

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

---

**T.K., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Biloxi, MS, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 09-891  
Issued: December 4, 2009**

*Appearances:*

*Joyce L. Ducey, for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 19, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 11, 2008. The record also contains a decision dated January 12, 2009 denying appellant's request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established an emotional condition causally related to compensable factors of her federal employment; and (2) whether the Office properly denied appellant's request for an oral hearing.

**FACTUAL HISTORY**

On June 27, 2008 appellant, then a 42-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained stress as a result of a verbal threat by her supervisor on June 27, 2008. In a narrative statement, she alleged that on June 27, 2008 she was in a room with two coworkers discussing "what was happening on the ward" when a supervisor, Latanya

Johnson, came in and told appellant in a “demanding and hostile voice” to come to her office. Appellant stated that she told the supervisor she wanted a union representative and the supervisor told her it was a direct order. She then turned on a tape recorder to listen to the morning report, and again was told in an angry and hostile voice to turn the recorder off and come to the supervisor’s office. According to appellant, a security officer arrived shortly thereafter, and she became upset and decided to go to the employing establishment health unit. The supervisor stated that she did not have the paperwork for the health unit, and told appellant to stay until she retrieved the paperwork. Appellant stated that the supervisor again became angry and told appellant to stay near the elevators until she returned.

A June 27, 2008 statement from a coworker, Linda Mitchell, indicated that on that day Ms. Johnson had reported an employee who was being verbally inappropriate and threatening. She stated that Ms. Johnson told her she had heard appellant speaking loudly and cursing behind a closed door, and she came in the room to ask to meet with her. Ms. Johnson reported that appellant would not meet with her without a union representative, and stated that she was giving her a direct order. According to Ms. Mitchell, the supervisor stated that “at his point [appellant] stood up and appeared as if she was coming toward her. [A coworker] gently pushed Ms. Johnson from the room.”

A security officer’s report indicated that appellant acknowledged that she may have used profanity in the discussion with coworkers, but it was not directed at a specific staff member. He indicated that Ms. Johnson stated that she could hear appellant speaking through the closed door and told appellant to report to her office. The security officer stated that, after speaking with participants, he felt there was a misunderstanding between appellant and the supervisor.

By decision dated August 11, 2008, the Office denied the claim for compensation. It found that no compensable work factors had been established.

On September 23, 2008 appellant faxed a request for a hearing before an Office hearing representative. By decision dated January 12, 2009, the Office determined the request was untimely. It further stated that it had considered appellant’s request and found that the issue could equally well be addressed by requesting reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.<sup>1</sup> This burden includes the submission of detailed descriptions of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>2</sup>

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 coverage of workers’ compensation. These injuries occur in the course of the employment and have some kind

---

<sup>1</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>2</sup> *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>3</sup>

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.<sup>4</sup> Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The initial question presented is whether appellant has alleged and substantiated a compensable work factor. Not every incident that is connected to employment will give rise to coverage under the Act. Appellant has alleged that she sustained stress from a June 27, 2008 incident with a supervisor. The statement from coworker Ms. Mitchell and from the security office confirms that the supervisor heard appellant speaking and using profanity in a discussion with coworkers. The supervisor entered the room, asked appellant to accompany her to her office, with appellant asking for a union representative. Ms. Johnson then gave appellant a direct order to come to her office. Appellant did not leave the room and security personnel were called.

The Board has held that verbal abuse may constitute a compensable work factor.<sup>6</sup> Not every statement, however, that is uttered in the workplace will give rise to a compensable work factor.<sup>7</sup> In this case, appellant alleged that the supervisor spoke to her in a "hostile" tone when she ordered her to come to the supervisor's office. While appellant may have felt uncomfortable or been offended by the tone of her supervisor, it does not rise to the level of verbal abuse.<sup>8</sup> Even if the supervisor had raised her voice, this would not in itself establish a compensable work factor.<sup>9</sup> There is no evidence that the actions or words of the supervisor were erroneous or abusive. The supervisor was responding to inappropriate language by appellant and to

---

<sup>3</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

<sup>5</sup> *Margreate Lublin*, 44 ECAB 945, 956 (1993).

<sup>6</sup> *David W. Shirey*, 42 ECAB 783 (1991).

<sup>7</sup> *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>8</sup> *See V.W.*, 58 ECAB \_\_\_\_ (Docket No. 07-234, issued March 22, 2007); *Denis M. Dupor*, 51 ECAB 482, 486 (2000).

<sup>9</sup> *Beverly R. Jones*, 55 ECAB 411 (2005); *Karen K. Levene*, 54 ECAB 671 (2003).

appellant's failure to leave the room when directed. The evidence does not establish that the supervisor acted unreasonably in this case.<sup>10</sup>

On appeal, appellant states there was medical evidence submitted supporting the claim, but it is well established that the medical evidence is not considered until a compensable work factor has been established.<sup>11</sup> Once a compensable factor is substantiated by the record, then the issue is whether there is an injury causally related to a compensable factor. The Board finds that in this case appellant did not allege and substantiate a compensable work factor, and therefore the medical evidence on causal relationship is not relevant. Appellant did not meet her burden of proof to establish an injury in the performance of duty.

### **LEGAL PRECEDENT -- ISSUE 2**

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary...."

If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing as a matter of right.<sup>12</sup> The Board has held that the Office, in its broad discretionary authority in the administration of the Act,<sup>13</sup> has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>14</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The evidence indicated that appellant sent her hearing request by facsimile transmission on September 23, 2008.<sup>16</sup> As noted above, she is entitled to a hearing as a matter of right if she submits a request within 30 days of the August 11, 2008 Office decision. Appellant did not

---

<sup>10</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably. *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>11</sup> See *Robert Breeden*, 57 ECAB 622, 629 (2006); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

<sup>12</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>13</sup> 5 U.S.C. §§ 8101-8193

<sup>14</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>15</sup> *Claudio Vazquez*, *supra* note 12. See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

<sup>16</sup> The record indicates that five pages were sent to the Office on September 23, 2008 by facsimile transmission, including a request for an oral hearing.

submit the request within 30 days, and therefore she is not entitled to a hearing as a matter of right.

In this case, the Office advised appellant that she could submit additional relevant evidence on the issue through the reconsideration process. This is a proper exercise of the Office's discretionary authority.<sup>17</sup> The Board finds that the Office properly denied appellant's untimely hearing request in this case.

### **CONCLUSION**

The Board finds that appellant did not establish an emotional condition causally related to a compensable work factor. The request for a hearing before an Office hearing representative was untimely filed and was properly denied by the Office.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 12, 2009 and August 11, 2008 are affirmed.

Issued: December 4, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>17</sup> See *Mary E. Hite*, 42 ECAB 641, 647 (1991).