U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHALIE M. ALENSKI and U.S. POSTAL SERVICE,
POST OFFICE, Riverhead, NY

Docket No. 99-1195; Submitted on the Record;
Issued September 26, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's application for review on January 7, 1999.

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 of 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.[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]

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 employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Eve O. Morris*, 44 ECAB 470, 473-74 (1993).

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 adjudicator 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.[5] 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 record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decisions dated September 13, 1996, June 12, 1997 and July 13, 1998, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors.[7] By letter dated October 10, 1998, appellant requested reconsideration and submitted additional evidence in support of her request. In a decision dated January 7, 1999, the Office found the newly submitted evidence insufficient to warrant reopening appellant's claim for further merit review. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty.

Regarding appellant's allegations that the employing establishment periodically requested that she obtain updated medical reports on very short notice, in order to support her continuing limited-duty status due to a 1992 back injury, placed her route up for bid without honoring a union agreement to provide appellant with a permanent limited-duty rehabilitation position and gave appellant less than 40 hours of limited duty a week on occasion, the Board finds that these

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] Following the Office's September 13, 1996 decision, appellant requested an oral hearing, which was held on April 9, 1997. In a decision dated June 12, 1997, an Office hearing representative denied appellant's emotional condition claim. By letter received June 11, 1998, appellant requested reconsideration and submitted additional evidence. In a decision dated July 13, 1998, the Office found the evidence insufficient to warrant modification of the prior decision.

allegations 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 Act.[8] Similarly, with respect to appellant's allegation that the employing establishment denied her medical attention on May 3, 1996, the date of her emotional breakdown, and later failed to timely inform her family that she had been hospitalized, this too, while generally related to the employment, is an administrative function of the employer.[9] 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.[10]

In a letter dated June 10, 1996, Susan Nichols, Manager Human Resources, stated that appellant was aware that a 40-hour limited-duty schedule was not guaranteed. In statements dated May 4 and August 29, 1996, Stephen A. Murray, appellant's immediate supervisor, explained that, in April 1993, having been released by her treating physician, appellant returned to full duty following her August 1992 back injury. Shortly thereafter, appellant filed a claim for a recurrence of disability and was returned to limited duty. The employing establishment requested that appellant submit medical evidence from her treating physician, Dr. Antonio Flores, to support her limited-duty status, but appellant failed to submit the requested reports, and instead submitted reports from her chiropractor, Dr. Michael D. Specter. As the Office had denied appellant's request to change her physician of record to Dr. Specter, the employing establishment declined to accept these medical reports as support for appellant's limited-duty status but nonetheless continued to honor appellant's request for limited duty. Mr. Murray stated that, in June 1995, having not worked at her regular job since May 1993, appellant requested a permanent sedentary position. Therefore, appellant's regular position was posted and appellant was given an unassigned regular position working temporary limited duty. In November 1995, appellant filed a claim for carpal tunnel syndrome, and continued to perform limited duty. On Friday May 3, 1996 the date of appellant's emotional breakdown, having learned that appellant's carpal tunnel claim was denied, Mr. Murray advised appellant that he expected her to return to full duty, and that, if she felt unable to perform full duty, she could apply for light duty and provide supporting medical evidence by Monday, May 6, 1996 or Tuesday, May 7, 1996, at the latest. Mr. Murray explained that appellant wished to have until Wednesday, May 8, 1996, to provide additional medical evidence, but that he advised her that this was not acceptable, and that if she felt she was unable to perform her full duties, she should stay off work until she had obtained the requested medical evidence supporting the need for light duty. Shortly after this exchange, at approximately 11:00 a.m., appellant became agitated and began pacing back and forth and saying that she needed to see a doctor. Mr. Murray explained that, as he did not know what forms to give appellant, he called the injury compensation office and left a message asking for assistance. He suggested to appellant that in the meantime, if she was really feeling badly,

[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. Dedonate*, 39 ECAB 1260, 1266-67 (1988).

[9] *Id.*

[10] *See Richard J. Ube*, 42 ECAB 916, 920 (1991).

she could go to her doctor and he would sort out the forms later. Appellant did not want to do this, and wished to speak to the union office, which she did. Mr. Murray stated that he then remembered to call the crisis team, who suggested that he call the employing establishment contract physician and make arrangements for appellant to be treated. However, when the contract physician's office informed Mr. Murray that they did not handle stress claims, he again sought assistance from the injury compensation specialist, who suggested he take appellant to a local emergency room. Mr. Murray followed this advice and transported appellant to the emergency room at approximately 11:30 a.m. Upon learning that the hospital wished to have appellant admitted, he provided a social worker with information about the events of the day and left his card with the social worker in case he needed to contact appellant's family. He stated that the social worker informed him that he would try to get information about appellant's family from her a little later. Mr. Murray then left the hospital at approximately 1:00 p.m.

In the instant case, there is no evidence in the record that the employing establishment acted unreasonably with respect to the assignment of appellant's work duties and schedules, or with respect to the requests that appellant produce updated medical reports to support her continued limited-duty status or that the employing establishment denied appellant medical treatment on May 3, 1996. Thus, appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

Appellant has also alleged that she was discriminated against by the employing establishment when she was, on occasion, not given a full 40-hour limited-duty work week, as a male coworker was given a 40-hour light-duty job. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[11] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[12] In the present case, the employing establishment denied that appellant was subjected to discrimination and appellant has not submitted sufficient evidence to establish that she was discriminated against by her supervisors.[13] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed discrimination.

With respect to appellant's allegation that she was forced to work outside her physical restrictions, the Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.[14] In this case, however, the record indicates that contrary to appellant's assertions, she

[11] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[12] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[13] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[14] *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

was told by the employing establishment that, if she did not feel able to perform her full duties, she could apply for light duty and provide medical evidence in support of her request.

Finally, regarding appellant's allegations that the employing establishment and the Office mishandled her compensation claims, the Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.[15]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[16] As no compensable factor of employment has been established, the Board will not address the medical evidence.[17]

The Board also finds that the Office did not abuse its discretion by denying appellant's application for review on January 7, 1999.

Following the decision dated July 13, 1998, appellant requested that the Office reconsider her case. In support of her request, appellant submitted a letter in which she reiterated the reasons she felt she was entitled to compensation for an emotional condition and submitted copies of several documents already contained in the record, on which she had highlighted selected portions.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his or her claim under 5 U.S.C. § 8128(a) by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[18] Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[19]

The Office, in denying appellant's application for review, properly noted that appellant had not raised any substantive legal questions nor included any new and relevant evidence, and, therefore, appellant's letter did not constitute a basis for reopening a case.[20] As appellant failed

[15] *See George A. Ross*, 43 ECAB 346, 353 (1991); *Virgule M. Hilton*, 37 ECAB 806, 811 (1986).

[16] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[17] *Margaret S. Krzycki*, *supra* note 16.

[18] 20 C.F.R. § 10.606(b).

[19] 20 C.F.R. § 10.608(b).

[20] *See James A. England*, 47 ECAB 115 (1995)*; Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z.*

to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated January 7, 1999 and July 13, 1998 are hereby affirmed.

Dated, Washington, DC
September 26, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

DeGuzman, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).