

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA ENNS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Albuquerque, NM

*Docket No. 00-91; Submitted on the Record;
Issued December 12, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision.

On February 19, 1997 appellant, then a 53-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on August 8, 1995 she suffered mental distress due to a verbal assault. She stopped work on August 17, 1995 and she returned to work on September 11, 1995. Appellant's claim was accompanied by factual and medical evidence.

By decision dated August 4, 1998, the Office of Workers' Compensation Programs found the evidence of record insufficient to establish that appellant sustained an emotional in the performance of duty. In a July 28, 1999 letter, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by medical evidence.

In an August 9, 1999 decision, the Office denied appellant's request for modification based on a merit review.

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 the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the

employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.¹

Perceptions and feelings alone are not compensable. 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.² To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying 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

In the present case, appellant alleged in a March 3, 1997 narrative statement that she was verbally assaulted by an unidentified man while entering the main building of the employing establishment to report to her tour of duty from 10:00 p.m. until 6:30 a.m. in August 1995. She also alleged that the unidentified man made a gesture several times as if he were shooting a gun at various targets, which caused her to stand frozen in place and prevented her from breathing. Appellant stated that she ran into the building, but no one was in sight to report the incident. She further stated that she was unsuccessful in her attempts to locate the night supervisor who may have filled out an incident report about the alleged incident. Appellant noted that her supervisor remembered that she talked to her about the alleged incident, but that her supervisor did not remember when they had this discussion and that she also did not remember when they had this discussion. She described the effects of the alleged incident on her professional and private life.

In support of her allegation that the August 8, 1995 incident occurred, appellant submitted the August 9, 1995 medical treatment notes, and October 2, 1995 and February 10, 1997 medical reports of Dr. Carol A. Saur, a psychiatrist, indicating that she was verbally assaulted by a patient on the employing establishment's grounds while coming to work.

In a letter dated June 23, 1997, the employing establishment controverted appellant's claim. Specifically, the employing establishment stated that appellant did not file a police report regarding the alleged incident. The employing establishment further stated that contrary to appellant's statement that she seldom encountered anyone who would be able to assist her if she was threatened coming on or leaving duty, it provided a personal escort to/from a vehicle if requested by an employee. Additionally, the employing establishment stated that appellant did not submit any medical documentation regarding the alleged injury.

The Board finds that appellant's statement, and Dr. Saur's treatment notes and medical reports provide a consistent history of injury and that appellant initially received medical

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

treatment a short time after the injury occurred. Accordingly, the Board finds that the contemporaneous evidence of record supports that the incident occurred as alleged.

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.⁴ 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. 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.⁵

Before a determination can be made as to whether appellant's allegation that she was verbally assaulted by a patient on August 8, 1995 constitutes a compensable factor of employment, a finding must be made as to whether appellant was in the performance of duty at that time. If appellant was in the performance of duty on August 8, 1995, then an incident occurring as a result thereof could constitute a compensable factor of employment. In this case, the Office found that appellant was not in the performance of duty on August 8, 1995. However, the Office failed to explain why the evidence of record was insufficient to establish that appellant was not in the performance of duty on August 8, 1995. Rather, the Office merely stated that appellant failed to establish that the incident occurred as alleged. Thus, the Board finds that the case is not in posture for decision regarding whether the August 8, 1995 incident took place while appellant was in the performance of duty.

On remand, the Office should complete development of the factual evidence to determine whether appellant was in the performance of duty on August 8, 1995. After such further development of the evidence as it considers necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation.

⁴ See *Barbara Bush*, 38 ECAB 710 (1987).

⁵ See *Gregory J. Meisenberg*, 44 ECAB 527 (1993).

The August 9, 1999 decision of the Office of Workers' Compensation Programs is vacated and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
December 12, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member