

**United States Department of Labor
Employees' Compensation Appeals Board**

LAURIE A. LOVETT-PARSONS, Appellant

and

**DEPARTMENT OF JUSTICE,
DEVENS FEDERAL MEDICAL CENTER,
Ayer, MA, Employer**

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**Docket No. 05-330
Issued October 12, 2005**

Appearances:

*Laurie A. Lovett-Parsons, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On November 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 5, 2004 which denied her claim for an emotional condition. 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 met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 16, 2002 appellant, then a 40-year-old charge nurse, filed an occupational disease claim alleging that she developed post-traumatic stress disorder and anxiety while in the performance of duty. Appellant became aware of her condition on March 10, 2001. Appellant

stopped work on July 15, 2002 and did not return. Appellant was terminated on September 18, 2003 due to her inability to perform her duties.¹

Appellant submitted a statement dated November 25, 2002 alleging that in July 2002 she was generally harassed by her supervisor, Karen Lehtola, her manager, Beverly Dandridge and the acting director, Helga Baca. She alleged that Ms. Lehtola made mean comments to her and was unprofessional. Appellant alleged that she improperly received a poor performance evaluation on July 15, 2002 and was not warned about her substandard performance prior to the evaluation. On March 26, 2003 she alleged that her emotional condition was caused by inadequate nursing staff levels due to a nursing shortage, an increasing inmate population and lack of clerical and support staff. Appellant also alleged that the employing establishment failed to assist her in filing of the occupational disease claim.

The employing establishment submitted a statement from Ms. Dandridge dated December 18, 2002. She advised that appellant worked 80 hours per week in a 2-week time period, with 12-hour shifts every other weekend, and 8-hour shifts 4 days a week and 3 days the second week. Ms. Dandridge described appellant's work duties and advised that appellant did not work overtime since her return to work in September 2001. She noted that appellant had been performing the required duties in accordance with expectations without difficulty and received a fully satisfactory overall performance evaluation.

By letter dated March 24, 2003, the Office asked appellant for a detailed description of the employment factors or incidents that she believed contributed to her claimed illness.

In a March 26, 2003 response, appellant stated that her current condition was a continuation of her accepted employment injury of March 10, 2001, file number 01-2000596. She received a minimally satisfactory performance review on July 15, 2002 from Ms. Lehtola. Appellant did not file a grievance; however, she discussed her performance review with a union representative and believed the matter was resolved. She attributed her current condition to inadequate nursing staff levels due to a nursing shortage, an increasing inmate population and acuity of the inmate population and lack of clerical and support staff to answer telephones, find charts, supervise inmate cleaning and perform correctional duties. Appellant submitted a memorandum from Ms. Lehtola dated April 15, 2002, noting that the shift reports prepared by appellant on April 11, 2002 failed to note a significant chart entry regarding a cancer patient. She noted on the memorandum that she never received notification of this chart omission from management and should have been informed within 15 days of the incident and given an opportunity to correct the chart. Appellant submitted a memorandum to Ms. Lehtola from a coworker, M. Tracy, dated June 19, 2002, which advised that, while an inmate had a seizure,

¹ Appellant filed a separate claim for an emotional condition on March 28, 2001 arising from an incident at the employing establishment on March 10, 2001, file number 01-2000596. The Office accepted appellant's claim for acute post-traumatic stress disorder resulting from an incident on March 10, 2001 when appellant was held in an elevator at the employing establishment by her coworkers. The record reflects that appellant filed a recurrence of disability with regard to file number 01-2000596 on September 22, 2003 which was denied by the Office on August 4, 2004. Appellant did not appeal from the Office's denial of the recurrence of disability. Therefore this claim is not before the Board on this appeal. File number 01-2000596 was consolidated with the current claim before the Board.

appellant was seen stepping back from the patient and lacking assertiveness in assisting in his care. It was noted that she did not take an active role in this incident because she was preparing paperwork for the ambulance and thought there was enough staff to handle the patient. Appellant submitted her July 15, 2002 performance evaluation which noted that appellant was either very capable and efficient or very disorganized and lax, with unclear documentation as demonstrated on some medical records and with written and verbal shift reports. With regard to communication, Ms. Lehtola noted that appellant interacted appropriately with inmates but, on occasion, communicated ineffectively with peers. Ms. Lehtola also noted that appellant had reported to her duty station unprepared and at times the data in the daily activity logbook was unclear and disorganized. Appellant had not completed the employing establishment's mandatory quarterly in-house medical requirements but had successfully completed the annual skills competency examination. She refused to sign the performance appraisal and stated that she never received any warning or counseling regarding her inadequacies. Appellant submitted an email from Ms. Baca dated July 17, 2002 which advised that she made a mistake on appellant's evaluation and noted that appellant did complete the quarterly in-house medical requirements timely. She submitted an August 21, 2002 statement advising that none of her peers indicated that they had difficulties with her verbal or written reports. With regard to the allegation that she reported to work unprepared on June 20, 2002, she was ill and attempted to notify her supervisors of her condition but was unable to contact Ms. Lehtola or Ms. Dandridge. Appellant reported for work and explained to Ms. Baca that she was ill and indicated that Ms. Baca shouted at her but thereafter provided a replacement in order that appellant could leave at 8:00 p.m. Appellant contended that Ms. Lehtola did not observe her working and was therefore not competent to rate her performance. She indicated that on Memorial Day she was short a nurse and advised Ms. Lehtola, who advised appellant to handle the duties.

Appellant submitted a medical report from Dr. Alvaro B. Lopez, a Board-certified psychiatrist, dated August 16, 2002. He treated appellant for symptoms of anxiety and stress and advised that she was unable to return to work. On June 20, 2003 the physician diagnosed post-traumatic stress disorder with psychotic features. Appellant submitted a statement from Alois Provost, lieutenant commander, dated March 17, 2004, who noted working with appellant and advised that she demonstrated excellent nursing assessment skills and documentation. Also submitted was a report from Leo F. Polizoti, Ph.D, a clinical psychologist, dated May 12, 2004, who diagnosed post-traumatic stress disorder and depressive disorder with psychotic symptoms caused by an incident in March 2001 when she was trapped in an elevator at work.

In a letter dated August 8, 2003, the employing establishment advised that, during the two quarters prior to July 15, 2002, the units staffed with nursing personnel were no less than in prior quarters. Rather the recruitment and hiring of new nursing staff had increased and a contract nurse agency was hired and supplied the institution with additional nursing staff. The employing establishment advised that appellant worked evenings and mornings in the Mental Health building in a partially locked unit that housed 30 inmates, and there was never an increase in the number of inmates in this unit. It was noted that the acuity and number of inmates in the general population outside the unit may have increased but not to the extent that extra staff would be necessary. The employing establishment noted that there was a full-time day watch employee from 8:00 a.m. to 4:00 p.m. and a medical records clerk available for each unit staffed with medical personnel. The supervision and accountability of the inmates assigned to the unit

in a janitorial capacity was the responsibility of every employee and the correctional duties performed in the units were the responsibility of security officers.

In a September 9, 2003 decision, the Office denied appellant's claim, finding that the claimed emotional condition did not arise in the performance of duty.

Appellant requested a review of the written record. On March 22, 2004 she reiterated her allegations and noted that she requested assistance from the employing establishment in filing an occupational disease claim and a recurrence of disability claim; however, the compensation specialist refused to assist her. She alleged that she was treated unreasonably with regard to personnel and administrative policies by the employing establishment. Appellant submitted a report from Dr. Polizoti dated May 12, 2004, who diagnosed post-traumatic stress disorder and chronic depressive disorder that he attributed to a March 2001 incident when appellant was trapped in an elevator while at work.

By decision dated November 5, 2004, the hearing representative affirmed the September 9, 2003 decision.

LEGAL PRECEDENT

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.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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.⁵ When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁶ There are situations where an injury or

² *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 3.

an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

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.⁸ 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.⁹

To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹⁰ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹¹ General allegations of harassment are not sufficient.¹² 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.¹³

ANALYSIS

Appellant alleged that in July 2002 she was harassed by Ms. Lehtola, Ms. Dandridge and Ms. Baca, given a poor performance evaluation and spoken to in an unprofessional manner. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute

⁷ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 3.

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁹ *Id.*

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² See *Paul Trotman-Hall*, 45 ECAB 229 (1993).

¹³ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

employment factors.¹⁴ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁵ Ms. Lehtola prepared appellant's performance evaluation on July 15, 2002 and noted appellant's strengths and areas for improvement, including unclear documentation in medical records and shift reports, ineffective communication techniques with peers, and reporting to her duty station unprepared. The record also contains a statement from Ms. Dandridge who noted that appellant had been performing her required duties in accordance with expectations and received a fully satisfactory performance evaluation. The factual evidence fails to support appellant's claim that she was harassed by Ms. Lehtola, Ms. Dandridge and Ms. Baca.¹⁶ She did not provide any evidence, such as witness statements, to establish her allegations. As such, these allegations remain her perceptions that do not rise to the level of compensable factors of employment.

She stated that, after her poor performance appraisal on July 15, 2002, Ms. Lehtola made mean comments to her and was unprofessional. 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 compensability.¹⁷ Appellant did not explain how Ms. Lehtola was "mean" or "unprofessional." She did not submit evidence or witness statements in support of her allegations. The Board finds that there is insufficient evidence to establish that Ms. Lehtola's comments or actions rose to the level of verbal abuse or otherwise fall within coverage under the Act.¹⁸

Appellant's other allegations fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹⁹ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁰

¹⁴ See David W. Shirey, *supra* note 10.

¹⁵ Jack Hopkins, Jr., *supra* note 11.

¹⁶ See Michael A. Deas, 53 ECAB 208 (2001).

¹⁷ See Charles D. Edwards, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁸ See *id.*

¹⁹ See *Thomas D. McEuen*, *supra* note 7.

²⁰ See Richard J. Dube, 42 ECAB 916, 920 (1991).

Regarding appellant's allegation that she was unfairly given a poor performance rating on July 15, 2002, this relates to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.²¹ The handling of disciplinary actions, evaluations and leave requests, the assignment of work duties, and the monitoring of activities at work are generally related to the employment, but are administrative functions of the employer, and not duties of the employee.²² The evidence is insufficient to establish that the employing establishment erred or acted abusively in this matter. The performance evaluation of July 15, 2002 indicated appellant's strengths as well as her weaknesses. Evidence in the record generally supported Ms. Lehtola's determination and there is insufficient evidence that Ms. Lehtola issued the performance evaluation in an abusive manner or that the evaluation was erroneous. While the employing establishment acknowledged mistakenly indicating that appellant had not completed certain quarterly in-house medical requirements, the record indicates that this was acknowledged and rectified. This type of ministerial mistake does not rise to the level of compensable error or abuse. Although appellant has alleged that the employing establishment erred and acted abusively regarding the performance appraisal, she did not provide evidence, beyond her assertions, to substantiate such actions were in error, abusive or unreasonable in nature. Instead, the evidence generally supports the supervisor's assessment. For example, a coworker informed the supervisory on June 19, 2002 that, during an emergency, appellant was observed stepping back from a patient instead of assisting in the situation. The employing establishment contended that Ms. Lehtola acted reasonably addressing this matter. The Board has held that, where the evidence demonstrates that the employing establishment has neither erred nor acted abusively, coverage under the Act will not be afforded.²³ Appellant has not established a compensable factor pertaining to the alleged poor performance evaluation.

Appellant also alleged that there was inadequate nursing staff levels due to a nursing shortage, an increasing inmate population and lack of clerical and support staff. The record fails to support this allegation. The employing establishment advised that during the two quarters prior to July 15, 2002 the units staffed with nursing personnel was no less than in prior quarters. Rather the recruitment and hiring of new nursing staff had increased and a contract nurse agency was hired and supplied the institution with additional nursing staff. The employing establishment advised that appellant was working evenings and mornings in the mental health building in a partially locked unit which housed 30 inmates, and there was never an increase in the number of inmates in this unit. It was noted that the acuity and number of inmates in the general population outside the unit may have increased but not to the extent that extra staff would be necessary. There is no evidence that appellant's regular duties involved determination of staffing levels. Instead, the employing establishment's staffing decision would appear to be administrative or personnel matters not related to appellant's regular or specially assigned duties. There is no evidence that the employing establishment acted erroneously or abusively in its staffing decisions. With regard to appellant's allegation that there was a lack of clerical and

²¹ 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).

²² *Id.*

²³ *Michael Thomas Plante*, 44 ECAB 510 (1993); *Effie O. Morris*, 44 ECAB 470 (1993).

support staff to answer telephones, find charts, supervise inmate cleaning and perform correctional duties, this too appears to be an administrative matter that is not part of appellant's regular or specially assigned duties. The evidence does not support that the employing establishment acted unreasonably with regard to these matters. The employing establishment noted that there was a full-time day watch from 8:00 a.m. to 4:00 p.m. and a medical records clerk was available for each unit staffed with medical personnel. The supervision and accountability of the inmates assigned to the unit in a janitorial capacity was the responsibility of every employee and the correctional duties performed in the units are the responsibility of the employing establishment officers.

On December 18, 2002 Ms. Dandridge advised that since appellant's return to work in September 2001, she did not work overtime. Ms. Dandridge confirmed that appellant had been performing her duties in accordance with expectations without difficulty and received a fully satisfactory overall performance evaluation. To the extent that appellant alleged overwork,²⁴ this is not established by sufficient evidence of record. The Board finds that appellant failed to establish a compensable factor pertaining to her allegation of being overworked.

Finally, appellant alleged that the employing establishment failed to assist her in filing an occupational disease claim and a recurrence of disability claim. The Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.²⁵ Therefore, the Board finds that appellant failed to establish a compensable factor pertaining to her allegation that the Office failed to assist her in handling her compensation claim.

Appellant has not otherwise alleged that specific regular or specially assigned duties caused or aggravated her claimed emotional condition. Consequently, appellant has not met her burden of proof in establishing her claim.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.²⁶

²⁴ The Board has held that overwork, as substantiated by sufficient factual information to support the claimant's account of events, may be a compensable factor of employment. *Bobbie D. Daly*, 53 ECAB 691 (2002).

²⁵ See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

²⁶ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board