

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE N. NEWMARK and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Sacramento, CA

*Docket No. 99-562; Submitted on the Record;
Issued January 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has established that she sustained an emotional condition causally related to factors of her federal employment.

On September 14, 1993 appellant, then a 41-year-old secretary, filed an occupational disease claim alleging that she sustained depression as a result of her federal employment. She stopped work on May 12, 1993 and did not return.

By decision dated January 10, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence did not establish that she sustained an emotional condition causally related to compensable employment factors. The Office listed as a compensable employment factor discussions between appellant and her supervisor, Richard H. Ross, regarding her job duties. The Office noted that, during one of the counseling sessions, Mr. Ross told appellant that she "was the worst secretary he had ever had." The Office further found that appellant's "special assignment to clean up her backlog of cases" occurred within the performance of duty. The Office found that appellant had not established as factual that a prior supervisor, Mr. Ball, sexually harassed her or questioned her honesty or that she experienced harassment and discrimination from Mr. Ross or verbal abuse from a coworker. The Office determined that appellant's complaints about her performance review, an investigation by the employing establishment into alleged misconduct, a recommendation that she switch to a different position and her termination from her position for nonattendance did not occur in the performance of duty.

On February 6, 1995 appellant requested a hearing on her claim. In a decision dated July 7, 1995, a hearing representative set aside the Office's January 10, 1995 decision and remanded the case for resolution of a conflict in medical opinion between appellant's attending physician Dr. Robert S. Treat, a Board-certified psychiatrist and Dr. Paul D. Michaels, an Office referral physician.

In a decision dated November 20, 1995, the Office denied appellant's claim on the grounds that the weight of the medical opinion evidence, as represented by the opinion of Dr. Arthur C. Lamb, a Board-certified psychiatrist, who performed an impartial medical examination, established that she did not have an emotional condition causally related to compensable factors of employment.

On November 22, 1995 appellant requested a review of the written record by an Office hearing representative. In a decision dated April 21, 1997, the hearing representative affirmed the Office's November 20, 1995 decision. The hearing representative noted that he believed that appellant's dispute with her coworker, Ms. Koon, constituted the only compensable factor of employment but that even accepting the Office's previous determination of the compensable employment factors, Dr. Lamb's report established that appellant did not sustain an emotional condition due to these factors.

By letter dated April 21, 1998, appellant requested reconsideration of her claim. In a decision dated July 24, 1998, the Office denied modification of its prior decision.

The Board finds that appellant has not established that she sustained an emotional condition causally related to factors of her federal employment.

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.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

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

¹ 5 U.S.C. §§ 8101-8193.

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).

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

Regarding appellant's allegations that her supervisor improperly assigned her work duties, wrongly investigated her for alleged misconduct and gave her a poor performance evaluation, the Board finds that these 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.⁷ Although the handling of investigations, evaluations and the assignment of work duties are generally related to the employment, they are administrative functions of the employer and not duties of the employee.⁸ 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.⁹ Appellant has not submitted any evidence supporting error or abuse by the employing establishment in its administration of these matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant further alleged that her supervisor from 1991 to 1992, Mr. Ball, sexually harassed her and that her supervisor from July 1992 onwards, Mr. Ross, harassed and discriminated against her. 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 her regular duties, these could constitute employment factors.¹⁰ 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.¹¹ In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or

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

⁶ *Id.*

⁷ 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).

⁸ *Id.*

⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

discriminated against by her supervisors.¹² Mr. Ball denied sexually harassing appellant. Appellant filed an Equal Employment Opportunity Complaint against Mr. Ross for discrimination; however, the employing establishment denied appellant's complaint. She has provided no corroborating evidence, such as witness statements, to establish that the alleged harassment and discrimination actually occurred.¹³ Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Many of appellant's allegations concerns problems with the manner in which her supervisor, Mr. Ross, performed his supervisory functions. An employee's complaints concerning the manner in which a supervisor performs his duties as a supervisor or the manner in which a supervisor exercises new supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.¹⁴ This principle recognizes that a supervisor or manager in general must be allowed to perform their duties, that employees will at times dislike the actions taken, but the mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.¹⁵ Appellant has not submitted evidence of error or abuse sufficient to substantiate that her supervisor acted unreasonably in the performance of his duties.

Appellant also alleged that she experienced stress due when a coworker "lashed out" at her. In a statement dated December 2, 1993, the coworker, Ms. Koon, related that she was upset with appellant for not completing her work. When appellant asked her what was the matter, she told her that she had "to start contributing your half to this office. When you [are] here, you [are] not here. Either you are out in the office on the telephone or you are in the cafeteria having coffee and you leave early all the time. It [is] not fair to me or to the office." Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁶ Appellant has not shown how the discussion with Ms. Koon over the performance of her work duties would rise to the level of verbal abuse¹⁷ or otherwise fall within the coverage of the Act.¹⁸

¹² 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).

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁴ *Abe E. Scott*, 45 ECAB 164 (1993).

¹⁵ *Id.*

¹⁶ *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹⁷ See, e.g., *Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). Compare *Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

¹⁸ The Board notes that the hearing representative indicated his belief that the dispute between appellant and Ms. Koon constituted a compensable factor of employment. However, the hearing representative properly

The Office found that Mr. Ross' comments regarding appellant's work performance and his statement that she was the "worst secretary he had ever had" occurred in the performance of duty. The Office further found that appellant's work completing overdue assignments constituted a compensable factor of employment. However, appellant's burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁹

In this case, the Office determined conflict existed in the medical opinion evidence and referred appellant to Dr. Lamb for an impartial medical examination. In a report dated October 23, 1995, he reviewed appellant's medical and work history, discussed the results of psychological testing and listed current findings. Dr. Lamb diagnosed dysthymia and a personality disorder not otherwise specified with dependent, histrionic and avoidant features. He stated:

"[Appellant] has had almost lifelong dysthymia for chronic depression. The question is did she suffer a severe aggravation of this condition to the point where she could have been diagnosed as suffering from a major depressive disorder or did she merely have that kind of reaction that many people would have to be severely criticized by a boss with this suggestion that they stepped down to a less demanding position. The chronology of the events in this case suggest to me the latter.

"Although quite preoccupied with problems in her personal life, I believe that it can be assumed that [appellant] became hurt and angry when initially criticized by SAC [special agent in charge] Ross. The way she responded suggests that she protected her self-esteem, thereby, minimizing depression by believing that he was the one at fault by being a poor supervisor. [Appellant], in fact, did not become disabled by depression but continued to work, albeit, in a disgruntled state.

"Then when she received an 'unacceptable' appraisal, after completing her project of backlogged work, she became more hurt and angry but not disabled by depression. [Appellant], apparently, did have some emotional upset confrontation with Mr. Ross, but she ended up filing a grievance and continuing to work. She apparently expected to be vindicated when her side was made known.

"It was only after [appellant] was informed about her grievance failed that, she decided, she could no longer work for SAC Ross. To feel you cannot work for a

considered the factors of employment previously found by the Office to be compensable in finding that the report of the impartial medical specialist constituted the weight of the medical evidence.

¹⁹ See *William P. George*, 43 ECAB 1159, 1168 (1992).

boss and to walk off the job after losing a grievance is not certain indication that a depression exists.”

Dr. Lamb found that the events “strongly suggested” that appellant would not have left work if she had prevailed in her grievance of her performance evaluation. He noted that appellant left work on May 12, 1993 but did not seek medical treatment until June 14, 1993 and that Dr. Treat found that appellant had recovered by August 1993. Dr. Lamb found that appellant had not sustained an emotional condition caused by factors found to be within the performance of duty. He opined that “[appellant] was well defended against the critical remarks and demands made to her by SAC Ross that constitute the only accepted factors occurring in the performance of duty that are relevant.”

Where there is a conflict of medical opinion and the cases referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.²⁰ The Board finds that the opinion of Dr. Lamb was based upon a proper factual and medical background and was sufficiently well rationalized to be given special weight. Under the circumstances of this case, his opinion constitutes the weight of the medical evidence.

Appellant submitted a report dated November 16, 1996 from Dr. Carolyn H. Knowles, a clinical psychologist. She discussed appellant’s problems with meeting the demands of her supervisor prior to retiring on disability in 1993. Dr. Knowles diagnosed major depressive disorder, recurrent and dependent personality disorder. She found that the “events surrounding her termination from employment with the [employing establishment] appear to this treating psychotherapist to have been the precipitating factors in causing a dysthymic -- condition which did not impair her capacity to work-to progress to a disabling depression.” Dr. Knowles did not relate appellant’s condition to a specific factor claimant determined by the Office to be compensable or provide a rationalized explanation regarding why a specific factor of federal employment aggravated her preexisting depressive disorder. The analysis provided by her is not sufficient to overcome the special weight afforded to Dr. Lamb as the impartial medical specialist selected in this case.

²⁰ *Josephine L. Bass*, 43 ECAB 929 (1992).

The decision of the Office of Workers' Compensation Programs dated July 24, 1998 is hereby affirmed.

Dated, Washington, DC
January 18, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member