U. S. DEPARTMENT OF LABOR

Employees Compensation Appeals Board

In the Matter of JOSEPHINE CARDENAS and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

Docket No. 00-214; Submitted on the Record;
Issued December 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On July 11, 1998 appellant, then a 33-year-old machine clerk, filed an occupational disease claim, Form CA-2, alleging that on June 12, 1998 she experienced situational stress and anxiety caused by her supervisor, Rhonda Mann. Appellant stated that she was subject to continuous battering and unwarranted accusations about her substandard performance since December 1997, which created and led up to a confrontation on March 31, 1998. She stated that examples of stress and anxiety Ms. Mann caused her were pulling her in for a discussion about appellant's personal problems with her boyfriend and demanding that she key faster; and "allowing" coworkers' explanations but not her when confronted. Appellant alleged that Ms. Mann pointed her finger at her and extended her hand in front of her to cut her off when she was talking which happened when she and a coworker returned on time from a break. Further, appellant stated that Ms. Mann accepted her coworker's explanation saying, "'Oh! that's right, you're ok,'" yet said to her, "'[Appellant] I will talk to you later!'" and then walked away, but never returned for an explanation. Additionally, appellant cited denying her the day off when she requested it even though the roster book was open. Appellant stated that "this condition" existed continuously throughout her work week because the "assault on her humanity [was] intolerable" and she "[was] forced to take the time off to" "'put [herself] together."'

By decision dated January 19, 1999, the Office denied the claim, stating that the alleged emotional condition did not arise in the performance of duty.

In an undated letter postmarked March 1, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated March 30, 1999, the Office's Branch of Hearings and Review denied appellant's request for a hearing, finding that appellant's request was postmarked March 1, 1999,

more than 30 days after the Office issued the January 19, 1999 decision and, therefore, was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

The Board finds that appellant has failed to establish 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 Act.[1] 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.[2]

A report from the employing establishment on an official form, Form 1769, stated that appellant alleged her emotional condition was due from a March 31, 1996 incident when she was given an investigative interview and told her that her conduct toward other employees would not be tolerated. The report stated, that appellant was keying "way under expectations of 21 ppm [pieces per minute]" and that she was averaging 8 ppm when she qualified at 37 ppm in order to obtain a bid on "SPBS." The report also stated, that appellant "put in" for a change of schedule which was disapproved due to staffing needs, along with a request to have a scheduled workday off which was disapproved for staffing reasons on June 25, 1998. The report stated that appellant was sent to break along with everyone else and 30 minutes later appellant stated that she did not take her break.

In a witness statement dated June 10, 1998, a coworker, Epifanio Delfin, Jr., stated that appellant invited him out for drinks and told him that Ms. Mann was "giving her a bad time at work." He stated appellant asked him to give a statement about Ms. Mann's treating her unfairly but he replied that Ms. Mann was treating him fairly at work.

In a statement dated July 16, 1998, Ms. Mann responded to appellant's allegations. Ms. Mann stated that on March 31, 1998 appellant "was given" an investigative interview for being absent without leave (AWOL) on March 27, 1998 from her work area. She stated that appellant requested to go home sick after her work habits were discussed with her supervisor, Allison Moore. She stated that appellant left the unit at 6:25 p.m. as requested to go home, but at 6:50 p.m. she was informed appellant was at the union office with the union steward, Rick Ott, and she had not clocked out because she decided to return to work.

[1] *Dinna M. Ramirez*, 48 ECAB 308 (1997); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[2] *Michael Ewanichak*, 48 ECAB 364 (1997); *Lillian Cutler*, 28 ECAB 125 (1976).

Ms. Mann stated that on March 31, 1998 appellant was also assigned to SPBS #1 and she approached Ms. Mann and started yelling at her because she did not want to key on SPBS #1 and wanted to know why she was there when she could return to keying on SPBS #2. Ms. Mann stated that she told appellant to lower her voice but appellant did not do so. She then again told appellant to lower her voice and report back to SPBS #1 and stated that her conduct was unacceptable and would not be tolerated in the employing establishment. Ms. Mann stated that she told appellant that if her behavior continued she would be walked off the workroom floor for disrupting the unit. Ms. Mann stated that when she asked appellant who gave her permission to go to the union office when she had not clocked off, appellant stated that she "just wanted to speak with a union steward to see what she could do."

Ms. Mann stated that, after the March 31, 1998 investigative interview, appellant "was given" a discussion in which she was informed that she was keying 8 to 15 ppm when she should be performing 21 ppm, and that in order to qualify on a bid for SPBS, she must key at a rate of 37 ppm. Ms. Mann stated that appellant "was informed" that she must stop challenging her when she told her to perform a certain task such as moving to another operation or not to yell at other employees. Ms. Mann stated that she advised appellant to keep her personal problems to herself and not discuss them with employees and she stated that she did not want to know anything about appellant's boyfriend.

Ms. Mann stated that she would not take corrective action on the AWOL but would give her another chance and start fresh. She told appellant to feel free to speak to her regarding any operational problem and stated that she hoped appellant would feel comfortable working under her supervision.

Ms. Mann stated that on May 25, 1998 appellant and the other employees were issued a tee shirt in recognition of their performance on SPBS #1 but appellant came to her and stated that she could not accept the tee shirt because she did not feel she earned it but accepted one the next day from another supervisor, Willie Smith.

Ms. Mann stated that on May 22, 1998 she disapproved appellant's request for leave, PS Form 3791, on June 13, 1998 and told her to resubmit the request at a later date so she could review her staffing. Ms. Mann stated that because the leave date was on the weekend she could not approve or disapprove it because she was not the supervisor in charge on weekends. She stated that appellant's PS Form 3791 was disapproved by the "MDO" for that date due to staffing needs as they would have been short staffed.

Ms. Mann stated that on June 22, 1998 appellant returned with other employees late from a break whom she informed should return to work on time. Ms. Mann stated that appellant was argumentative and she told appellant she would not argue with her and would speak with her later. She stated that appellant "always trie[d] to display a scene and disrupt the work area, so rather than discuss work issues with her," she told appellant she would speak with her later, off the workroom floor.

Appellant submitted a petition signed by several coworkers dated October 3, 1995, stating that Ms. Mann lacked the ability to interact successfully and effectively with subordinates

whom she treated with total disregard and without consideration and recommended that she be reassigned to an administrative position.

By letter dated September 23, 1998, the Office requested additional information from appellant including any medical records documenting her emotional condition.

In a statement dated October 22, 1998, appellant's coworker, Mike Fletcher, stated that he saw Ms. Mann point her finger at appellant "in a threatening manner while talking to her with a scolding look while [appellant] was working on her counsel." He noted that Ms. Mann stands directly in front of appellant's work station during her work tour watching and staring at her. Mr. Fletcher acknowledge, however, that during these episodes he could not hear the conversation due to the noise output of the machine. He stated that he had seen appellant come away from discussions with Ms. Mann "visibly upset and in tears."

Mr. Fletcher stated that, since Ms. Mann became the supervisor for their operation, she had singled out female employees for public belittlement and embarrassment. He stated that, although Ms. Mann had discussions with each of the employees on her expectation of their work, he watched as she continually harassed appellant and other female employees "to the point of tears and obvious physical discomfort." Mr. Fletcher stated that Ms. Mann tried "to split the camaraderie" of their unit by issuing half the crew with tee shirts. He stated that appellant felt that was wrong and would not accept the tee shirt but subsequently accepted a tee shirt from Mr. Smith, who issued tee shirts to the other employees who had not previously received them. Mr. Fletcher indicated that he monitored the machine output and found that no employee was keying less than the machines maximum output. He stated that he watched Ms. Mann wait for the computer graph to show a minimum output and then print the results to prove her point and maintain them for future use.

Appellant submitted a medical report to support her claim.

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[3] The issue is not whether the claimant has established harassment or discrimination under standards applied by the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[4] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[5]

In the present case, the incidents appellant alleged, including management's monitoring her, yelling at her, refusing to assign her to another machine, disapproving her leave requests, evaluating her work performance and singling her out for criticism do not relate to her regular or specially assigned duties but fall within the administrative functions of the employing

[3] *Michael Ewanichak*, *supra* note 11; *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[4] *See Martha L. Cook*, 47 ECAB 226, 231-32 (1995).

[5] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

establishment. They constitute compensable factors only if there is affirmative evidence that the employer erred or acted abusively in the administration of these matters.[6] Appellant, however, has presented insufficient evidence to establish that Ms. Mann harassed her or that management acted abusively or erroneously. The monitoring of work by a supervisor is an administrative function and is not compensable.[7] Although Mr. Fletcher stated that he observed Ms. Mann excessively monitor appellant, he did not provide specific dates, stated he could not hear the conversation and saw appellant come away from discussions with Ms. Mann in tears. His statement is not specific as to the allegations of harassment and constitute his perceptions as to the work environment.

The approval of leave is an administrative matter and appellant did not show that Ms. Mann abused her discretion in disapproving her leave as she said they would have been short on staff had it been approved.[8] Appellant's desire to work on another machine, *i.e.*, SPBS #2, is an administrative matter and appellant did not show Ms. Mann acted abusively in assigning her to work on SPBS #1.[9] Moreover, disciplinary matters as in Ms. Mann's evaluating appellant's work performance, giving investigative interviews or discussing her work expectations with appellant pertain to actions taken in an administrative capacity and are not compensable under the Act unless it is demonstrated that the employing establishment erred or acted abusively in its administrative capacity.[10] Although Mr. Fletcher claimed he never found that any employee underkeyed and Ms. Mann saved low key results to use against someone, he did not provide any specific evidence to show that Ms. Mann was wrong in finding that appellant underkeyed and in criticizing her for it. Appellant did not establish a compensable factor in this regard.

Further, although Mr. Fletcher stated he saw Ms. Mann single appellant out and speak to her in a threatening manner and talk to her with a "scolding look," insufficient specific details of the incidents were provided. Moreover, the incident of the tee shirts was an administrative matter and appellant did not show that Ms. Mann abused her discretion in distributing the tee shirts. Further, appellant's allegations that she was subject to "continuous battering and unwarranted accusation about her substandard performance" was not sufficiently corroborated by evidence in the record. Appellant also presented insufficient evidence to show that she was improperly chastised when she returned from a break. A claim based on verbal altercations or difficult relationships with a supervisor must be supported by evidence of record.[11] Ms. Mann denied that she treated appellant differently than other employees or that she unreasonably criticized or yelled at her and appellant has failed to support her allegations with affirmative evidence.

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[6] *Michael Evanichak, supra* note 11; *Jimmy Gilbreath*, 44 ECAB 555 (1993).

[7] *Daryl Davis*, 45 ECAB 907, 911 (1994).

[8] *See Beverly Diffin*, 48 ECAB 125, 129 (1996).

[9] *See Anna C. Leanza*, 48 ECAB 115, 121(1996).

[10] *Barbara J. Nicholson*, 45 ECAB 803, 809 (1994).

[11] *Diane C. Bernard*, 45 ECAB 223, 228 (1993).

The Board, therefore, finds that appellant has failed to allege a compensable factor of employment. Since no compensable factors have been alleged, it is not necessary to address the medical evidence.[12]

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."[13] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.[14] The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.[15]

Section 10.616(a) of the Office's regulations[16] provides in pertinent part:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."

The Board has held that the Office, in its Broad discretionary authority in the administration of the Act, 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.[17] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[18] when the request is made after the 30-day period for requesting a hearing,[19] and when the request is for a second hearing on the same issue.[20]

Since the postmark date of appellant's hearing request is March 1, 1999, the Branch of Hearings and Review properly determined that the request which was filed more than 30 days after the Office's January 19, 1999 decision was untimely. Appellant contended that she did not

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[12] *Id*.

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. § 10.615.

[15] *Id*.

[16] 20 C.F.R. § 616(a).

[17] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[18] *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

[19] *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

[20] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

receive the Office's January 19, 1999 decision until February 11, 1999 and responded on March 1, 1999. She stated that she informed the Office of a change of address on approximately December 4, 1998. While it is true that appellant informed the Office of a change of address on December 4, 1998 from 302 Madison Avenue, Vacaville, California 95687 to P.O. Box # 5814, Vacaville, CA 95696, the Office's January 19, 1999 decision bore the new and correct address. It is presumed under "the mailbox rule" that a properly addressed correspondence is mailed in the ordinary course of business unless rebutted. The appearance of the properly addressed decision in the case record, together with the mailing custom or practice of the Office, will raise the presumption that the decision was properly mailed. Appellant has not submitted any evidence to rebut the presumption.[21]

The Board finds that the Office properly denied appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated March 30 and January 19, 1999 are hereby affirmed.

Dated, Washington, DC
December 19, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[21] *See Clara T. Norga*, 46 ECAB 473, 487 (1995).