U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA GARCIA and ARCHITECT OF THE CAPITOL, SENATE OFFICE BUILDINGS, Washington, DC

Docket No. 00-416; Oral Argument Held November 8, 2000; Issued January 5, 2001

Appearances: *Harold Levi, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has 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 request for merit review.

On January 7, 1998 appellant, then a 55-year-old electromotive equipment mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on September 15, 1997 she first realized that her stress was due to employment factors. In an attached statement, she attributed her condition to being required to work one night a week, that she informed her supervisors of her inability to work a night shift due to her health and sleep disorder problems and that she and her supervisor had a dispute over her leave requests. Appellant stopped work on September 16, 1997.

In an October 8, 1997 report, Dr. Michael D. Potash, appellant's attending physician, diagnosed chronic depression and insomnia and opined that appellant was totally disabled due to these disabilities.

In a report dated December 18, 1997, Dr. Christina de Lima, attending physician, based upon a physical examination and medical history, diagnosed severe depression and concurred with Dr. Potash that appellant was totally disabled and should be allowed to retire on disability.

In a January 5, 1998 addendum, Dr. Potash, diagnosed dysthymic disorder which rendered appellant totally disabled from any work.

In an April 3, 1998 letter, the Office advised appellant that the evidence was insufficient to support her claim for an emotional condition. Specifically, the Office advised appellant that the evidence was insufficient to support that her claimed condition was due to factors of her federal employment and advised her as to the type of information required to support her claim.

In a letter dated April 30, 1998, appellant responded to the April 3, 1998 Office inquiry and submitted additional medical reports including March 13 and February 27, 1998 letters from Dr. Potash, a March 2, 1998 letter from Dr. de Lima, a January 28, 1998 letter from Dr. Michael D. Levine, a March 12, 1998 status report from Dr. Robert S. Viener, a Board-certified orthopedic surgeon, an undated letter from Dr. Richard C. Carson, a Board-certified anesthesiologist, and various treatment notes during the period May 16 through October 30, 1997 from Dr. Hamid R. Quraishi, an attending Board-certified orthopedic surgeon.

In a May 14, 1998 letter appellant submitted additional medical evidence from Drs. de Lima, Levine, Potash and Viener.

By decision dated June 25, 1998, the Office denied appellant's claim on the basis that she failed to establish an injury in the performance of duty. The Office specifically determined that appellant had failed to provide her employer with medical evidence supporting her contention that she was unable to perform the proposed shift change nor did she actually work the shift change and, thus she failed to establish that her disability was within the performance of duty.

On April 12, 1999 appellant's counsel requested reconsideration and submitted a March 8, 1999 report by Dr. Potash in support of her request.

By decision dated July 14, 1999, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification.

In a letter dated July 21, 1999, appellant's counsel requested reconsideration and contended that the Office erred in denying her claim as appellant had proven that her supervisor's actions were discriminatory and abusive.

By decision dated August 27, 1999, the Office denied appellant's request for a merit review on the basis that the evidence submitted was repetitious and immaterial.

The Board finds that appellant has not met her burden of proof 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 his 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

[1] 5 U.S.C. §§ 8101-8193.

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]

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.[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 dispute regarding a shift change one day a week and disputes with her supervisor regarding leave requests. The Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether the alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that the employing establishment improperly proposed to change her work shift from the daytime to the nighttime. As noted above, disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. On the other hand, the Board has held that a change in an employee's work shift may under certain circumstances be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty.[7] Appellant's assertion that the proposed change in work shift would aggravate her condition relates to an administrative function of the employing establishment. Furthermore, appellant did

[2] *See Thomas D. McEuen*, 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] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

[6] *Id.*

[7] *See Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

not work the shift change. To show that an administrative action such as the proposed change in work shift implicated a compensable employment factor, appellant would have to show that the employing establishment committed error or abuse.[8] Appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the proposed change in work shift.

Regarding appellant's allegations that the employing establishment wrongly denied her leave requests, the Board finds that this allegation relates 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.[9] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[10] 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.[11] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters as she has failed to establish that the employing establishment acted unreasonably with respect to administrative matters.

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.[12]

The Board also finds that the Office properly refused to reopen the claim for merit review.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (i) showing that the Office erroneously applied or interpreted a point of law; or (ii) advancing relevant legal argument not previously considered by the Office; or (iii) submitting relevant and pertinent evidence not previously considered by the Office.[13] Section 10.607 provides that when an application for review of the merits of a

[8] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[9] *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. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[10] *Id.*

[11] *See Richard J. Dube*, *supra* note 8.

[12] 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).

[13] 20 C.F.R. § 10.606.

claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[14]

In her July 21, 1999 letter requesting reconsideration, appellant did not submit any relevant and pertinent evidence not previously considered by the Office and did not argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a point of law not previously considered by the Office. Appellant merely restated arguments considered in the prior decision and that she did not agree with the Office's decision denying her claim. Therefore, the Office properly denied her request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 27 and July 14, 1999 are hereby affirmed.[15]

Dated, Washington, DC
January 5, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member

[14] 20 C.F.R. § 10.607.

[15] Appellant's counsel contended at oral argument that appellant had sustained tendinitis causally related to factors of her federal employment. The Board concludes that as the case record is devoid of any final decision respecting this alleged condition, the Board may not properly exercise jurisdiction, over this issue. *See* 20 C.F.R. § 501.2(c).