appellant that Mr. Culmer changed his “personality” toward appellant very quickly.

Appellant recalled that Ms. Kisselburg told her that she would observe appellant in the field during an October 22, 1998 audit. On October 22, 1998 on her way to the audit, appellant collided with a car stopped in front of her, which she attributed to being fearful and distracted by the prospect of Ms. Kisselburg’s observation. Her physicians held her off work through November 27, 1998. After she returned to work, appellant recalled that a union steward told her that Ms. Kisselburg’s branch chief ordered her to remove the September 1998 rating from appellant’s file, as it was only based on one case. Appellant also alleged that, in December 1998 and February 1999, Ms. Kisselburg assigned her a heavy case load, including cases with short deadlines and complex issues, in retaliation for appellant going to the union. Ms. Kisselburg then gave appellant an additional unfavorable evaluation. Appellant also alleged that Ms. Kisselburg made frequent harassing comments regarding her work.<sup>2</sup>

In a November 20, 2000 report, Dr. Nader F. Nowparast, an attending clinical psychologist, stated that appellant’s condition was exacerbated by the life-threatening automobile accident she sustained in the course of her employment. Dr. Nowparast diagnosed schizoaffective disorder, depressive type, dependent personality disorder, borderline personality disorder, and noted Axis IV “[s]evere [c]hronic [p]sychosocial [s]tressors caused by [w]ork [e]nvironment and [e]xacerbated by [w]ork-[r]elated [a]utomobile [a]ccident.”

The employing establishment submitted witness statements regarding appellant’s account of events. In an April 3, 2001 letter, Ms. Kisselburg noted that appellant attended classroom training from May 26 to June 16, 1998, followed by three weeks of on-the-job training and coaching. Ms. Kisselburg stated that she did not issue the September 22, 1998 evaluation until training had ended. Ms. Kisselburg stated that, while the September 22, 1998 mid-year evaluation “should not have been assigned a numerical rating,” she “was a new manager and did not know that.” Ms. Kisselburg stated that she discussed with appellant how to improve her performance, including working with appellant on a case from “the initial interview.” Ms. Kisselburg admitted speaking with the union about the September 1998 evaluation, but asserted that she was not instructed to remove it from appellant’s file. Ms. Kisselburg acknowledged that appellant “was concerned about her performance” and requested written guidelines. However, Ms. Kisselburg denied asking Mr. Culmer if he knew the steps for an audit.

In an April 3, 2001 letter, Mr. Culmer stated that he recalled the conversation about an agent bribing a manager, but that he did not know anything about appellant’s performance rating, or that Mr. Gustafson disliked appellant. He recalled that Ms. Kisselburg asked him for a “workpaper” outline that she had given him when he was a trainee. In an April 3, 2001 letter,

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<sup>2</sup> In a July 2, 2001 letter, appellant, through her representative, asserted that Ms. Kisselburg’s harassment and mismanagement changed appellant’s status “from successful agent to worker in remedial training.” She asserted that witness statements submitted supported her account of events.

Ms. Kleinhans stated that, during the conversation regarding how managers treat their agents, she stated only that she did not like the way her group treated their secretary.<sup>3</sup>

In an April 30, 2001 letter, the Office of Workers' Compensation Programs explained that the witness statements of record were insufficient to corroborate her account of coworker conversations regarding her performance, or other aspects of harassment. The Office also advised appellant to submit rationalized medical evidence citing the alleged factors of employment, and explaining how and why those factors would cause the claimed emotional condition.

By decision dated September 12, 2001, the Office denied appellant's claim on the grounds that appellant had not established a compensable factor of employment. The Office accepted as factual but noncompensable that appellant requested and received written guidelines from Ms. Kisselburg; the September 22, 1998 performance review, and that Ms. Kisselburg told appellant she would observe her during a field audit on October 22, 1998. The Office found that the incidents were administrative matters, and that no error or abuse was shown. The Office further found that appellant's other allegations were not established as factual.

Appellant disagreed with this decision and in a September 27, 2001 letter requested a review of the written record by the Office's Branch of Hearings and Review. In a March 21, 2002 letter, appellant changed her request to an oral hearing before a representative of the Office's Branch of Hearings and Review, held June 26, 2002. At the hearing, appellant alleged that she had feelings of sadness while watching taxpayers cry, were compensable factors of employment. After the hearing, appellant asserted that her psychiatric conditions were also due to the accepted October 22, 1998 automobile accident. She submitted additional evidence.

In a June 7, 2001 report, Dr. Nowparast stated that appellant's schizoaffective, dependent, avoidant and schizotypal personality disorders were caused by "[w]ork-[r]elated [i]njuries that have been [e]xacerbated by a [l]ife-[t]hreatening [w]ork-[r]elated [a]uto[m]obile [a]ccident." Dr. Nowparast found appellant totally disabled, in part, due to the October 22, 1998 motor vehicle accident.<sup>4</sup>

In a July 24, 2002 response to the hearing transcript, Ms. Kisselburg stated that she was unaware in September 1998 that interim evaluations were not supposed to contain a numerical rating. Ms. Kisselburg contended that the numerical rating of 2.09 was an accurate assessment, and that other supervisors provided numerical interim ratings.<sup>5</sup> Ms. Kisselburg denied asking

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<sup>3</sup> In an April 3, 2001 letter, Mr. Gustafson stated that he did not recall having a conversation with Mr. Culmer regarding whether or not Ms. Kisselburg was a "nice" manager. In an April 3, 2001 letter, Ms. Villasenor stated that she did not recall telling appellant that Mr. Culmer could change his personality very quickly.

<sup>4</sup> In a June 23, 2002 report, Dr. Shoeila Khajavi, an attending psychiatrist, diagnosed schizoaffective and schizoid personality disorders. Dr. Khajavi did not discuss appellant's allegations or the history of injury.

<sup>5</sup> The record contains April 22, 1998 and May 11, 2000 mid-year reviews containing both numeric and narrative ratings. As the names of the employees and supervisors are blacked out, it is not clear if these are appellant's ratings. Additionally, as appellant stopped work in March 1999 and did not return, the May 11, 2000 rating could not be hers.

Mr. Culmer if he knew the steps for performing an audit, but remembered providing appellant with written instructions at appellant's request.<sup>6</sup>

By decision dated and finalized October 15, 2002, the Office hearing representative affirmed the September 12, 2002 decision of the Office, finding that appellant had failed to establish a compensable factor of employment. The hearing representative affirmed the Office's September 12, 2001 decision, including that appellant failed to establish any incident of harassment. The hearing representative concluded that there was no error or abuse shown regarding the September 1998 rating, the provision of written audit guidelines, or Ms. Kisselburg's plan to observe appellant on October 22, 1998.

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

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters but such matters are not related to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.<sup>7</sup>

In its decision dated and finalized October 15, 2002, the Office found that appellant had failed to establish any compensable factors of employment, including the September 1998 performance appraisal. However, the Board finds that appellant has established two compensable factors of employment: the October 22, 1998 motor vehicle accident; and her emotional reaction to the job requirement of public contact.

Appellant alleged that her emotional condition was caused, in part, by the October 22, 1998 motor vehicle accident. The evidence of record indicates that the Office accepted the October 22, 1998 accident as work related. Therefore, the October 22, 1998 motor vehicle accident is a compensable factor of employment. In November 20, 2000 and June 7, 2001 reports, Dr. Nowparast, an attending clinical psychologist, stated that appellant's condition was exacerbated by the life-threatening automobile accident she sustained in the course of her employment with the employing establishment. However, it cannot be presently ascertained if there is additional evidence in the case record of Claim No. 13-1174875 relevant to appellant's emotional condition claim presently before the Board. Therefore, to allow for the complete consideration of all pertinent evidence, on remand of the case, the Office shall double Claim No. 13-117485, pertaining to the October 22, 1998 motor vehicle accident, with the present case.

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<sup>6</sup> Appellant's attorney responded to Ms. Kisselburg's statement by August 5, 2002 letter. Appellant asserted that Ms. Kisselburg admitted that she committed error by issuing the September 1998 numerical rating.

<sup>7</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

This doubling shall occur prior to any further development of appellant's emotional condition claim.

Appellant generally noted that she was upset by her contact with crying taxpayers during audits. However, appellant did not cite to any specific incidents of when she was with crying taxpayers. While this could constitute a compensable factor, the allegation is not established factually. For this reason the Board finds that this is not a compensable factor.

Appellant also attributed her claimed emotional condition to a number of noncompensable factors. Appellant alleged that Ms. Kisselburg's issuance of a numeric interim rating in September 1998 was compensable error. The Board has held that reactions to assessments of performance are not covered by the Act unless error or abuse is shown.<sup>8</sup> In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>9</sup> Ms. Kisselburg submitted April 3, 2001 and July 24, 2002 statements regarding the September 1998 evaluation, admitting that while the mid-year evaluation should have been in narrative rather than numeric form, she "was a new manager and did not know that," particularly as other supervisors issued numeric interim ratings. The Board finds that Ms. Kisselburg's explanation that the error in the performance rating's format was due to her inexperience and following the example of other supervisors was reasonable. The Board therefore finds that appellant has not established that the incorrect appraisal format was a deliberate or abusive error. Thus, appellant has not established a compensable factor of employment in this regard.<sup>10</sup>

Appellant also attributed her emotional condition to anxiety over being able to perform her assigned duties. The Board has held that an employee's anxiety over being able to carry out specific job functions is compensable. However, general feelings of job insecurity are not compensable.<sup>11</sup> In her October 5, 1999 statement, appellant explained that, following the September 1998 rating, she was worried that she "could not perform the job the way that" Ms. Kisselburg wanted.... Ms. Kisselburg confirmed in April 3, 2001 and July 24, 2002 statements that appellant had general concerns about her performance. Thus, the record demonstrates that appellant had general concerns about being able to perform her assigned duties, as opposed to anxiety over being able to carry out specific elements of her position.<sup>12</sup> Therefore, the Board finds that appellant has submitted insufficient corroborating evidence to establish a compensable factor of employment in this regard.

Appellant also attributed her emotional condition to two factual but noncompensable incidents. Appellant alleged that Ms. Kisselburg issued her demeaning, overly basic written audit instructions. However, a reaction to instruction itself is not compensable, as the Board has

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<sup>8</sup> *Effie O. Morris*, 44 ECAB 470 (1993).

<sup>9</sup> *See Richard Dube*, 42 ECAB 916 (1991).

<sup>10</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>11</sup> *Ernest St. Pierre*, 51 ECAB 623 (2000); *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>12</sup> *Ernest St. Pierre*, *supra* note 11.

held that work assignments given by supervisors in the exercise of supervisory discretion are actions taken in and administrative capacity.<sup>13</sup> Also, as appellant did not submit a copy of these written instructions, the Office could not determine if there was any error or abuse involved. Appellant also attributed her condition to anticipatory anxiety regarding Ms. Kisselburg's schedule filed observation on October 22, 1998. The Board has held that the review or monitoring of an employee's work activities is an administrative function, and not a part of the employee's assigned duties.<sup>14</sup> The Board finds that, under the circumstances of the case, it was reasonable for Ms. Kisselburg to closely monitor an audit from its inception. Thus, appellant has not established that her reaction to the prospective field observation, or the written instructions, as compensable factors of employment.

Appellant also attributed her emotional condition to work factors not established as factual. Appellant alleged, but did not corroborate, that Ms. Kisselburg was directed to remove the September 1998 evaluation from her record, and that Ms. Kisselburg gave appellant a second unfavorable evaluation sometime after September 1998. Appellant did not submit sufficient factual evidence to corroborate these allegations. Also, appellant alleged overwork in December 1998 and February 1999. The Board has held that overwork may be a compensable factor of employment.<sup>15</sup> However, appellant submitted insufficient proof to establish her allegations of overwork. Appellant did not submit a roster of assigned cases showing an increase in workload, or any details regarding deadlines. Thus, appellant submitted insufficient evidence to establish her allegations of overwork.

Appellant also alleged a pattern of harassment and retaliation by Ms. Kisselburg and Mr. Culmer. In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur. The Board notes that unfounded perceptions of harassment do not constitute an employment factor.<sup>16</sup> Appellant described alleged conversations in which coworker Ms. Villasenor said that coworker Mr. Culmer changed his personality with regard to appellant, that on September 23 or 24, 1998 Mr. Culmer and Ms. Kleinhans alleged she bribed a manager to get a higher performance rating, and that coworker Mr. Gustafson stated that Ms. Kisselburg was nice to everyone but appellant. However, April 3, 2001 statements from Mr. Culmer, Mr. Gustafson, Ms. Kleinhans and Ms. Villasenor do not corroborate appellant's account of these conversations. Ms. Villasenor and Mr. Gustafson stated that they did not recall the alleged conversations. Ms. Kleinhans stated that she did recall discussing how managers treat their agents, but that she spoke only about how the group treated its secretary. Mr. Culmer did remember the conversation about an agent bribing a manager, but denied that he knew anything about appellant's performance rating, or that he stated that Mr. Gustafson disliked appellant.

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<sup>13</sup> *Robert Knoke*, 51 ECAB 319 (2000).

<sup>14</sup> *Sherry L. McFall*, 51 ECAB 436 (2000).

<sup>15</sup> *Sandra F. Powell*, 45 ECAB 877 (1994); *William P. George*, 43 ECAB 1159 (1992); *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

<sup>16</sup> *Kathleen D. Walker*, 42 ECAB 603 (1991).

Appellant submitted insufficient corroborating evidence to establish her account of events. Also, appellant did not provide specific dates and descriptions of other incidents. Therefore, appellant has not established harassment with her supervisor as a compensable factor of employment.<sup>17</sup>

As appellant has established the October 22, 1998 motor vehicle accident as a compensable factor of employment, the case will be remanded to the Office for further development. On remand of the case, the Office shall first double the present record with that of Claim No. 13-117485. The Office shall then prepare a statement of accepted facts and obtain further medical opinion on causal relationship. Following this and other development that the Office deems necessary, the Office shall issue a *de novo* decision in the case.

The decision of the Office of Workers' Compensation Programs dated and finalized October 15, 2002 is hereby set aside, and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, DC  
July 24, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>17</sup> The Board notes that appellant also attributed her emotional condition to the October 22, 1998 automobile accident, which was accepted under Claim No. 13-1174875. The automobile accident claim is not before the Board on the present appeal. The record does not indicate if appellant pursued an emotional condition claim as a consequential injury of the October 22, 1998 accident under Claim No. 13-1174875.