United States Department of Labor
Employees' Compensation Appeals Board

ELIZABETH A. TANNER, Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HUDSON VALLEY HEALTH CARE SYSTEM, Castle Point, NY, Employer	)	**Docket No. 05-788** **Issued: July 1, 2005**

Appearances:
Elizabeth A. Tanner, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 17, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 30, 2004, in which the Office denied her claim that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment. She also appealed a November 22, 2004 decision in which the Office denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying merit review.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a stress-related condition causally related to her federal employment; and (2) whether the Office properly refused to reopen appellant's claim for merit review.

FACTUAL HISTORY

On September 24, 2003 appellant, then a 45-year-old patient services assistant, filed a Form CA-2, occupational disease claim, alleging that she was upset by a team nurse and that this caused migraine headaches and diarrhea. She also stated that a strong bleach-like odor permeated the employing establishment due to asbestos removal. Appellant stopped work on September 10, 2003 and returned on September 16, 2003.

By letter dated December 1, 2003, the Office informed appellant of the type evidence needed to support her claim, to include a comprehensive report from her treating physician which described her symptoms, results of examinations and tests, a diagnosis, treatment provided, the effect of the treatment, and the physician's opinion, with medical reasons, regarding the cause of her condition.

In a statement dated December 11, 2003, appellant reiterated that she was upset by a lead team nurse, that she received conflicting instructions and orders, was overworked, had to perform duties outside her job description, and had to tolerate abusive and disgruntled supervisors, coworkers and patients. She stated that her migraines recurred when she experienced stress at work. Appellant also submitted a January 13, 2003 report in which Dr. Suresh Chandani, an attending family practitioner, advised that appellant had been treated on December 16, 2002 with a diagnosis of anxiety and stress-related headache due to work. Dr. Chandani stated that appellant was treated with rest and medication and that, upon a return visit on December 27, 2002, she was advised to return to work and continue medication. Appellant also submitted a form report with an illegible signature that states the date of service was December 16, 2002 and that the date of injury was December 11, 2003. The nature of injury states that on December 11, 2003 "due to elevated stress level caused by incident occurring at work, patient suffered chest discomfort, headache [and] nosebleed." Stress and anxiety were diagnosed, medication was prescribed, and "no work" was indicated. Appellant also submitted what appears to be a clinic log for the dates March 3 to June 30, 2004 that is essentially illegible.

Appellant also submitted a number of "reports of contact" including one composed by her on September 10, 2003 in which she describes an incident that occurred that day when Carolann Husted came into her office and interrupted her to advise her about work. She stated that "one cannot be interrupted while doing this or serious errors could occur."

In a report of contact dated December 11, 2002, Kelli Totillo, a coworker, advised that on that date she witnessed Pam Jinks loudly and rudely scolding appellant who appeared upset and humiliated and that appellant stated that she felt light-headed and had a headache. Lonietta Y. McFarlane, a union steward, submitted a report of contact dated December 9, 2002 in which she advised that Ms. Jinks reported to her that appellant had a new job which made appellant very happy. Raymond M. Uhrlass, a coworker, submitted a statement dated January 9, 2003 in which he reported that on December 11, 2002 he witnessed Ms. Jinks questioning and reprimanding appellant in a very loud voice, after which appellant was upset.

By decision dated July 30, 2004, the Office denied the claim. The Office found that the December 11, 2002 incident occurred as alleged but that appellant did not establish other compensable factors of employment. The Office further found that the medical evidence of

record did not establish that her condition was caused by the accepted December 11, 2002 incident.

On August 24, 2004 appellant requested reconsideration, generally alleging that her claim should be accepted. In a decision dated November 24, 2004, the Office denied appellant's reconsideration request, finding that she failed to submit evidence or argument sufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[1] 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.[2]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[3] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[5] When an employee experiences emotional stress in carrying out his or her employment 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. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[6]

While 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

[1] *Leslie C. Moore*, 52 ECAB 132 (2000).

[2] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Robert W. Johns*, 51 ECAB 137 (1999).

[6] *Lillian Cutler, supra* note 3.

compensability.[7] Disciplinary actions concerning an oral remand, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable unless the employee shows management acted unreasonably.[8] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9] The Board has also held that overwork may be a compensable factor of employment. As with all allegations, however, overwork must be established on a factual basis to be a compensable employment factor.[10]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence[11]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[12] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[14]

ANALYSIS -- ISSUE 1

The Office found and the Board agrees that appellant established that Ms. Jinks acted inappropriately in reprimanding appellant in public on December 11, 2002. This would thus be a compensable factor of employment. Regarding her other allegations, however, appellant did not establish by the submission of probative evidence to establish a factual basis for these

[7] *Denise Y. McCollum*, 53 ECAB 647 (2002).

[8] *Janice I. Moore*, 53 ECAB 777 (2002).

[9] *Kim Nguyen*, 53 ECAB 127 (2001).

[10] *Bobbie D. Daly*, 53 ECAB 691 (2002).

[11] *James E. Norris*, 52 ECAB 93 (2000).

[12] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[13] *Leslie C. Moore*, *supra* note 1; *Gary L. Fowler*, 45 ECAB 365 (1994).

[14] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

allegations.[15] For example, she submitted no evidence regarding the strong odor permeating the building. She also submitted no evidence to support that she was either overworked or worked outside her job description. The Board thus finds that appellant did not establish these as compensable employment factors.[16]

Regarding her contention that Ms. Husted interrupted her work on September 10, 2003, an employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.[17] Although such matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[18] Again appellant provided no supportive evidence to show that Ms. Husted acted unreasonably.[19] She therefore failed to establish that this incident was compensable.

Appellant also generally alleged that she was harassed by the employing establishment. The Board, however, again finds that she has submitted insufficient evidence to establish that she was treated in a harassing manner. While appellant submitted statements that support the one accepted incident of December 11, 2002, she submitted no probative, reliable evidence to indicate that employing establishment management continued to harass her. The Board, therefore, finds that she did not establish a pattern of harassment on the part of the employing establishment.[20]

Nonetheless, as appellant has established a compensable factor of employment, that Ms. Jinks reprimanded her inappropriately on December 11, 2002, the medical evidence must therefore be analyzed.[21] The Board initially notes that the form report dated December 16, 2002 contains inconsistent dates, noting the date of service was December 16, 2002 and that the date of injury was December 11, 2003. Furthermore, the signature is illegible and therefore it cannot be ascertained whether the report was rendered by a physician.[22] The clinic log is also of no probative value as it is illegible, contains no signatures and provides dates that are subsequent to the instant claim.[23] Likewise, Dr. Chandani's January 13, 2003 report is insufficient to meet

[15] *See Bobbie E. Daly, supra* note 10.

[16] *Id.*

[17] *Marguerite Toland*, 52 ECAB 294 (2001).

[18] *Dennis J. Balogh, supra* note 2.

[19] *Janice I. Moore, supra* note 8.

[20] *James E. Norris, supra* note 11.

[21] *See Dennis J. Balogh, supra* note 2.

[22] Section 8101(2) of the Act defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The Board has held that a medical opinion, in general, can only be given by a qualified physician. *Ricky S. Storms*, 52 ECAB 349 (2001).

[23] *Id.*

appellant's burden as the physician merely advised that appellant had been treated on December 16, 2002 with a diagnosis of anxiety and stress-related headache. While Dr. Chandani advised that appellant's anxiety was due to work, the physician did not mention the one compensable factor of employment or describe any specific employment incidents as causing appellant's condition. The Board therefore finds that Dr. Chandani's January 13, 2003 report is too general in nature to meet appellant's burden of proof.[24]

The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relationship.[25] Appellant has the burden of proof to establish that the conditions for which she claims compensation were caused or adversely affected by her federal employment.[26] Part of this burden includes the necessity of presenting rationalized medical evidence, based on a complete factual and medical background, establishing a causal relationship. An award of compensation may not be based upon surmise, conjecture or upon appellant's belief that there is a relationship between her medical conditions and her federal employment. The Board finds that appellant has not submitted sufficient probative medical evidence and, therefore, failed to discharge her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act states that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

"(1) end, decrease or increase the compensation awarded; or

"(2) award compensation previously refused or discontinued."[27]

Section 10.608(a) of Office regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[28] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[29] Section 10.608(b) provides that when a request for reconsideration is

[24] *Leslie C. Moore*, *supra* note 1.

[25] *Albert C. Brown*, 52 ECAB 152 (2000); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[26] *See Calvin E. King*, 51 ECAB 394 (2000).

[27] 5 U.S.C. § 8128(a); *see Claudio Vazquez*, 52 ECAB 496 (2001).

[28] 20 C.F.R. § 10.608(a).

[29] 20 C.F.R. § 10.608(b)(1) and (2).

timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[30]

ANALYSIS -- ISSUE 2

In her letter requesting reconsideration, appellant merely stated that she wished to request reconsideration and wanted her claim approved. She thus did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[31]

With respect to the third above-noted requirement under section 10.606(b)(2), as appellant submitted no additional evidence with her reconsideration request, she did not present relevant and pertinent new evidence not previously considered by the Office.[32] The Office, therefore, properly denied her request for merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition causally related to her federal employment. The Board further finds that the Office properly refused to reopen appellant's claim for merit review on November 22, 2004.[33]

[30] 20 C.F.R. § 10.608(b).

[31] 20 C.F.R. § 10.606(b)(2).

[32] *Supra* note 29.

[33] The Board notes that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and July 30, 2004 be affirmed.

Issued: July 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member