U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOKNAMSIK L. HORTEN and U.S. POSTAL SERVICE,
POST OFFICE, Johnstown, PA

Docket No. 01-1721; Submitted on the Record;
Issued July 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of her employment.

On September 12, 1999 appellant, then a 52-year-old clerk, filed an occupational disease claim alleging that she sustained an emotional condition due to a change in her work shift, being subjected to harassment and discrimination by the employing establishment management, being harassed by coworkers when she obtained a light-duty position as the result of an Equal Employment Opportunity Commission (EEOC) agreement, being reassigned by the employing establishment to a mail processor position in violation of the EEOC agreement and being required to perform work outside of her medical restrictions.

In a letter to appellant dated August 31, 1999, Postmaster Michael Hudak, Jr., denied appellant's request for a change to a daylight shift. He stated that he had reviewed the medical opinions she submitted in support of her request for a change to a daylight shift but felt the physicians were not aware of all the facts involved. Mr. Hudak stated that appellant voluntarily bid on a midnight shift tour (Tour 1) in 1990 and had been on Tour 1 since that time. She voluntarily relinquished the bid assignment in 1994 but continued working the Tour 1 schedule. He noted that there had been 102 job vacancies since 1994 and there were 34 jobs for which appellant did not bid even though she would have been the senior bidder. Of these 34 jobs, several were afternoon shifts that would have allowed her to assume proper sleep patterns and several others were midnight shift but with consecutive days off.

In a statement dated September 20, 1999, Mr. Louis Fallon, an employing establishment injury compensation manager, stated that appellant's stress could be due to her ownership and involvement with a restaurant while working a full-time job at the employing establishment and this could also account for her objections to working certain shifts and need for certain days off. Mr. Fallon noted that the employee's union had challenged an EEOC agreement that it felt unfairly placed appellant in a position protected by the union's National Agreement over senior qualified applicants. The EEOC agreement involving appellant contained a provision that the

agreement would be null and void if any terms violated the collective bargaining agreement[1] but appellant did not ask to renegotiate the agreement or reinstate her EEOC complaint, but had instead filed a claim for a stress condition. Mr. Fallon noted that appellant had had the opportunity to bid on positions that would have provided her with her preferred shift and days off while at the same time avoiding violation or conflict with the collective bargaining agreement but she failed to do so and, instead, was seeking to be placed in a job that is on a preferred shift with preferred days off without consideration of the seniority and bidding rights of other employees.

In a report dated April 22, 1998, Dr. Fredrick W. Munzer, appellant's attending physician, stated that appellant was working a split shift, primarily at night. He stated that she wanted to have a daylight shift but did not have the seniority to obtain it. Dr. Munzer stated that appellant had been suffering fatigue, irritability and symptoms of depression that seemed to be related to lack of ability to sleep during the daylight hours.

In a report dated May 17, 1999, Dr. Munzer stated that appellant had significant health problems related, at least in part, to job stress and particularly to changing shift patterns and loss of sleep. He stated that it would be beneficial if appellant could be assigned to a position where work hours were limited to the daylight shift with two consecutive days off to allow proper rest and sleep patterns.

In a report dated September 7, 1999, Dr. Munzer stated that appellant felt the employing establishment had violated a contract with her and she was upset due to her dissatisfaction with work scheduling and job conditions.

In a report dated November 4, 1999, Grant W. Croyle, Ph.D., a clinical psychologist, diagnosed adjustment disorder with mixed anxiety and depressed mood secondary to occupational problems, rule out associated somatic disorder; obsessive-compulsive personality traits and narcissistic features, rule out post-traumatic stress disorder delayed onset sparked by workplace circumstances given history of earlier spousal abuse; right shoulder pain related to past work-related injury; psychosocial stressors: workplace conflicts perceived breach of contract/agreements, perceived minority discrimination, off work without monetary income, marital strain exacerbated by work and employment conditions. He stated that his opinion is that appellant was experiencing emotional impairment with secondary physical symptoms in reference to her inability to adapt effectively to perceived harsh workplace conditions. Dr. Croyle stated:

> " It is her perception [that] agreements and contracts have been breached…. She expects she will be treated with rejection, isolation and … hostility if returned to her former place of employment….

[1] The record contains a mediation agreement dated June 22, 1999 that indicates that the employing establishment would assist appellant in submitting a request for a permanent reassignment to light duty and that her days off would be Sunday and Monday. The agreement contained a provision that the agreement would be null and void if any terms were determined to violate a provision of the collective bargaining agreement.

He indicated that appellant wanted to work in an environment that was fair and rewarded people for their efforts and "within conditions that she believes others had agreed to in the past."

By decision dated April 5, 2000, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence of record failed to establish that her emotional condition was causally related to her change in work shift.

By letter dated April 19, 2000, appellant requested a hearing that was held on February 26, 2001.

In a report dated June 5, 2000, Dr. Munzer diagnosed situational anxiety and depression. He noted that appellant had problems with "scheduling, on-the-job stress, marital discord because of being on opposite schedules from her husband who also works for the [employing establishment]." Dr. Munzer stated. "I had attempted to have [the employing establishment] adjust her schedule to suit her physical and emotional needs …, they felt that was not appropriate." He noted that appellant was trying to refocus getting away from the employment situation and compensation case which had been consuming her life and was discussing alternative business ventures. Dr. Munzer stated that appellant was a restaurant manager and was considering purchasing additional property and was trying to get her focus back on business and improving her financial situation. He stated:

> "I feel [appellant] is suffering from significant depression and situational anxiety caused in a large part if not exclusively by her employment situation. I have advised her in the past and continue to advise her that, she should not go back to that job. Physically, she could perform alternate duty if they accommodate her schedule and neck problems, however, emotionally, I am not sure she will cope."

In a report dated July 7, 2000, Dr. William R. Acosta, a neurologist, stated that appellant had work restrictions that included no heavy lifting, pushing, or pulling. He noted that appellant told him on April 18, 2000 that she had been given a work assignment that exceeded her work restrictions and had experienced cervical pain since then.

In a report dated February 1, 2001, Dr. Croyle stated that appellant had perceptions of racial discrimination and that she had a cervical neck injury for which she obtained modified duty but the employing establishment later reneged on its agreement.

In a statement dated March 22, 2001, Dennis Mattani, supervisor of customer services, stated that appellant had told him that her coworkers were refusing to talk to her but she did not tell him that she felt they were harassing her. He advised appellant that he could not make the other workers talk to her and he did not investigate further because appellant did not allege harassment.

In a statement dated March 28, 2001, the employing establishment denied that it had erred or acted abusively in its handling of administrative matters. It denied that appellant was ever asked to perform work in excess of her physical restrictions and noted that she had not provided any copies of medical restrictions. The employing establishment stated that it was not aware of any harassment of appellant by coworkers.

By decision dated May 4, 2001 and finalized May 8, 2001, the Office hearing representative affirmed the Office's April 5, 2000 decision and stated that appellant had failed to establish that her emotional condition was causally related to any compensable factors of employment.[2]

The Board finds that appellant has failed to establish that she sustained an emotional condition causally related to factors of her 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 his or 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.[3] 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 his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[4]

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.[5] 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.[6]

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.[7] 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] The record contains additional evidence which was not before the Office at the time it issued its May 8, 2001 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

[3] 5 U.S.C. §§ 8101-8193.

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

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

[6] *See Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[7] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

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

Regarding appellant's allegations that the employing establishment reassigned her to a mail-processor position in violation of an EEOC agreement, the Board finds that the scheduling of job assignments relates to administrative or personnel matters and does not fall within the coverage of the Act.[9] Although the scheduling of job assignments is generally related to the employment, it is an administrative function of the employer and not a duty 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] In a statement dated March 28, 2001, the employing establishment denied that it had erred or acted abusively in its handling of administrative matters. In a statement dated September 20, 1999, Mr. Fallon, an employing establishment injury compensation manager, stated that the employing establishment had not acted abusively or in error in handling administrative matters concerning appellant. He stated that appellant's stress could be due to her ownership and involvement with a restaurant while working a fulltime job at the employing establishment and this could also account for her objections to working certain shifts and need for certain days off. Mr. Fallon noted that the employee's union had challenged an EEOC agreement that it felt unfairly placed appellant in a position protected by the union's National Agreement over senior qualified applicants. The EEOC agreement involving appellant contained a provision that the agreement would be null and void if any terms violated the collective bargaining agreement but appellant did not ask to renegotiate the agreement or reinstate her EEOC complaint, but had instead filed a claim for a stress condition. The evidence of record does not substantiate that the employing establishment erred or acted abusively regarding this administrative matter. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant alleged that the employing establishment improperly changed her work shift. 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 duty 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.[12] In the present case, appellant has not submitted sufficient

[8] *Id.*

[9] *See Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[10] *Id.*.

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

[12] *See Gloria Swanson*, 43 ECAB 161, 165-68 (1991).

evidence to establish that the employing establishment effectuated a change in her duty shift in such a manner as to establish a compensable employment factor. In a letter to appellant dated August 31, 1999, Postmaster Hudak, denied appellant's request for a change to a daylight shift. He stated that he had reviewed the medical opinions she submitted in support of her request for a change to a daylight shift but felt the physicians were not aware of all the facts involved. Mr. Hudak stated that appellant had voluntarily bid on a midnight shift tour (Tour 1) in 1990 and had been on Tour 1 since that time. She voluntarily relinquished the bid assignment in 1994 but continued working the Tour 1 schedule. Mr. Hudak noted that there had been several job vacancies since 1994 that would have allowed appellant to move to a day shift but she did not bid on these jobs. In a statement dated September 20, 1999, Mr. Fallon noted that appellant had had the opportunity to bid on positions that would have provided her with her preferred shift and days off while at the same time avoiding violation or conflict with the collective bargaining agreement but she failed to do so. Considering all the circumstances in this case, the record demonstrates appellant's frustration at continuing with her tour/shift and her inability to affect a change to a day shift tour that does not impact the seniority and building rights of other employees. Appellant has not established a compensable factor.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. 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.[13] 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.[14] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination. In a statement dated March 22, 2001, Mr. Mattani, supervisor of customer services, stated that appellant had told him that her coworkers were refusing to talk to her but she did not tell him that she felt they were harassing her. He advised appellant that he could not make the other workers talk to her and he did not investigate further because appellant did not allege harassment. Appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[15] Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant alleged that she was required to work outside her medical 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.[16] In a statement dated March 28, 2001, the employing establishment denied that appellant was ever asked to perform work in excess of her physical restrictions and noted that she had not provided

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

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

[15] *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).

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

any copies of medical restrictions. Appellant has not specified the duties that exceeded her medical restrictions or provided proof that the employing establishment exceeded any work restrictions. Therefore, this allegation cannot be deemed a compensable factor of employment.

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.[17]

The decision of the Office of Workers' Compensation Programs dated May 8, 2001 is affirmed.

Dated, Washington, DC
July 24, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Garry M. Carlo,* 47 ECAB 299, 305 (1996).