

United States Department of Labor
Employees' Compensation Appeals Board

SHIRLEY A. WATSON, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Los Angeles, CA, Employer**

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**Docket No. 03-1408
Issued: January 7, 2005**

Appearances:

*C.B. Weiser, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On May 5, 2003 appellant filed an appeal from a decision of the Office of Workers' Compensation Programs dated April 7, 2003, which denied modification of a decision rejecting her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

On November 20, 2000 appellant, then a 50-year-old staff appraiser, filed a claim alleging that she developed severe anxiety and depression causally related to factors of her federal employment. She stopped work on November 14, 2000. Appellant also submitted a statement describing several alleged employment incidents dating from January 1995 that she believed caused or contributed to her condition.

Appellant alleged that she was accused of harassing Ron and Sandra Smith, coworkers, in January and August 1995; that her life was threatened in a parking lot on May 15, 1996 when the Smiths tried to run her over;¹ she was denied adequate sick leave after falling backwards and striking her head; she accidentally had physical contact with Mrs. Smith's elbow and that she was counseled by Kevin Kalama on August 12, 1999. Appellant alleged that on December 2, 1999 she was publicly disciplined by Roger Satterfield; that on October 13, 2000 she was harassed, abused and threatened by Mr. Kalama regarding a new work assignment and that she was removed from her supervisory duties, threatened with removal from her position, reduced in pay grade and received a poor performance assessment.

In support of her claim, appellant submitted two witness statements, a statement from Mr. Kalama, who denied that he harassed appellant, two employing establishment memoranda concerning the alleged October 13, 2000 incident and an Equal Employment Opportunity (EEO) interview. In a medical report, Dr. Carl S. Wells, a clinical psychologist, diagnosed major depressive disorder, chronic and recurrent and panic disorder and he related them to her physical injury, the employing establishment's distrust of appellant's claim of physical injury, her proposed demotion and removal while out on sick leave and the attack by the Smiths. He also linked appellant's emotional illnesses to the October 13, 2000 incident with Mr. Kalama and a "series of stressful events on the job." Mr. Satterfield's criticism was not mentioned.

By decision dated July 10, 2001, the Office rejected appellant's claim for an emotional condition on the grounds that the record failed to establish that Mr. Kalama acted abusively towards her.

By letter dated July 17, 2001, appellant requested an oral hearing.

By decision dated November 26, 2001, an Office hearing representative set aside the June 10, 2001 decision and remanded the case finding that it only considered the alleged October 13, 2000 incident. The hearing representative instructed the Office to make findings of fact as to the compensability of all allegations, particularly the two employing establishment memoranda which noted that Mr. Kalama had reacted inappropriately with regard to the October 13, 2000 incident.

On remand, the Office obtained further evidence from appellant and the employing establishment. The Office concluded that the parking lot incident was not deliberate, that Mr. Kalama did raise his voice but did not threaten appellant and that Mr. Satterfield stood over her and spoke loudly, but did not otherwise harass her.

¹ An employing establishment investigation into the May 15, 1996 incident noted that Mr. Smith acknowledged having to suddenly stop his car to prevent striking appellant. The investigator noted that several potential witnesses were not cooperative and concluded that it was a situation of appellant's word against that of Mr. Smith.

By decision dated March 19, 2002, the Office identified 12 incidents implicated by appellant as causing her emotional condition and discussed the compensability of each.² The Office found as compensable an incident when Mr. Satterfield stood over appellant on December 2, 1999 and critically yelled at her about her performance. The Office reviewed the medical evidence to find that the accepted factor was not addressed. The Office, therefore, rejected appellant's claim.

On March 25, 2002 appellant, through her representative, requested an oral hearing, which was held on October 29, 2002. She and two witnesses testified. Appellant claimed that on October 13, 2000 Mr. Kalama blew up and screamed at her, pointed his finger at her, prevented her from going to her desk or making a telephone call and threatened her. She denied that she contributed to the incident in any way. Appellant alleged that the activities assigned to her on October 13, 2000 were additional duties usually performed by other employees. Connie Jefferson, a witness, stated that on October 13, 2000 Mr. Kalama came into the office and was loud and abrupt and yelled at appellant without giving her a chance to speak, stating that Mr. Kalama was unprofessional. Wanda Savage, a witness, stated that on December 2, 1999 the new job assignments were unjust and Mr. Satterfield stood over appellant and hollered loudly.

By decision dated April 7, 2003, an Office hearing representative affirmed the March 19, 2002 decision, finding that appellant had failed to implicate any compensable factors of her employment in the development of her emotional conditions. The hearing representative found that, although Mr. Kalama was unprofessional on October 13, 2000, his behavior did not constitute a threat or harassment. He found that Mr. Satterfield was unprofessional on December 2, 1999 but that the incident was not sufficient to establish abuse or a threat. The hearing representative found that the parking lot incident occurred in May 1996, but that the investigators were unable to determine whether the action was deliberate or accidental.

LEGAL PRECEDENT

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and

² The events were as follows: (1) Appellant was stripped of her duties; (2) her proposed removal from duty; (3) sick leave was denied; (4) appellant was almost run down by the Smiths in the parking lot; (5) appellant accidentally brushed Mrs. Smith's arm; (6) appellant was counseled by Mr. Kalama; (7) appellant filed an EEO claim; (8) appellant was reassigned; (9) appellant was scheduled for training by Mr. Satterfield; (10) appellant obtained witness statements to pursue a grievance; (11) Mr. Kalama was condescending towards her; (12) appellant was denied advanced sick leave.

in the course of the employment and comes within the coverage of the Act.³ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁴ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁵ To the extent that the evidence of record demonstrates that the employing establishment either erred or acted abusively in an administrative or personnel action, such action will be considered a compensable factor of employment.⁶ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁷ Mere perceptions of error or abuse are not sufficient to establish entitlement to compensation. A claimant must support his or her allegations with probative and reliable evidence.⁸

When working conditions are alleged as factors in causing 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.⁹ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹⁰ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹¹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.¹²

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990); *see also Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Id.*

⁵ *See Joseph Dedenato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁶ *Carolyn S. Philpott*, 51 ECAB 175 (1999).

⁷ *Brian H. Derrick*, 51 ECAB 417 (2000).

⁸ *See Janet I. Jones*, 47 ECAB 345 (1996).

⁹ *See Barbara Bush*, 38 ECAB 710 (1987).

¹⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹¹ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹² *Supra* note 3.

ANALYSIS

Appellant attributed her emotional condition to a variety of incidents at work. She claimed that she was deliberately targeted to be run over by the Smiths in the parking lot. Although the Board has recognized the compensability of physical threats and assaults in certain circumstances, the weight of the evidence of record does not support appellant's allegation that the Smiths deliberately tried to run over her with their car. An investigation by the employing establishment noted that appellant was in the parking lot at the same time as the Smiths when Mr. Smith had to suddenly stop his car to keep from striking her. The investigator concluded, however, that appellant's characterization of the incident as a malicious act directed against her was not supported by the witnesses interviewed. The Board finds that appellant's characterization of this incident is not support by sufficient evidence and, therefore, is not a compensable factor.

Appellant's allegation that she was improperly denied sick leave is not supported by sufficient evidence. Matters concerning leave and approval of leave are administrative in nature and no evidence of administrative error or abuse had been presented. This does not establish a compensable factor of employment.¹³

Appellant claimed that she was harassed and threatened by Mr. Kalama. She alleged that when she was counseled, he yelled at her and criticized her on August 12, 1999 and on October 13, 2000. These incidents were addressed by the witnesses as occurring as alleged, but the witness statements do not support that appellant was threatened by Mr. Kalama. The record reflects that he was loud in addressing, instructing and criticizing her. Criticizing an employee's performance is an administrative function which is not a duty of the employee while the Board has recognized verbal abuse under certain circumstances this does not imply that every statement uttered in the workplace will give rise to compensability.¹⁴

Appellant also claimed that Mr. Satterfield was harsh and threateningly criticized her performance and instructed her how to perform her job on December 2, 1999. Again the witness statements do not support her characterization that she was threatened in any way or harassed. Assessment of an employee's performance is an administrative function of the employer.¹⁵ The evidence of record does not substantiate administrative error or abuse. Mr. Satterfield was described as speaking loudly. This does not rise to the level of administrative error or verbal abuse to constitute a compensable work factor.¹⁶

Appellant alleged that she was given work assignments which were usually performed by other people, but failed to provide sufficient evidence to support her allegations. The Board has

¹³ See *Donna J. DiBernardo*, 47 ECAB 700 (1996); *Garry M. Carlo*, 47 ECAB 299 (1996).

¹⁴ See *Frank B. Gwozdz*, 50 ECAB 534 (1999).

¹⁵ *Sherry L. McFall*, 51 ECAB 436 (2000).

¹⁶ *Id.*

recognized that overwork can be a compensable factor of employment,¹⁷ but without proof that she was required to perform overwork the allegations in this case are not substantiated.¹⁸

Appellant alleged supervisory harassment, threats mental abuse, which are not substantiated. She also implicated being removed from her supervisory duties, being reduced in pay and grade, being removed from her position and being given a poor performance appraisal. The Board notes that two of these administrative incidents, absent evidence of error or abuse, were ultimately reversed with appellant regaining her grade and pay rate and being given a position similar to her original position. She did not, however, provide evidence that these actions were erroneous or abusive.¹⁹ The mere fact that an administrative action is changed is not an admission of error.²⁰ Also, findings at the employing establishment that certain conduct was unprofessional does not rise to the level of harassment or abuse.²¹

CONCLUSION

Appellant has not submitted probative and corroborating evidence sufficient to establish that her emotional conditions were caused by any compensable factors of her employment.

¹⁷ See *Robert Bartlett*, 51 ECAB 664 (2000).

¹⁸ See *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁹ *Id.*; see *Joe E. Hendricks* 43 ECAB 550 (1992) (the mere fact that an employing establishment lessens a disciplinary action taken towards the employee does not establish that the employing establishment acted in an abusive or erroneous manner).

²⁰ *Id.*

²¹ See *Sherry L. McFall*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 7, 2003 is hereby affirmed.

Issued: January 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member