U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ZENAIDA D. DEVERA and U.S. POSTAL SERVICE,
POST OFFICE, Oakland, CA

Docket No. 02-74; Submitted on the Record;
Issued May 2, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

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 properly determined that appellant abandoned her request for a hearing.

On July 10, 2000 appellant, then a 45-year-old manager, filed a claim alleging that she sustained an emotional condition due to various incidents and conditions at work. Appellant claimed that she was harassed by Paul Klutz, a supervisor, on several dates including June 16, 2000. She claimed that she was also harassed by two other supervisors, Pam Tebbetts and Scott Tucker, who also failed to address her concerns regarding Mr. Klutz. Appellant stopped work on June 16, 2000. By decision dated February 6, 2001, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. By decision dated August 23, 2001, the Office determined that appellant abandoned her request for a hearing.

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

[1] 5 U.S.C. §§ 8101-8193.

employee's fear of a reduction-in-force or his 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 number of employment incidents and conditions and the Office denied her claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that on June 16, 2000 Mr. Klutz, a supervisor, confronted her in an abusive and threatening manner regarding her treatment of priority mail. She claimed that Mr. Klutz yelled at her and said angrily, "There's no such thing as advanced priority mail," "What the hell is this?" and "You [a]re really going to get it this time." Appellant asserted that Mr. Klutz wrongly accused her of lying about the priority mail. She claimed that Mr. Klutz shook his clenched fists two inches away from her face on three occasions and asserted that she felt Mr. Klutz was going to strike her. She indicated that Ms. Tebbetts, a supervisor, arrived at her work site about an hour after Mr. Klutz started yelling at her, but did not attempt to stop Mr. Klutz even though he continued to shake his clenched fist two inches away from her face. Appellant alleged that later on June 16, 2000 Ms. Tebbetts confronted her about her conversation with Mr. Klutz earlier in the day. She claimed that Ms. Tebbetts was furious, pointed her fingers

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[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.*

at her and told her to give up her management position. Appellant asserted that Ms. Tebbetts intentionally held up paperwork in order to delay her receipt of pay checks.

Appellant alleged that she was discriminated against with respect to promotions and pay, particularly in comparison with Ms. Tebbetts due to her "personal relationship" with Mr. Klutz. She claimed that on June 2, 2000 Mr. Klutz and Ms. Tebbetts harassed her and threatened to discipline her because she submitted a statement in connection with an investigation of them. Appellant claimed that Mr. Klutz harassed her by asking friends to call her at home in order to convince her to return to work. She asserted that on June 3, 2000, Ms. Tebbetts refused to talk about false allegations she had made against her and told her that she had made a mistake in hiring her. Appellant claimed that Ms. Tebbetts unreasonably threatened her with disciplinary action on several occasions.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[7] 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.[8]

With respect to Mr. Klutz' actions on June 16, 2000, Mr. Klutz has submitted a statement, in which he admitted that he raised his voice, but denied that he shook his fists close to appellant's face as alleged. The record contains statements, in which Marie Nwaki, a supervisor, indicated that on June 16, 2000 Mr. Klutz was "angry and really upset, not just pissed off" with appellant and noted that she had never seen him that angry. Ms. Nwaki indicated that Mr. Klutz yelled at appellant, "What the hell is the priority mail still sitting here [for]?" She noted that at one point Mr. Klutz' and appellant's faces were a few inches apart and that Mr. Klutz had his two fists clenched by his sides. In other statements, Ruben Domingo, a supervisor, indicated that Mr. Klutz was highly irate on June 16, 2000 and yelled at appellant.[9] Rosalie Keb, another supervisor, stated that Mr. Klutz was very enraged on June 16, 2000 and was standing about a foot away from appellant with his fists clenched.[10]

The Board has reviewed the available evidence and finds that appellant has established an incident of a verbal altercation with Mr. Klutz on June 16, 2000. Although not every aspect of appellant's claim has been established (such as Mr. Klutz waving his fists close to appellant's face), the record shows that the combination of Mr. Klutz' actions and statements on June 16, 2000 constituted an altercation with her supervisor.[11]

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

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

[9] He indicated that he did not hear the words that Mr. Klutz said to appellant.

[10] She stated that Mr. Klutz said to appellant, "There's no such thing as advanced priority mail."

[11] *See Abe E. Scott*, 45 ECAB 164, 173 (1993).

The Board further finds, however, that appellant has not established that Mr. Klutz committed harassment or discrimination on any other occasion or that Ms. Tebbetts engaged in harassment or discrimination as alleged. The employing establishment denied the occurrence of these other claimed acts of harassment and discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by Mr. Klutz or Ms. Tebbetts on these other occasions.[12] She did not provide corroborating evidence, such as witness statements, with respect to these other claims.[13] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed incidents of harassment and discrimination apart from Mr. Klutz' actions on June 16, 2000.

Appellant also claimed that Ms. Tebbetts unfairly disciplined her for her use of leave and wrongly placed her on absent without leave status. She asserted that Ms. Tebbetts acted improperly in handling work assignments and disciplinary actions, falsified work reports and gave conflicting instructions. 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.[14] Although the handling of disciplinary actions, 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.[15] 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.[16] Appellant has not submitted sufficient evidence to support her assertion that the employing establishment committed error or abuse in connection with administrative matters.[17] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

In the present case, appellant has established a compensable employment factor with respect to the altercation with Mr. Klutz on June 16, 2000. As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this

[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] *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).

[15] *Id.*

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

[17] It appears that appellant filed an Equal Employment Opportunity complaint in connection with some of these matters, but the record does not contain copies of any decision.

purpose.[18] After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

The Board further finds that the Office properly determined that appellant abandoned her request for a hearing before an Office hearing representative.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[19]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[20] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

[18] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[19] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[20] 20 C.F.R. § 10.622(b) (1999).

> "Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, [the Branch of Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [the Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
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> "This course of action is correct even if [the Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[21]

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on July 26, 2001. The record shows that the Office mailed appropriate notice to the claimant at her last known address. The record also supports that appellant did not request postponement and that she failed to appear at the scheduled hearing. She also failed to provide any notification for her failure to appear within 10 days of the scheduled date of the hearing, in that she did not provide notification for such failure until August 7, 2001, *i.e.*, a date more than 10 days after July 26, 2001.[22] As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.[23]

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

[22] In a letter dated August 2, 2001 and received by the Office on August 7, 2001, appellant indicated that she was unable to make it to the hearing scheduled for July 26, 2001 because she was unable to find the hearing site.

[23] *See also Claudia J. Whitten*, 52 ECAB ___ (Docket No. 99-2128, issued August 22, 2001).

The February 6, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board. The August 23, 2001 decision of the Office is affirmed.

Dated, Washington, DC
May 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member