U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY L. McFALL and DEPARTMENT OF AGRICULTURE, PLANT PROTECTION QUARANTINE, Brownsville, TX

Docket No. 98-919; Submitted on the Record;
Issued April 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

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

On March 25, 1997 appellant, then a 34-year-old plant protection quarantine officer, filed an occupational disease claim alleging that she sustained an aggravation of emotional stress when she was "[f]alsely accused of sexual harassment by [management] head." Appellant also attributed her condition to working in a confined space with extreme temperature changes. Appellant did not stop work.[1]

In a statement accompanying her claim, appellant related:

> "During April [through] August 1996 I was placed under very restrictive working conditions and all inspectional duties were removed. I was placed in a confined working area with extreme temperature variations as noted by various officers. I had been subjected to various situations within this confined area, which were mentally intolerable. I had been restricted from bathroom use, telephone use and other basic freedoms. I had been falsely accused of sexual harassment by management, which is the main reason for the restrictive working conditions and[/]or reassignment."

[1] Appellant filed a previous claim for an emotional condition due to employment factors beginning August 13, 1994. The Office of Workers' Compensation Programs assigned the case File Number A16-0247680 and denied the claim in decisions dated March 8, 1995 and October 16, 1996. In a decision dated November 23, 1998, the Board affirmed the Office's October 16, 1996 decision; *see* Docket No. 97-854 (issued November 23, 1998).

Appellant further related that she was "overworked by management doing large assignments with short time frames assigned and continually being badgered by management to complete. Many of these assignments were senior and upper management oriented."

In a statement dated June 15, 1997, appellant identified the following items as causing her emotional condition: being erroneously accused of sexual harassment; being placed on a performance improvement plan (PIP) and subsequently demoted; management failing to keep information private; discriminatory treatment and false charges of misconduct; and being placed in a restrictive work environment. Appellant noted that she experienced "frequent instances of chronic depression" due to disciplinary actions taken by the employing establishment and listed the grievances that she filed in response to the actions.

By decision dated November 6, 1997, the Office denied appellant's claim on the grounds that she did not establish an injury in the performance of duty. The Office found that appellant had not alleged any compensable factors of employment.

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

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] 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.[3]

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.[4] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[5]

In the present case, appellant has alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.

Appellant attributed her emotional condition to being "falsely accused of sexual harassment by management." In an affidavit dated October 17, 1996, Kyle Hitchcock, a coworker, related that he had filed a complaint against appellant for conduct unbecoming an officer rather than a charge of sexual harassment. Mr. Hitchcock stated, "I did not like the way she would grab me. She would usually grab me on the upper arm and squeeze it in an unprofessional manner. I had told her to stop it about three different times." Mr. Hitchcock indicated that he had submitted the complaint against appellant to Rolando Trevino, who was a supervisor with the employing establishment. The record contains a settlement agreement reached between appellant and the employing establishment on December 3, 1996 in which the employing establishment reduced appellant's 60-day suspension to 30 days and changed the grounds for the suspension from sexual harassment to unbecoming conduct. However, the fact that an employing establishment lessens a disciplinary action taken towards an employee does not establish that the employing establishment acted in an erroneous or abusive manner.[6] Appellant has not submitted any evidence which would show error or abuse by the employing establishment in its actions regarding its investigation or settlement of the allegations of sexual harassment.

Appellant further maintains that, based on the charge of sexual harassment, the employing establishment placed her in a restrictive working environment from April through August 1996 and that this contributed to her depression. She related that she was placed in a confined area with extreme temperature changes and was "restricted from bathroom use, telephone use and other basic freedoms." By letter dated April 11, 1996, a supervisor with the employing establishment assigned appellant to a workstation with instructions that she contact a supervisor before leaving the workstation for any reason, including restroom breaks and obtain permission from a supervisor prior to using a telephone. In response to appellant's allegations regarding the condition of workstation, a supervisor related that from April through August 1996 appellant worked in an air-conditioned office around 187 square feet in size inputting computer data and "was not exposed to any fumes, chemicals, or other irritants during the time she was stationed at this office." The record contains no finding that the employing establishment committed error or abuse in requiring appellant, based on past conduct, to consult with a supervisor prior to leaving the workstation or using the telephone. Further, appellant has submitted no evidence in support of her contention that she worked in a confined area with extreme temperature variations. The Board has held that disability sustained by a claimant

[5] *Id.*

[6] *Garry M. Carlo*, 47 ECAB 299 (1996).

related to frustration from not being permitted to work in a particular environment or to hold a particular position is not covered under the Act.[7]

Regarding appellant's allegation that she was overworked and given deadlines, in which to do her assignments, the Board has held that overwork may be a compensable factor of employment.[8] However, as with all allegations, overwork must be established on a factual basis.[9] In the instant case, appellant has submitted no evidence to support her contention that she was overworked or given inappropriate deadlines, in which to complete her assignments and, therefore, this contention cannot be deemed a compensable factor of employment.

Appellant also attributed her emotional condition to being placed on a PIP and subsequently demoted in grade. The assessment of an employee's performance is an administrative matter and thus not covered by the Act unless the evidence discloses that the employing establishment acted unreasonably or abusively.[10] In the instant case, appellant has not established that the employing establishment committed error or abuse in placing her on the PIP or in reducing her grade at the conclusion of the PIP. In a final review of the PIP dated October 26, 1995, appellant's supervisor noted that she had failed to satisfactorily improve her deficiencies. In a settlement agreement reached between appellant and the employing establishment, appellant accepted a voluntary reduction in grade. Appellant has not submitted any evidence corroborating her allegations of error by the employing establishment in placing her on the PIP or reducing her grade.

Appellant further attributed her emotional condition to disciplinary actions taken by the employing establishment. The record indicates that appellant received a letter on June 14, 1995 from a supervisor requesting that she explain her conduct on May 26 and June 5, 1995. The record further contains a memorandum dated August 12, 1995, in which a supervisor noted that appellant did not follow instructions. Appellant also received a proposed 14-day suspension on October 12, 1995 for failing to follow instructions. Reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable unless it is established that the employing establishment erred or acted abusively in such capacity.[11] While the employing establishment reduced appellant's 14-day suspension to a 7-day suspension, as discussed above, the fact that a personnel action is lessened or modified does not, in and of itself, establish that the employing establishment's actions were either erroneous or unreasonable.[12] In this case, appellant has not submitted any independent evidence which would show that the actions taken by the employing establishment were improper. Thus, she has not established a compensable employment factor.

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[7] *James E. Woods*, 45 ECAB 556 (1994).

[8] *Georgia F. Kennedy*, 34 ECAB 608 (1983).

[9] *See William P. George*, 43 ECAB 1159 (1992).

[10] *Effie O. Morris*, 44 ECAB 470 (1993).

[11] *Barbara J. Nicholson*, 45 ECAB 803 (1994).

[12] *See Garry M. Carlo*, *supra* note 6.

Appellant argued that managers at the employing establishment harassed her by erroneously charging her with misconduct and treating her differently from other employees. Actions of a claimant's supervisor or coworker which the claimant characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.[13] Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.[14] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[15] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[16] In the present case, the Board finds that appellant has not supported her allegations of harassment and discrimination with sufficient probative evidence.

As appellant has not established that she sustained an emotional condition as a result of a compensable factor of employment, she has not met her burden of proof to establish that her emotional condition was sustained in the performance of duty.[17]

[13] *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

[14] *See Lorraine E. Schroeder*, 44 ECAB 323 (1992).

[15] *William P. George*, *supra* note 9.

[16] *See Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[17] The Board notes that subsequent to the Office's November 6, 1997 decision, appellant submitted additional evidence. The Board's review is limited to the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, cannot consider the evidence submitted after the Office's decision. Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. § 501.7(a).

The decision of the Office of Workers' Compensation Programs dated November 6, 1997 is hereby affirmed.

Dated, Washington, D.C.
April 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member