U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELISSA R. SHAFFER and U.S. POSTAL SERVICE,
WEST WORTHINGTON STATION, Columbus, OH

Docket No. 03-552; Submitted on the Record;
Issued May 6, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

This case has been before the Board previously. In an order dated July 2, 2002, the Board remanded the case to the Office of Workers' Compensation Programs because the record before the Board was incomplete and would not permit an informed adjudication of the case by the Board.[1] Further procedural history indicates that on October 16, 2000 appellant, then a 29-year-old window clerk, filed an occupational disease claim alleging that, upon arrival at a new bid job on September 25, 2000, she was harassed and refused accommodations by employing establishment management.[2] By letter dated October 24, 2000, the Office informed appellant of the type evidence needed to support her claim. In a second letter that same day, the Office requested that the employing establishment furnish information regarding appellant's allegations.

In response, appellant submitted a diary describing events that took place from September 25 to 29, 2000, reports in which Dr. Patricia A. Child and Dr. Joan O. Hildebrand diagnosed depression, further medical evidence describing her physical limitations, an additional personal statement, a statement from Thomas Woerner, union steward and additional evidence including correspondence with the employing establishment and information regarding

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[1] Docket No. 01-2077 (issued July 2, 2003).

[2] Appellant also filed an occupational disease claim on September 26, 1998 for harassment at another employing establishment facility. By decision dated October 28, 1999, the Office accepted that she sustained employment-related stress for incidents that occurred from 1997 to 1999. She had missed intermittent periods of work and received appropriate compensation. That case was adjudicated by the Office under file number 090446438 whereas the instant case was adjudicated under file number 092002039. The record also indicates that appellant sustained employment-related lumbar strains on April 18, 1997 and March 2, 1998. Appellant also has a 30 percent service-connected disability for which she receives benefits from the Department of Veterans Affairs.

employing establishment policies. The employing establishment submitted a number of statements.

By decision dated December 14, 2000, the Office denied the claim, finding that appellant failed to establish that she sustained an injury in the performance of duty. In a request stamped received by the Office on January 29, 2001, appellant requested reconsideration and submitted additional evidence. In a decision dated May 9, 2001, the Office denied modification of the prior decision. Appellant then filed an appeal with the Board which, as discussed *supra*, remanded the case on July 2, 2002.

Subsequent to the Board's July 2, 2002 decision, the records for file number 09044638 and 092002039 were doubled, with the former becoming the master file.[3] By decision dated August 23, 2002, the Office denied modification of the prior decision. The Office further noted that appellant had not sustained a recurrence of disability of her 1998 claim because her current claim was in regard to new events that occurred in the year 2000. The instant appeal follows.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an injury in the performance of duty.

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[4]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[5] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[6] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[7] When an employee experiences emotional stress in carrying out his or her employment duties, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his or her work.[8]

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[3] *Supra* note 2.

[4] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[8] *Lillian Cutler*, *supra* note 5.

In the instant case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions that occurred when she reported to a new duty station. The Office denied her claim on the grounds that she did not establish any compensable employment factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant is specifically alleging that she was harassed and discriminated against when she reported for a new bid position as a window clerk at the West Worthington Station, stating that the employing establishment failed to accommodate her as a disabled veteran and under the American With Disabilities Act (ADA), harassed her regarding her attire, failed to provide a uniform allowance, tried to coerce her into applying for light or limited duty, denied her work at the bid position and transferred her to another duty station on another shift. She submitted copies of six grievances and an Equal Employment Opportunity (EEO) complaint that she had filed regarding these matters.

Thomas Woerner, a union steward, submitted a statement in which he advised that he attended a meeting on October 16, 2000 with appellant and employing establishment management regarding appellant's accommodations and restrictions. He opined that the employing establishment should accommodate appellant. In a statement dated January 5, 2000,[9] Bob Springsteen, a union steward, related events that occurred in September 2000 regarding appellant's placement at the West Worthington Station, and opined that appellant was treated unfairly. Larry Canady, a union steward, submitted a statement dated January 18, 2001, in which he advised that he had been asked to have appellant bring in an updated statement regarding her physical restrictions. He stated that he did so on or about August 29, 2000 and that a copy should be on file.

In statements dated September 27, 2000, Kathleen French, station manager, explained that, on that day, she tried to discuss appellant's light-duty requirements and that a request from appellant would need to be put in writing. She stated that, in the presence of Union Steward Marty Kelley, she explained that any employee on light duty was required to request light duty in writing. Appellant stated that she would not comply, and Ms. French informed appellant that she was officially instructed to submit the request.

In a statement dated September 27, 2000, Jeff Eesley advised that on that day Ms. French asked him to accompany her in a discussion with appellant when Ms. French advised appellant that she needed to request light or limited duty in writing. Appellant replied that she did not have to provide such a request. He related that appellant then got angry and requested union representation, which was not available at the West Worthington Station and would have to be called for. Ms. French asked appellant to vacate the building and return to work the next day. In a statement dated September 29, 2000, Mr. Eesley stated that appellant, who was working hand-stamping mail, "threw a 1260" on his desk and that appellant told him that Ms. French had instructed her to leave when the hand-stamping was completed. While Mr. Eesley was checking the veracity of this statement with Ms. French, appellant left the building, even though he told

[9] The Board assumes this date is a typographical error inasmuch as the statement discusses events that occurred in September 2000.

her to stop. He stated that he then talked with Mr. Springsteen, who informed him that he had told appellant not to leave until she checked with her supervisor or Ms. French.

In a letter dated September 29, 2000, the employing establishment advised appellant that, effective September 30, 2000, she was to report back to her previous assignment as she had not been officially placed at her new bid at the West Worthington Station. By letter dated October 5, 2000, the employing establishment informed appellant that the window clerk position would be held in abeyance until October 16, 2000, and that prior to that date she should submit medical certification stating "that you can now, or will be able to within the next six months, fully perform the duties of the position." A uniform allowance was activated, effective October 7, 2000. In an October 16, 2000 letter, the employing establishment informed appellant that, as medical documentation had been received stating that her condition was permanent and that she was unable to perform the bid position, she would immediately become "an unassigned regular at the main post office."

Ms. French submitted a statement dated December 7, 2000 in which she advised that she informed appellant that her attire was inappropriate and unprofessional when working as a window clerk.[10] She conceded that she knew that appellant had not yet received a uniform allowance but asked if she had a white blouse and black slacks. Appellant stated that she did not. Ms. French then advised appellant that she could not work as a window clerk. She stated that at no time had she treated appellant in an abusive manner. Ms. French also advised that she did not inform appellant that she could go home after the hand-stamping was completed, that she informed appellant that the telephone was for official business and that she would need management permission to use it and that a union steward was always made available to appellant, at her request. She also stated that she observed appellant leave the parking lot by the entrance at an unsafe speed and discussed this with her because it was a safety issue.

The Board finds that in the instant case appellant's allegations regarding her attire, telephone use and requests for accommodations 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.[11] The Board has long held that, although the handling of the assignment of work duties is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[12] Likewise, matters pertaining to grievances,[13] restricting telephone use,[14] enforcement of a dress code,[15] disagreement of supervisory or management action,[16] frustration with the policies and procedures of the employing

[10] Appellant stated that she was dressed in jeans and a sweatshirt.

[11] *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).

[12] *Id.*

[13] *Robert W. Johns*, 51 ECAB 137 (1999).

[14] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[15] *Claudia L. Yantis*, 48 ECAB 157 (1996).

[16] *Christophe Jolicoeur*, 49 ECAB 553 (1998).

establishment[17] and frustration from not being permitted to work in a particular environment or to hold a particular position[18] are administrative matters. The Board has found, however, 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.[19]

Appellant has submitted evidence that she filed grievances and an EEO claim. While the Office may look to evidence from an EEO claim or grievances in determining whether incidents or harassment occurred as alleged, the Office must make its own independent findings. The standard for "harassment" or "discrimination" as defined by EEO statutory or case law is not the applicable standard for a claim under the Act, grievances and EEO complaints, by themselves, do not establish workplace harassment or that unfair treatment occurred.[20] Moreover, the record does not contain any final EEO or grievance decision in these matters.

While appellant submitted statements from union stewards who generally advised that the employing establishment should have accommodated appellant, the Board finds that these do not rise to a level that indicates that the employing establishment acted in an abusive manner. Appellant, thus, has not established a compensable employment factor under the Act with respect to administrative matters.

Regarding appellant's contention that she was improperly reassigned, the Board has held that a change in an employee's duty shift may under certain circumstances be a factor of employment that could be considered in determining if an injury has been sustained in the performance of duty.[21] In the present case, however, appellant has not submitted sufficient evidence to establish that the employing establishment effectuated a change in her duty shift in such a manner as to implicate a compensable employment factor. To show that this aspect of the claimed shift change implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse, but in this case appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. The Board therefore finds that it was reasonable for the employing establishment to change her duty.

The Board has also 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.[22] In the instant case, however, the opposite is true. Rather than applying for light or limited duty, appellant was emphatic that she could perform the bid position. The Board finds

[17] *William Karl Hansen*, 49 ECAB 140 (1997).

[18] *Clara T. Norga*, 46 ECAB 473 (1995).

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

[20] *Constance I. Galbreath*, 49 ECAB 401 (1998).

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

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

that the employing establishment did not commit error or abuse in requiring that she submit medical evidence regarding her physical restrictions since she is also arguing that she should be accommodated because she is a disabled veteran.[23]

Appellant has also generally alleged that harassment and discrimination on the part of her supervisors contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from the performance of regular or specially assigned duties, these could constitute compensable employment factors. For harassment to give rise to a compensable disability under the Act, there must be some evidence that acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[24] An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.[25] Supporting statements from coworkers that are general in nature and do not refer to specific incidents are insufficient to substantiate allegations of harassment.[26] Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, then the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.[27]

As stated previously, the standards under the EEO and the Act differ, and in the instant case appellant provided no corroboration that she was harassed by employing establishment management other than the general statements of the union stewards, discussed previously. Here, 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 discriminated against by employing establishment management.[28] The Board therefore finds that appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

In conclusion, the Board finds that, as appellant has not established a compensable employment factor, she has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty as alleged.[29]

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[23] The Board notes that the medical evidence regarding her physical condition is somewhat contradictory. In a report dated August 29, 2000, a physician whose signature is illegible provided restrictions to appellant's physician activity and advised that they were "continuous, permanent." Dr. Adrian Zachary, an osteopathic physician, signed this same report on October 16, 2000. In a report dated October 16, 2000, Dr. Zachary advised that appellant's restrictions were "medically pending" and that she should be reevaluated in six months.

[24] *Elizabeth Pinero, supra* note 14.

[25] *O. Paul Gregg*, 46 ECAB 624 (1995).

[26] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[27] *Michael Ewanichak*, 48 ECAB 364 (1997).

[28] *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).

[29] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

The decision of the Office of Workers' Compensation Programs dated August 23, 2002 is hereby affirmed.

Dated, Washington, DC
May 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member