United States Department of Labor
Employees' Compensation Appeals Board

BEVERLY J. PHILLIPS Appellant	)	
and	)	**Docket No. 05-1446**
	)	**Issued: September 21, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI, Employer	)	

Appearances:
Robert P. Walsh, Esq., for the appellant
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 June 24, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 25, 2005, denying her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 25, 2005 decision.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to a compensable factor of her employment.

FACTUAL HISTORY

On March 25, 2004 appellant, then a 59-year-old patient services assistant, filed an occupational disease claim alleging that she sustained an emotional condition on March 19, 2004 when she was struck on the left side of her head. She indicated that she did not see who hit her. Appellant saw Cary Seekins standing in front of her and asked if he had hit her. He replied, "What are you going to do about it?" She became upset and went to the water fountain, at which

time Mr. Seekins approached and apologized. The record reflects that appellant stopped work on March 19, 2004 and retired on October 1, 2004.

In a March 19, 2004 statement, Mr. Seekins stated that he stopped at the scheduling window where appellant was seated. He stated that she was holding a newspaper in her left hand and looking down. Mr. Seekins reached through the window and "flicked the top of the newspaper in a faking manner." Appellant looked to her left and asked Anne Hemingway "why she did that." Ms. Hemingway responded that she had not done anything. Appellant looked up and asked Mr. Seekins if he had "done that" and he "acknowledged in a light-hearted manner" that he had. Mr. Seekins stated that appellant told him not to touch her again. When he realized that she became angry and did not understand that he hit her newspaper as a joke, he apologized. In a March 29, 2004 statement, Mr. Seekins denied that any part of his body struck appellant on March 19, 2004.

In a March 19, 2004 statement, Ms. Hemingway stated that she saw Mr. Seekins reach through appellant's window and hit the newspaper she was holding in her left hand which was close to her head. Appellant turned to her and asked, "Why did you hit me? Did you hit me?" She denied hitting appellant. Appellant then asked Mr. Seekins if he struck her and he responded, "What are you going to do about it?" She told him not to ever hit her and he again responded, "What are you going to do about it?" Appellant became angry and walked away. Mr. Seekins asked Ms. Hemingway, "Was that real?" and she replied, "Yes, it was." When appellant returned, Mr. Seekins reached out to shake her hand but she turned and walked to the water fountain. Mr. Seekins called her name twice but she did not respond. Mr. Seekins later spoke to Ms. Hemingway and said he was confused about the incident and appellant's response was not normal because he was just "playing." She told him that appellant did not view the incident as "playing" and was "hurt to the point of tears."

In a March 19, 2004 statement, Joyce Martin stated that appellant asked Ms. Hemingway in an angry voice if she hit her and Ms. Hemingway stated that she had not. Appellant asked Mr. Seekins if he had hit her and he replied, "Yeah, what are you going to do about it?" She told him not to ever put his hands on her again and he repeated, "What are you going to do about it?" Appellant got up and went to the water fountain.

In a March 24, 2004 statement, Dr. Bruce Wilson, a physician in the employing establishment medical clinic, stated that he examined appellant on March 19, 2004. Appellant alleged that another employee had struck her on the left side of her head within the previous 30 minutes. She was mildly tearful and upset and had an area of mild redness around the left ear but no laceration in the area where she had several ear piercings. Dr. Wilson gave appellant some medication for a headache and released her to return to work, "as there were no obvious injuries."

Employing establishment police reports indicate that appellant reported being struck hard on the left side of her head as she held a newspaper in her left hand a few inches from the left side of her head. The police reports indicate that appellant's left ear was pinkish red in color and appellant was upset, with eyes watery and her voice cracking. Appellant stated that Mr. Seekins was known for playing jokes and "sounded like he was joking" when he asked her, "What are

you going to do about it?" but she indicated to the police officers that she was not the type of person who liked jokes. Mr. Seekins advised the investigating officers that he hit only appellant's newspaper. Appellant also submitted medical evidence in support of her claim.

By decision dated June 4, 2004, the Office denied appellant's claim on the grounds that the evidence failed to establish that she was struck on the side of her head, as alleged.[1]

Appellant requested an oral hearing that was held January 20, 2005. In a March 8, 2005 affidavit, appellant provided some corrections to the transcript of the hearing. She noted that, even if she was struck "in jest," the incident on March 19, 2004 constituted horseplay which was not permitted by employing establishment policy and she took offense and sustained injury as a result of the incident.

By decision dated March 25, 2005, an Office hearing representative affirmed the June 4, 2004 decision.

LEGAL PRECEDENT

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

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*,[4] the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Act. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the coverage under the Act.[5] When an employee experiences emotional distress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her 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

[1] On May 27, 2004 the Office had accepted that appellant sustained a minor contusion to the left side of the head but stated in the June 4, 2004 decision that the prior decision was in error based on information obtained subsequently.

[2] 5 U.S.C. §§ 8101-8193.

[3] *George C. Clark*, 56 ECAB ___ (Docket No. 04-1573, issued November 30, 2004).

[4] 28 ECAB 125 (1976).

[5] *George C. Clark*, *supra* note 4.

results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.[6] 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] Generally, actions of the employing establishment in administrative matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.[8] However, 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.[9]

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.[10] 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.[11]

ANALYSIS

Appellant alleged that on March 19, 2004 that she was struck on the left side of her head but did not see who struck her. Ms. Hemingway saw Mr. Seekins hit at appellant's newspaper which she was holding in her left hand. Mr. Seekins acknowledged that he struck appellant's newspaper but did so in a joking manner. Dr. Wilson found that there was some redness around appellant's left ear when he examined her after the incident. Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident occurred as alleged.[12]

The Board finds that the evidence is sufficient to establish that on March 19, 2004 Mr. Seekins struck at the newspaper that appellant was holding close to the left side of her head. Appellant indicated that she felt something strike the left side of her head. The evidence suggests that when Mr. Seekins hit the newspaper appellant was holding, the newspaper may have made contact with the left side of appellant's head and it was the newspaper that she felt strike her head. The case will be remanded for further development of the factual evidence to

[6] *Lillian Cutler*, *supra* note 4.

[7] *Id*.

[8] *Michael L. Malone*, 46 ECAB 957 (1995).

[9] *Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

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

[11] *Id.*

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

determine whether the March 19, 2004 incident when Mr. Seekins hit a newspaper that appellant was holding near her head constituted a compensable factor of employment.

CONCLUSION

The Board finds that this case must be remanded for further development of the factual evidence as to whether the incident on March 19, 2004 when Mr. Seekins hit the newspaper that appellant was holding constituted a compensable factor of employment. If it finds that the March 19, 2004 incident constitutes a compensable employment factor, the Office should review the medical evidence to determine whether an injury occurred as a result of the incident. After such further development as it deems necessary, the Office should issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2005 is set aside and the case is remanded for further action consistent with this decision.

Issued: September 21, 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