U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY HICKS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, BROOKLYN DISTRICT, Brooklyn, NY

Docket No. 98-533; Submitted on the Record;
Issued August 11, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty as alleged.

The procedural history of the case is as follows. On November 1, 1995 appellant, then a 51-year-old internal revenue agent, filed a claim for major depression. In an accompanying statement, appellant alleged that her condition was due to "numerous unfair and unequitable labor actions" by employing establishment officials, and a "hostile and abusive work environment," causing her to seek treatment from Dr. Henry McCurtis, an attending psychiatrist, beginning on September 15, 1995. Appellant subsequently submitted several other factual statements alleging specific work incidents, each of which will be enumerated below, and a general pattern of harassment, hostility and discrimination on the basis of sex, national origin, race, appearance, age, religion and in retaliation for filing Equal Employment Opportunity (EEO) grievances.[1] The record indicates that appellant stopped work in September 1995 and did not return.

By decision dated March 27, 1996, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that fact of injury was not established. The Office noted that appellant was advised by a February 25, 1996[2] letter of the need for additional information, but did not provide such evidence. Appellant disagreed with this decision and by an April 1, 1996 letter requested reconsideration. She made additional factual allegations in an attached statement and submitted copies of employing establishment work procedures and personnel policies.

[1] In a January 31, 1996 letter, the employing establishment generally controverted appellant's claim.

[2] February 25, 1996 letter advising appellant to submit detailed factual statements describing the incidents alleged to have caused her claimed emotional condition, and rationalized medical evidence explaining how and why those factors would cause the claimed condition.

By decision dated November 13, 1996, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that the allegations in appellant's factual statement were not supported by the accompanying employing establishment policies or corroborating witness statements.[3] Appellant disagreed with this decision and in a March 4, 1997 letter requested reconsideration. She submitted additional evidence, including February 21 and June 1, 1995 decisions of the Equal Employment Opportunity Commission (EEOC).[4]

In a March 24, 1997 letter, the Office advised appellant that the evidence submitted accompanying her March 4, 1997 reconsideration request had been reviewed, and additional information was needed.[5] The Office advised appellant that the EEOC decisions did not establish the alleged incidents of harassment or discrimination. Appellant was requested to submit "any decision regarding the specific allegations themselves … that they did occur, and were unlawfully discriminatory" or evidenced error or abuse. The Office also asked that appellant provide information on the "outcome of the reviews" that the EEOC had ordered the employing establishment to perform in its February 21 and June 1, 1995 decisions.[6] The record indicates that appellant did not submit such evidence.

By decision dated May 2, 1997, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office concluded that the evidence submitted failed to establish any compensable factors of employment.

After a thorough review of the case record, each of appellant's allegations and the applicable law, the Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged.

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[3] The Office also noted that a March 7, 1995 report from Dr. McCurtis, an attending psychiatrist, did not discuss any of the alleged employment factors.

[4] Appellant submitted: February 21 and June 1, 1995 decisions from the EEOC; an October 18, 1996 administrative decision of the employing establishment rescinding a May 17, 1996 proposed letter of adverse action, converting absence without leave (AWOL) to Family and Medical Leave Act absences for the period January 29 to April 12, 1996, and converting remaining AWOL charges through October 25, 1996 to leave without pay; a February 11, 1997 factual statement; reports from Dr. McCurtis dated February 28, 1997; copies of employing establishment regulations.

[5] In an April 22, 1997 letter, appellant's authorized attorney representative requested that the Office's reconsideration of appellant's case be suspended pending the outcome of an action for discrimination filed in the United States District Court, Eastern District of New York. The representative noted that discovery was not yet complete. He submitted various procedural documents relating to the lawsuit. On April 30, 1997 the Office telephoned appellant's representative and advised him that the Office's regulations would not allow the reconsideration process to be held in abeyance, that a decision with appeal rights would be issued, and that appellant could then request reconsideration.

[6] The Office also requested that the employing establishment provide additional information regarding appellant's work load, and to address appellant's allegation of being "singled out" in her work load reviews. On April 2, 1997 the employing establishment requested additional time to reply. The Office approved the extension, but the employing establishment did not submit additional information prior to issuance of the Office's May 2, 1997 decision.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. Where disability results from an employee's emotional reaction to employment matters but such matters are not related 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.[7]

In this case, appellant attributed her claimed emotional condition to a variety of specific incidents and alleged patterns of behavior which do not constitute compensable factors of employment. The Office, as part of its adjudicatory function, made specific findings on each of the factors appellant implicated.[8]

Appellant's chief allegation is that employing establishment officials harassed, "singled out" and discriminated against her due to her sex, race, appearance, national origin, age, religion, and in retaliation for her participation in the EEO grievance process, creating a hostile, "poisoned and abusive work environment." Regarding the discrimination complaint, the Office found that the charges were unsupported. The Board has held that in cases where charges of discrimination are unsupported, an appellant's emotional upset is considered to be self-generated and not in the performance of duty.[9]

Appellant's allegations of harassment pertain both to her general allegations, and to numerous administrative, personnel and disciplinary incidents from January 1991 to September 1995 as set forth below. The Board notes that unfounded perceptions of harassment do not constitute an employment factor and that mere perceptions are not compensable under the Act.[10]

Appellant alleged that her claimed emotional condition was due in part to a series of disciplinary actions by employing establishment supervisors and officials: February, March, October, November and December, 1992 adverse "contact memoranda" from supervisor Stan Lottman regarding appellant's unauthorized use of more than one work station; a December 2, 1992 "admonishment memorandum" by Mr. Lottman regarding appellant's use of more than one work station, filed in her personnel folder on January 8, 1993; numerous 1993 contact memoranda regarding appellant's AWOL status, disciplinary actions, use of administrative time, credit hours, reporting times and problems with required reports; a March 25, 1993 contact memorandum from supervisor Pearl Roberts regarding a clerical error by appellant on a monthly technical time report; an October 10, 1993 letter of reprimand from District Director Herbert J. Huff for insubordination; a November 18, 1993 contact memorandum indicating that disciplinary action was forthcoming; a November 11, 1993 conversation between her supervisor and a branch chief; a December 10, 1993 letter of reprimand; a December 13, 1993 contact memorandum regarding appellant's use of administrative leave; two February 2, 1994 contact memoranda

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

[8] *See Barbara Bush*, 38 ECAB 710 (1987).

[9] *See Walter Asberry, Jr.*, 36 ECAB 686 (1985); *Lillian Cutler*, *supra* note 7.

[10] *Kathleen D. Walker*, 42 ECAB 603 (1991).

regarding use of leave for EEO activities; a March 15, 1994 letter from Mr. Huff regarding a three-day suspension; a three-day suspension from March 29-31, 1994; a March 25, 1994 contact memorandum for claiming one hour administrative leave to read an agency-wide memorandum that was designed to take 20 minutes to read; a May 12, 1994 contact memorandum for insubordination, failure to do work and failure to work on cases; a May 20, 1994 contact memorandum from Ms. Roberts for falsifying records and insubordination; a June 7, 1994 contact memorandum for failing to do work; August 23, 1994 and January 25, 1995 letters proposing a 10-day suspension; a June 1996[11] proposed letter of termination from branch chief Nunzio Donato.

Regarding the memoranda, letters of reprimand and suspensions, the Office found that disciplinary actions are not considered to be in the performance of duty.[12] The Board has held that these disciplinary actions relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Federal Employees' Compensation Act.[13] However, the Board has also found that 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[14] Appellant has not submitted sufficient evidence in corroboration of her claim to establish that the employing establishment erred or acted abusively with regard to the reprimands. Thus, appellant has not established a compensable employment factor under the Act in this respect.[15]

Appellant asserted that her supervisors harassed her, as follows: on January 31 and February 1, 1991 Stan Bricker monitored appellant's tour of duty and use of credit hours; Mr. Bricker followed her to the restroom in January and February 1991;[16] on April 8, 1991 Mr. Bricker questioned appellant as to the status of cases assigned to her; Mr. Bricker returned cases "sporadically" in May 1991; on April 7, 1993 a group manager asked appellant to remove the manager's name from a document appellant prepared during a case discussion; on May 11, 1994 a group manager approached appellant's desk and asked what she was doing, while ignoring other employees nearby who were discussing sports. Regarding appellant's reaction to her supervisor following her to the bathroom, the Office found that the incident did not involve

[11] In an October 18, 1996 letter, the employing establishment rescinded a proposed May 17, 1996 letter of adverse action, converting appellant's AWOL absences to family and medical leave for the period January 29 to April 12, 1996 and converting the remaining AWOL charges through October 25, 1996 to leave without pay.

[12] *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[13] *See Jimmy Gilbreath*, 44 ECAB 555 (1993).

[14] *See Richard Dube*, 42 ECAB 916 (1991).

[15] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

[16] The record contains an undated, unattributed excerpt from what appears to be an employing establishment reply to an EEO grievance, noting that on an unspecified date, appellant was asked where she had been and replied "Can't a lady go to the ladies' room?"

appellant's regularly or specially assigned duties and was therefore not compensable. Insofar as the other alleged incidents represent harassment, the Board has held that mere perceptions of harassment do not constitute a compensable factor of employment. There must be evidence that harassment did in fact occur.[17] There is no corroborating evidence that these incidents occurred in this case record, therefore, they are not compensable.

Appellant also alleged that her claimed emotional condition was attributable in part to performance reviews: seven caseload reviews in January 1991 conducted by supervisor, Mr. Bricker, who did not allow her to be present; work load reviews by Mr. Bricker in February; on April 30 and May 16, 1991; on February 9, 1993 Ms. Roberts scheduled a March 22, 1993 work load review that did not take place; a June 9, 1993 Revenue Agent Report Evaluation and work load review to which appellant alleges she was given inadequate response time; she was given one hour on November 10, 1993 to read her annual appraisal; a December 20, 1993 work load review; management did not respond to appellant's 18-page rebuttal to the December 20, 1993 work load review; Ms. Roberts scheduled a work load review on February 2, 1994; a March 4, 1994 review of nonfiler cases by Ms. Roberts; a May 5, 1994 work load review; a scheduled July 10, 1994 work load review that was not performed; the time of a July 19, 1994 work load review was changed; an October 6, 1994 work load review where cases were not returned to appellant until October 21, 1994; December 6, 1994, April 27 to May 2, May 9 to 19, July 21 to August 8 and August 25 to September 1, 1995 work load reviews.

The Office found that the work load reviews and revenue agent review were normal administrative functions of the employing establishment and did not evince error or abuse. The Board notes that appellant did not provide evidence other than her own statements to corroborate the dates or circumstances of these reviews, whether she was entitled to be present, if appellant was not afforded a mandated response period, if the employing establishment was obligated to respond to her December 20, 1993 "rebuttal," or whether cases reviewed were to be returned to appellant within a specific period of time. Thus, appellant has not established that the work load reviews constitute a compensable factor of employment.

Appellant also alleged that her condition was due to negative performance reviews: a "negative" May 25, 1991 report from Mr. Bricker resulting in her being relieved of one of her cases; January and February 1992 "negative" performance reports by supervisor Mr. Lottman which he allegedly wrote prior to being her supervisor; an "unsuccessful" performance rating in September 1994 for the period September 1993 to September 1994. The Office found that these evaluations were an administrative function of the employer, and not the duty of appellant, and that, lacking evidence of error or abuse on the part of the employer, such functions did not constitute factors of employment. The Board has held that reactions to assessments of performance are not covered by the Act.[18]

Appellant asserted that her emotional condition was also caused by her frustration over not being given desired duties: on March 20, 1991 Mr. Bricker relieved appellant of her monthly

[17] *Kathleen D. Walker*, *supra* note 10.

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

reports preparation duties; she was not promoted in October 1991, February 1994 and February 1995; in February and March 1992 Mr. Lottman stated that appellant had control of "C" and "D" cards; in March 1992 appellant was transferred from Mr. Bricker's field group 1105 to Mr. Lottman's training group 1401; in November 1992 appellant was assigned cases in an "unfair manner"; in 1993 male agents were assigned to act as group leaders. However, disability is not covered where it results from an employee's desire for a different job or job duties, and thus the Office found that appellant had not established a compensable factor in this regard.[19] Additionally, the Board has held that frustration from not being permitted to hold a particular position is not a factor of employment.[20]

Appellant also attributed her claimed condition to administrative matters regarding use of leave: on November 23, 1993 a supervisor gave other employees in appellant's work group 59 minutes of administrative leave; Ms. Roberts charged appellant as AWOL on January 12, 1994; a supervisor did not approve administrative leave requests on March 10 and 25, 1994; a supervisor treated appellant "differently" regarding March 25, 28 and April 4, 1994 requests for religious leave; on May 3, 1994 appellant had to take one-hour administrative leave as she did not report back to her work station following a training class. However, the Office found, and the Board has held, that leave usage is an administrative or personnel matter not within the performance of duty. As appellant has not established that the employing establishment erred or acted abusively with regard to appellant's leave usage and requests, she has not demonstrated a compensable employment factor in this regard.[21]

Appellant also alleged a number of actions against her by supervisors: on April 11, 1991 Mr. Bricker spilled ink on appellant's desk and dress but did not apologize; on April 23 and May 20, 1991 Mr. Bricker scheduled meetings for 3:00, delaying appellant who normally left work at 3:30; on June 9, 1993 Ms. Roberts yelled at appellant for refusing to sign a case review document; in March 1992 Mr. Lottman humiliated appellant at a meeting; in April 1992 Mr. Lottman yelled at appellant at a meeting. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[22] However, appellant has not submitted witness statements or other evidence to corroborate her account of events, and therefore these incidents are not compensable.

Although appellant alleged that she suffered an emotional condition due to harassment at work, she failed to provide reliable, probative and substantial evidence that such harassment did, in fact, occur. Because the evidence of record fails to establish a compensable factor of employment, the Board finds that appellant has failed to establish a compensable factor of

[19] *Raymond S. Cordova*, 32 ECAB 1005 (1981).

[20] *Id.*

[21] *Anthony A. Zarcone*, 44 ECAB 751 (1993).

[22] *Ruthie M. Evans*, 41 ECAB 416 (1990).

employment, the Board finds that appellant has failed to establish that her emotional condition is causally related to her federal employment.[23]

[23] Appellant also submitted medical evidence. In September 15 and October 27, 1995 reports, Dr. McCurtis, an attending psychiatrist, stated that appellant continued under treatment for a major depressive episode with impaired functioning, holding her off work through November 1995. Dr. McCurtis did not mention any work factors in this report. In a February 28, 1997 report, Dr. McCurtis, noted treating appellant for depression, anxiety, affective disorder and clinical symptoms of post-traumatic stress disorder beginning September 15, 1995. He opined that appellant's condition was attributable to her account of discrimination and harassment at work beginning with the January 1991 work load reviews by Mr. Bricker, a "hostile work environment," her transfer from a field group to training group in March 1992, negative monthly reports in January and February 1992, and attempted dismissal for accumulating 600 hours AWOL. However, as appellant has not established any compensable factors of employment, including those cited by Dr. McCurtis, the Office need not examine the medical evidence in this case. *Margaret S. Krzycki*, 43 ECAB 496 (1992).

The decision of the Office of Workers' Compensation Programs dated May 2, 1997 is hereby affirmed.[24]

Dated, Washington, D.C.
August 11, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[24] On appeal appellant submitted new medical evidence: reports by Dr. McCurtis dated September 15, October 27 and November 18, 1995; August 27 and 31, December 14, 1996; May 4, June 7, October 6 and 7, 1997. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c). The Board notes that appellant was advised of this regulation in the appeal rights provided with the May 2, 1997 decision. These appeal rights state explicitly that: "If you believe that *all available evidence has been submitted*, you have the right to appeal to the Employees' Compensation Appeals Board for review of the decision. Review by the Appeals Board is *limited to the evidence of record and no new evidence may be submitted*." (Emphasis added.)