U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PENELOPE C. OWENS and U.S. POSTAL SERVICE,
POST OFFICE, Mankato, MN

Docket No. 03-1078; Submitted on the Record;
Issued July 7, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

On May 16, 2002 appellant, then a 50-year-old distribution clerk, filed an occupational disease claim alleging that she sustained work-related stress. By decision dated August 19, 2002, the Office of Workers' Compensation Programs denied her claim on the grounds that she did not establish fact of injury. In a letter dated September 25, 2002, appellant requested reconsideration of her claim and submitted additional factual and medical evidence. By decision dated January 7, 2003, the Office denied modification of its August 19, 2002 decision. The Office found that appellant had not established any compensable factors of employment.

The Board finds that the case is not in posture for decision.

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.[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]

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[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).

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]

Appellant attributed her emotional condition, in part, to the performance of her day-to-day duties as a distribution clerk. She related that, in the fall of 2002, she made an error "entering weights of the local newspapers into the computer." Appellant stated that, due to this error, management removed her from her work location and prohibited her from entering information into the computer. She related:

> "This entire event created a huge amount of stress for me. I enjoyed working in the [work location] with the customers over the [tele]phone, in person and the type of work that was involved. I felt a great deal of guilt over the error I had made in entering the percentage of weight for the newspaper....
>
> "My stress level began to increase along with shame and depression because of the error I had made -- even though it was an innocent error, I felt I should have known better and caught the error."

Appellant indicated that her psychiatrist recommended hospitalization and that, when she refused, he recommended time off from work. She stated that she was off work from the end of January 2002 until April 2002, when she gradually returned to full-time employment.

In this case, appellant related that she experienced stress and depression due to making an error while entering information into a computer at work. As discussed above, where a claimed disability results from an employee's emotional reaction to the performance of his or her regular or specially assigned duties or to an imposed employment requirement, the disability comes

[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.*

within the coverage of the Act.[7] Since appellant's transcribing error in the fall of 2002 related to the performance of her day-to-day duties as a distribution clerk and arose out of the nature of her work, she has established a compensable factor under *Cutler*.

Regarding appellant's claim of harassment by her supervisors and coworkers, the Board notes that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. However, for harassment to give rise to a compensable factor of employment there must be evidence that harassment or discrimination did, in fact, occur.[8] Mere perceptions of harassment are not compensable. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement, the claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[9] In this case, appellant maintained that management placed orange highlighting on the job requirements for positions in her tour of duty because of her physical restrictions. She further related that a person "had handwritten in 'YUK YUK'" under her name on the job posting that she had received. However, appellant has submitted insufficient evidence substantiating that these actions occurred as alleged.[10] Appellant also stated that she was sexually harassed by a manager in July 2002, who touched her buttocks. She indicated that the sexual harassment claim "was dropped due to lack of evidence." Appellant further related that after the sexual harassment investigation a manager informed her of complaints that she had breached the confidentiality of persons involved in the investigation.[11] Again, however, appellant has not submitted any reliable and probative evidence establishing that she was sexually harassed at work or that a manager told her that she had breached confidentiality. As noted above, there must be some evidence that the harassment did occur as appellant's own perceptions of harassment are not compensable under the Act.

Appellant further contended that she experienced stress because management no longer allowed her to work in the area where she made the data entry mistake. However, the assignment of work is recognized as an administrative function of the employer and, absent evidence of error or abuse, does not constitute a compensable factor of employment.[12] In this case, appellant has not submitted any evidence showing that the employing establishment committed error or abuse in its assignment of work to appellant.

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[7] *Robert Bartlett*, 51 ECAB 664 (2000).

[8] *Helen P. Allen*, 47 ECAB 141 (1995).

[9] *Ernest J. Malagrida*, 51 ECAB 287 (2000).

[10] Further, it is unclear why the placement of orange highlighting on a position description would constitute harassment.

[11] Appellant further noted that she waited years to file her claim for carpal tunnel syndrome because she was afraid of retaliation.

[12] *See Peggy R. Lee*, 46 ECAB 527 (1995).

Appellant related that, in April 2002, she learned that her job had been abolished and that she would have to bid for a new position with different workdays and hours. However, an employee's frustration over not being permitted to work a particular shift or to hold a particular position is not covered under the Act.[13] Changes in workdays and hours, positions, locations and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty. However, a change in a duty shift does not arise as a compensable factor *per se*. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in duty shift, *i.e.*, a compensable factor arising out of and in the course of employment or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.[14] The assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.[15] In this case, while appellant mentioned her change in position and work hours, she did not allege that she was unable to perform the duties of the position and thus she has not identified a compensable employment factor.

Appellant has established as a compensable factor of employment her error entering information into a computer in the fall of 2002 during the performance of her regularly assigned work duties. However, her 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.[16] In a report dated August 21, 2002, Dr. Edward C. Sathoff, a Board-certified psychiatrist, related that he had treated appellant since April 1999 for recurrent major depressive disorder and post-traumatic stress disorder. He opined that appellant's "work environment has negatively affected her psychiatric functioning." Dr. Sathoff stated:

> "In September of 2001, [appellant] had made an error keying in data to the computer. She had referred to it as having been a[n] 'honest error' and had told me that the computer did [not] kick it back out. The postmaster banned her from working in the bulk mail area and sent her back to throwing mail again, something that is difficult for her with her orthopedic difficulties. [Appellant] also reports that her supervisor called her into his office and ended up yelling at her. She reports that she was no longer allowed to touch the computer. When I saw [appellant] in November, she told me that 'they keep needling me' and acknowledged that her supervisor had gotten her upset and crying again."

[13] *Ruth C. Borden*, 43 ECAB 146 (1991).

[14] *Helen Allen*, 47 ECAB 141 (1995); *Peggy R. Lee*, 46 ECAB 527 (1995).

[15] *Id*.

[16] *See William P. George*, 43 ECAB 1159, 1168 (1992).

The Board finds that, although Dr. Sathoff did not provide sufficient medical rationale explaining how the accepted employment factor caused or contributed to appellant's emotional condition, his report is generally supportive of appellant's claim and sufficient to require further development by the Office.[17] The case, therefore, will be remanded to the Office for preparation of a statement of accepted facts and further development of the medical evidence on the issue of whether appellant sustained an emotional condition causally related to the compensable employment factor. After such further development as is deemed necessary, the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated January 7, 2003 and August 19, 2002 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
July 7, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *See John J. Carlone*, 41 ECAB 354 (1989).