U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRINE M. MALIFF and U.S. POSTAL SERVICE,
POST OFFICE, Eatontown, NJ

Docket No. 97-1520; Submitted on the Record;
Issued August 4, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; (2) whether appellant sustained an emotional condition in the performance of duty; and (3) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On June 20, 1994 appellant, a 30-year-old automation clerk, sustained an injury to her neck while picking up and lifting trays of mail. Appellant filed a Form CA-1 claim for benefits on June 23, 1994, which the Office accepted for cervical sprain/strain. Appellant was paid compensation for temporary total disability for appropriate periods and returned to limited duty for four hours per day, effective August 11, 1994.

In a report dated March 15, 1995, Dr. Michael A. Sclafani, a specialist in sports medicine and orthopedic surgery, stated that appellant was suffering from chronic neck pain of unknown etiology secondary to an injury sustained 10 months earlier. Dr. Sclafani advised that her examination and magnetic resonance imaging (MRI) scan were both normal and opined that her subjective complaints were not consistent with the objective findings. He found no evidence of significant cervical disc herniation or any other type of significant underlying pathology and advised that appellant was fit to return to full-duty work as a clerk.

In order to clarify appellant's current condition, the Office scheduled a second opinion medical examination with Dr. Ralph Kuhn, a Board-certified orthopedic surgeon, which took place on August 24, 1995. In a report dated August 31, 1995, Dr. Kuhn related that appellant reported that an x-ray and MRI of the cervical spine she had undergone were both negative. He opined that, based on appellant's history, negative diagnostic tests, and a normal examination, appellant had returned to her preinjury state, had no further need of orthopedic, chiropractic or medical care due to the June 20, 1994 employment injury, and could return to regular duty on a full-time basis at her job with the employing establishment.

In a notice of proposed termination dated September 23, 1995, the Office, based on the opinions of Drs. Sclafani and Kuhn, found that the medical evidence established that appellant could work full duty. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. In response, appellant submitted a handwritten note asserting that she continued to experience residuals from her work-related cervical condition. Appellant did not, however, submit any additional medical evidence.

By decision dated December 1, 1995, the Office terminated appellant's compensation, finding that the weight of the medical evidence established that she could work full duty.

By letter dated December 9, 1995, appellant requested an examination of the written record.

By decision dated April 26, 1996, the Office affirmed its prior decision terminating compensation.

By letters dated July 15 and August 26, 1996, appellant requested reconsideration.

By decision dated February 13, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds the Office met its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

In the present case, the Office based its December 1, 1995 decision to terminate appellant's compensation on the medical reports of Drs. Sclafani and Kuhn, both of whom found that appellant was fit to return to full duty as an automation clerk. Dr. Sclafani stated that appellant had a normal examination and normal MRI results, and indicated that her subjective complaints were not consistent with the objective findings. He concluded that appellant had no evidence of significant cervical disc herniation or any other type of significant underlying pathology and advised that she was fit to return to full-duty work as a clerk. Dr. Kuhn concluded that appellant had no further need of orthopedic, chiropractic or medical care due to the June 20, 1994 employment injury based on her medical history, negative diagnostic tests, and a normal examination, and found that she had returned to her preinjury state. He stated that appellant could return to regular duty on a full-time basis at her job with the employing establishment.

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

Accordingly, based on the probative and well-rationalized opinions of Drs. Sclafani and Kuhn, which are unrefuted, that appellant demonstrated no objective findings indicating any residual disability stemming from her June 20, 1994 work injury and was fit to return to full duty, the Board finds that the Office met its burden of proof in terminating appellant's compensation benefits.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; she has not advanced a point of law or fact not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. This is important since the outstanding issue in the case -- whether the Office properly found that appellant no longer had any continuing disability resulting from her June 20, 1994 employment injury and was therefore able to return to full duty -- was medical in nature. Additionally, appellant's July 15 and August 26, 1996 letters did not show the Office erroneously applied or interpreted a point of law nor did they advance a point of law or fact not previously considered by the Office. Although appellant generally contended that her current condition and/or disability was causally related to her June 20, 1994 work injury, she failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

Appellant filed a Form CA-2 claim for occupational disease on January 6, 1995, claiming she had sustained an emotional condition which she first became aware of in September 1994.

In a report dated January 9, 1995, Dr. Walter Florek, a clinical psychologist, stated that appellant had a myriad of severe symptoms related to stressors at her place of employment, which met the diagnostic criteria for generalized anxiety disorder. He advised that the severity of her presenting symptoms would ordinarily indicate the need for psychotropic medications, which were unavailable at that time due to her pregnancy. Dr. Florek advised that appellant limit her exposure to stressors until she attained a level of control over her emotional and psychological stress, and recommended that she be placed on a two-week leave of absence.

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[3] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *Howard A. Williams,* 45 ECAB 853 (1994).

By letter dated February 6, 1995, the Office advised appellant that the evidence she submitted was not sufficient to determine whether she was eligible for compensation benefits, and that she needed to submit a detailed description of the specific employment-related conditions or incidents she believed contributed to her illness. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition, and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, at her employing establishment contributed to her condition.

In response to the Office's letter, appellant submitted a letter dated February 13, 1995 in which she asserted that her June 20, 1994 cervical injury had precipitated a campaign of abuse and harassment on the part of the employing establishment, and that she had consequently filed 21 Equal Opportunity Employment (EEO) complaints. Accompanying appellant's letter was a February 16, 1995 report from Dr. Florek, who stated that while employed at a previous work site appellant had experienced difficulties with her supervisors which contributed to her psychological and emotional distress; this distress was ultimately diagnosed as adjustment disorder with anxious mood. Dr. Florek stated that appellant had been examined by Dr. Robert Berkowitz, Board-certified in psychiatry and neurology, who opined that her diagnosed stress was job related. Dr. Florek noted, however, that it appeared that by the time appellant was examined by Dr Berkowitz, her situation at work had been resolved, resulting in a temporary amelioration of her stress-related condition.

With regard to her current condition, Dr. Florek stated that appellant complained of the following symptoms: excessive worrying; difficulty concentrating; sleep disruption; nail biting; scratching; racing thoughts restlessness; being easily fatigued; irritability; diminished appetite and trichotillomania. Dr. Florek found that the presence of these symptoms provided objective support for an Axis I diagnosis of generalized anxiety disorder, the exacerbation of which was directly related to the stressors appellant was reporting at her place of employment. He concluded that there was a direct connection between the level of actual or perceived stress and appellant's physiological reactions, resulting in her medical/psychological condition. Dr. Florek advised that if these intense stressors remained, appellant's condition would probably worsen.

In a February 21, 1995 letter, appellant stated that the only off-the-job stress factor she had was severe financial strain but that was due to the delay by management. She further indicated that details of her stress-related employment situations were listed in her EEO complaints. Accompanying her letter were copies of these complaints and a December 14, 1994 notice of suspension from the employing establishment.

In complaints filed on August 8, August 19 and October 2, 1994, appellant indicated that beginning June 24, 1994 two supervisors had discriminated against her when they denied her leave, vacation time, single days off, and the right to see a physician after an on-the-job injury. Appellant further alleged in these complaints that her supervisors did not inform her about the amount of her paycheck, did not give her a pay stub, delayed her continuation of pay for an on-the-job injury, accused her of presenting a forged doctor's note, and denied her proper paperwork for an on-the-job injury.

The record contains a December 14, 1994 employing establishment notice of a seven-day suspension to appellant, indicating that she would be suspended for seven calendar days

beginning January 14, 1995 due to being absent without official leave (AWOL) on November 25 and December 10, 1994. The employing establishment indicated that on November 25, 1994 she failed to report to work in accordance with her schedule and failed to submit documentation to substantiate her absence, and that on December 10, 1994 she requested sick leave but failed to submit acceptable administrative documentation to substantiate her absence. In response to these charges, appellant stated that she had called in sick to work on November 25, 1994 but was never asked to submit documentation, and that on December 10, 1994 she had again called in sick to work but was not asked to submit documentation to support her sick leave request.

In a December 20, 1994 EEO complaint, appellant alleged that on December 14, 1994 she received a seven calendar day suspension for being AWOL; that she had not been allowed to perform all the duties of her job assignment and was required to display her doctor's work restrictions; that she went home ill on December 20, 1994 and brought in a doctor's note, and was still denied leave; that she was ordered home after requesting to stay an extra one-half hour because she had to come in late due to a family funeral. Appellant alleged that she called in sick on both days, as was her custom, received acknowledgment from an anonymous person at the employing establishment, and then unexpectedly received the notice of suspension for being AWOL on November 25 and December 10, 1994. Appellant alleged that the December 14, 1994 notice of suspension was instigated by a supervisor who was trying to get her fired because she had filed numerous charges against him.

In a January 7, 1995 EEO complaint, appellant stated that she was being discriminated against because of physical disabilities resulting from her 1994 work injury, because of her pregnancy, and also because of mental disability due to being harassed to the point of stress, anxiety and depression. She indicated that on December 30, 1994 her supervisor denied her a change of schedule for that day and on January 4, 1995 a different supervisor denied her a change of schedule without providing a reason for it, as he was required to do. Appellant claimed that on January 6, 1995, an employing establishment official refused to allow her to perform duties listed in her job description, although they permitted other employees who had greater restrictions than she to perform her job duties.

By letter dated May 5, 1995, the Office advised appellant to submit a written statement identifying relevant dates, locations, a description of all practices, incidents, and confrontations that she believed caused or contributed to her claimed medical condition and to submit any resolution reports of EEO complaints. The Office again advised her to submit medical evidence with a rationalized opinion pertaining to the issue of causal relationship.

By letter dated May 11, 1995, appellant stated that there had been no resolution to her EEO complaints, and questioned why the Office required another statement from her.

By decision dated July 13, 1995, the Office found that fact of injury was not established, as the evidence of record did not establish that an injury was sustained in the performance of duty. The Office found that there was insufficient evidence in the record to establish the occurrence of employment events, incidents or exposures at work or the existence of an emotional condition causally related to such events, incidents or exposures. The Office further found that appellant had failed to establish error or abuse with regard to any of the alleged administrative actions on the part of the employing establishment.

By letter dated August 1, 1995, appellant requested a review of the written record. In addition, appellant submitted a statement dated August 3, 1996 asserting that she had been discriminated against and harassed at work, causing an enormous amount of stress, but that she had switched tours and had eliminated 95 percent of all her stress. Appellant also submitted several additional medical reports pertaining to her alleged emotional condition: a December 8, 1995 report from Dr. Chuni Kansagram, a specialist in psychiatry; a January 3, 1996 medical report from Dr. Dennis Wong, a specialist in psychiatry; and a February 5, 1996 report from Dr. Bongshin Rhee, a specialist in psychiatry.

By decision dated August 19, 1996, the Office affirmed the prior decision, finding that appellant failed to submit evidence sufficient to warrant modification. An Office hearing representative found that appellant failed to provide sufficient corroborative, factual support for the employment events or incidents she allegedly sustained, which he characterized as being vague and confusing to the extent that they were incomprehensible. He stated that appellant failed to provide specific names and dates in conjunction with the alleged incidents, which made them unverifiable. The hearing representative therefore found that appellant failed to establish the occurrence of the claimed employment events or incidents, and found that her statements alleging these incidents were inherently incredible or self-contradictory.

The hearing representative further stated that appellant failed to establish that the employment events she alleged were related to her regular or specially assigned duties or other specific conditions of employment. He indicated that appellant's reaction to administrative or personnel-type matters, such as assigning, monitoring, evaluating or correcting work performance, or the granting and/or denial of such things as leave or requests for job changes, charging appellant with being AWOL, refusing doctor's slips that had been requested, etc., did not establish a connection to employment sufficient to establish that she sustained an emotional condition in the performance of duty, as she failed to demonstrate that the employing establishment acted erroneously or abusively with regard to these actions. The hearing representative stated that appellant had merely stated generally that she was exposed to stress and anxiety at work, without providing an understandable and verifiable statement of specific employment factors she believed had caused her claimed psychiatric condition. He found that while appellant submitted some EEO complaints, it was unclear whether these constituted all the employment factors she wished to claim.

By letter dated November 6, 1996, appellant requested reconsideration. In support of her claim, appellant submitted a September 9, 1996 medical report from Dr. Robert S. Dengrove, Board-certified in psychiatry and neurology. Dr. Dengrove found that appellant was suffering from dysthmic disorder, chronic pain disorder, and generalized anxiety disorder as a result of the trauma stemming from her June 20, 1994 employment injury. He advised that these conditions had progressively worsened due to the difficulties occurring at work subsequent to the 1994 work injury. Dr. Dengrove opined that appellant had, approximately, a 25 percent disability of the whole person due to the neuropsychiatric condition resulting from the work-related injuries sustained in June 1994 and continuing to the present.

By decision dated December 17, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[6] There must be evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[7]

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[8] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[9]

It is well established that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. A claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.[10] The Board has underscored that, 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 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.[11] The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. 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 compensable factor of employment, the Office should then determine

[6] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

[7] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[8] *Lillian Cutler*, 28 ECAB 125 (1976).

[9] *Id.*

[10] *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

[11] *Norma L. Blank*, 43 ECAB 384 (1992).

whether the evidence of record substantiates that factor. Perceptions and feelings, alone, are not compensable. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.[12]

In the present case, the Office found that the allegations made by appellant concerning the implicated work-related incidents were not established as factual by the weight of evidence of record. The Office reviewed appellant's allegations of harassment and abuse, to which she referred in her EEO complaints, and found they were unsubstantiated and insufficiently specific with regard to particular incidents, names and dates. Appellant's statements do not establish that her supervisors harassed or abused her during the periods she alleged these episodes to have occurred.

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty. Appellant has not submitted any factual evidence to support her allegations that she was harassed, mistreated, or treated in a discriminatory manner by her supervisors. The Board notes that appellant failed to establish that the episodes of harassment factually occurred as alleged and that appellant failed to provide any corroborating evidence for her allegations. As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with certain superiors at work which do not support her claim for an emotional disability.[13]

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error, and are therefore not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.[14]

In the instant case, appellant alleged a variety of abuses on the part of the employing establishment, beginning on June 24, 1994 and continuing through January 6, 1995, which depict a pattern of abusive, discriminatory and retaliatory administrative practices. These include: denying leave requests, vacation time and requests for schedule changes without proper cause; denying her medical attention for her employment injury; deliberately delaying compensation payments due her for her work injury; unfairly accusing her of presenting a forged doctor's note; denying her proper paperwork for her work injury, discriminating against her because of her physical and mental disabilities and her pregnancy; and retaliating against her for filing EEO claims by improperly suspending her for failing to submit acceptable administrative documentation to substantiate her absences. Appellant, however, has presented no evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment. None of these episodes constituted a factor of employment. Disciplinary matters

[12] *Id.*

[13] *See Hall, supra* note 10.

[14] *Alfred Arts*, 45 ECAB 530 (1994).

consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity, and are not compensable as factors of employment.[15] In the absence of agency error such personnel matters are not compensable factors of employment. Accordingly, a reaction to such factors do not constitute an injury arising within performance of duty. The Board therefore affirms the Office's August 19, 1996 decision denying compensation based on an alleged emotional condition.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim, based on compensation for an alleged emotional condition, pursuant to 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[16] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[17] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[18]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; she has not advanced a point of law or fact not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. Although appellant submitted Dr. Dengrove's September 9, 1996 medical report with her request for reconsideration, this report merely stated that appellant had sustained an emotional/psychiatric condition which was allegedly due to her June 20, 1994 employment injury and employment-related stress, a contention rejected by the Office in previous decisions. Thus, as the medical evidence appellant submitted was repetitive and duplicative of evidence already in the case record, it has no evidentiary value and the Office properly determined that it did not constitute a basis for reopening the case. Thus, her request did not contain any relevant and pertinent medical evidence for the Office to review. This is important since the outstanding issue in the case -- whether appellant sustained an emotional condition in the performance of duty -- was medical in nature. Additionally, appellant's November 6, 1996 letter did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that she sustained an emotional condition in the performance of duty, she failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

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[15] *Barbara E. Hamm*, 45 ECAB 843 (1994); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[16] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.138(b)(2).

[18] *Howard A. Williams*, 45 ECAB 853 (1994).

The decisions of the Office of Workers' Compensation Programs dated April 26, August 19 and December 17, 1996, and February 13, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 4, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member