

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA PARDO and FEDERAL DEPOSIT INSURANCE CORPORATION,
PERSONNEL SERVICES BRANCH, Washington, DC

*Docket No. 03-1583; Submitted on the Record;
Issued January 12, 2004*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

Appellant a 48-year-old personnel management specialist, filed a notice of occupational disease on June 19, 2000 alleging that she developed major depression and anxiety disorder due to her federal employment. The Office of Workers' Compensation Programs requested additional factual and medical evidence by letter dated August 1, 2000. The Office denied appellant's claim by decision dated March 21, 2001.

Appellant requested reconsideration on March 19, 2002. By decision dated September 10, 2002, the Office denied modification of the March 21, 2001 decision, finding that appellant had not substantiated a compensable factor of employment. She appealed this decision to the Board and, in an Order Remanding Case dated February 24, 2003, the Board found that the record before it did not contain the September 10, 2002 decision of the Office. The case was remanded for reconstruction and proper assemblage of the record followed by an appropriate decision.¹ By decision dated April 24, 2003, the Office considered appellant's claim on the merits and denied modification of its decisions.

The Board finds that appellant has failed to meet her burden of proof in establishing that she developed an emotional condition due 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 illness has some connection with the employment but, nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is

¹ Docket No. 03-462 (issued February 24, 2003).

compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.²

Appellant attributed her emotional condition to the actions of her supervisor, Vanessa Singleton, in assigning projects with shorter deadlines than other staff members; performance appraisals which appellant felt were negative or did not accurately reflect her work in 1998 and 2001; a letter of counseling that she received for insubordination on May 12, 1999; denial of sick leave requests; denial of requests for details to other jobs; and the requirement that appellant report her whereabouts when leaving the office, which appellant alleged was not imposed on other employees.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly addressed leave and improperly assigned work duties, the Board finds that these allegations are related to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties. As such they do not fall within the coverage of the Federal Employees' Compensation Act.³ But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁴

In support of her allegations of error or abuse, appellant submitted an e-mail from Ms. Singleton dated May 23, 2000 stating that appellant should check with her prior to leaving the Office for any reason. Ms. Singleton stated that appellant should arrive on time so that she could complete her work assignments within the time frames assigned. Appellant has submitted no witness statements or other evidence that Ms. Singleton singled appellant out for this reporting requirement. The mere fact that appellant's supervisor asked to be notified when appellant left the office is not unreasonable and does not rise to the level of error or abuse in an administrative action. Therefore, appellant has not established that this requirement is a compensable factor of employment.

Appellant alleged error or abuse in her 1998 performance appraisal. In a decision dated May 20, 1999, the reviewing official concluded that appellant's summary rating should not be changed, but that two changes should be made to her performance appraisal. In a December 5, 2000 statement, Ms. Singleton noted that, as a result of a grievance filed by appellant, which occurred prior to her supervision, two or three of the elements of appellant's 1998 performance appraisal were found to be inaccurate and were rewritten. Ms. Singleton changed the language in the elements identified and provided, but noted that the changes did not alter the final

² *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

³ 5 U.S.C. §§ 8101-8193; see *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gates*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁴ *Martha L. Watson*, 46 ECAB 407 (1995).

performance rating. Peggy Stokes, a second level supervisor of Employee Relations Specialists, stated on October 3, 2000 that appellant's administrative grievance, relative to her 1998 performance appraisal, resulted in changes including additional comments and was issued on May 20, 1999.

Appellant has alleged error in her 1998 performance appraisal and the reviewing official concluded that aspects of appellant's appraisal did not accurately reflect her performance. Therefore, the Board finds that appellant has established administrative error in her 1998 performance appraisal and has substantiated a compensable employment factor.

Appellant alleged error or abuse in her 1999 mid-year performance review, alleged that her 1999 performance appraisal was too low and that her written comments were required in less time than was appropriate. She filed an Equal Employment Opportunity (EEO) complaint on this issue which was settled without an admission of wrong doing by either party. In regard to appellant's 1999 performance appraisal, Ms. Singleton stated that she was not aware of guidelines that specified time frames for providing rebuttals to performance appraisals and that she asked appellant to submit her comments within two days of receiving the appraisal. Appellant's second line supervisor, Cindy Medlock, stated that appellant was allowed to rebut her performance appraisal, but that she was not aware of whether this time was within the established guidelines.⁵ Appellant has not established any error or abuse in her 1999 performance appraisal or the conduct of her mid-year review. Therefore, appellant has not established a compensable factor of employment in this regard.

Regarding appellant's allegation that she improperly received a letter of counseling charging insubordination, Ms. Singleton asserted that appellant tape recorded the mid-year performance review without Ms. Singleton's permission with a standard cassette tape recorder. Appellant refused to give her the tape and failed to comply with a request for the cassette tape from Peggy Stokes, assistant director of personnel. Ms. Stokes submitted a statement dated August 10, 2000, alleging that she informed appellant that the employing establishment did not allow employees to tape record meetings and that appellant refused to give her the tape. Appellant submitted a transcript of her 1999 mid-year review. This transcript, which appellant asserts results from a second micro-cassette tape recorder, does not support the allegations that Ms. Singleton and Ms. Stokes repeatedly requested the standard cassette tape and that appellant refused to comply. The Board finds that this transcript does not establish error or abuse in the administration of discipline for insubordination, as appellant's retention of the second tape establish that she failed to comply with the request to surrender the illicit recording, the basis for the charge in the letter of counseling.

Appellant alleged that the employing establishment failed to grant her requests for details to other jobs. Ms. Singleton stated that appellant participated in details to the Management Review Staff on two separate occasions. After returning from her second detail, appellant had requested three other details. Ms. Singleton denied these requests based on the fact that

⁵ Appellant submitted a "[m]emorandum of [u]nderstanding" regarding performance appraisals indicating that an employee was allowed seven days to comment. However, this agreement was not in force until after December 31, 1999 and, therefore, was not applicable to appellant's 1999 performance review which took place in November 1999.

appellant had work assignments that needed to be completed. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.⁶

Ms. Singleton stated that appellant utilized leave without pay (LWOP) from January 17 to February 3, 2000. When appellant returned from the LWOP period, she requested sick leave on specific dates within that time period. Ms. Singleton stated that appellant had not requested sick leave before or during the time that she utilized LWOP, but that upon her return to work appellant requested sick leave only on days during which the government was closed, granting administrative leave. She stated that appellant did not provide documentation of doctor's appointments on the dates in question and that she did not approve the sick leave request. Appellant has submitted no evidence of error or abuse on the part of the employing establishment in the denial of this request to change her leave status.

Appellant requested LWOP from July 17 through September 5, 2000. Kathy Stewart, senior personnel management specialist, denied this request on the grounds that appellant had not submitted appropriate medical documentation. Appellant requested to utilize the Family Medical Leave Act on July 26, 2000. Ms. Singleton stated and Ms. Stewart confirmed, that Ms. Singleton advised that she had 30 days to respond to appellant's request and that appellant would not be on approved leave until Ms. Singleton had reviewed the documentation and consulted with management. Ms. Singleton informed appellant that, if appellant failed to report to work before her leave request was approved, she would be charged with absence without leave (AWOL). Appellant did not report to work from August 1, 2000 through the date that her leave request was approved, on August 4, 2000. She submitted an e-mail noting that the employing establishment was changing her leave status from AWOL to LWOP. However, there is no admission of wrongdoing on the part of the employing establishment in this e-mail and no evidence that the original determination was erroneous. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.⁷

Appellant stated that, due to her inability to meet the deadlines set by Ms. Singleton, she felt that she was not capable of doing her work. She submitted a series of e-mails from Ms. Singleton stating that appellant was not meeting the deadlines assigned dating from March 1999 to June 1999. In an e-mail dated May 26, 2000, Ms. Singleton noted that appellant failed to comply with an assigned deadline to unpack her office and stated, "[f]ailure to complete work assignments given to you within the timeframe stated, as we have discussed on several occasions, will affect your performance rating." In a December 5, 2000 statement, Ms. Singleton stated that appellant needed to improve her time management and her ability to meet due dates. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable including an unusually heavy workload and imposition of deadlines.⁸ Appellant alleged that she was unable to meet the deadlines and

⁶ *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

⁷ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

⁸ *See Lillian Cutler*, *supra* note 2.

Ms. Singleton agreed that appellant had difficulty in the timely presentation of her work. Therefore, the Board finds that appellant has established this factor of employment.

Appellant alleged that she was assigned more projects than her comparable coworkers. Ms. Singleton denied that appellant received more work than similarly situated employees. However, in an e-mail dated December 28, 2000, appellant's team leader, Ms. Stewart, suggested that appellant had too much to do and recommended reassigning a project. Appellant submitted evidence substantiating that she was overworked, on that occasion but has not established discriminatory treatment. Therefore, the Board finds that she has established a compensable factor of overwork in December 2000.

Appellant's February 8, 2000 EEO complaint alleged harassment, retaliation and discrimination by Ms. Singleton, her secretary and Ms. Medlock through the above described events. 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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁹ The parties settled this complaint on August 16, 2001 with no admission of discrimination on the part of the employing establishment. In a statement dated December 5, 2000, Ms. Singleton stated that she was appellant's first line supervisor from May to September 1996 and again beginning in February 1999. She stated that she did not treat appellant differently or expect more of her than other similar employees. Appellant has not submitted sufficient corroboration evidence to establish harassment, discrimination or retaliation on the part of her supervisors or the employing establishment.

Appellant was afraid of losing her job. Regarding appellant's allegation that she developed stress due to insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Act.¹⁰

To establish appellant's occupational disease claim that she has 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.¹¹ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete

⁹ *Alice M. Washington*, 46 ECAB 382 (1994).

¹⁰ *See Artice Dotson*, 42 ECAB 754, 758 (1990).

¹¹ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹²

Appellant has established compensable employment factors that, she was unable to meet the deadlines involved in her work, that she was overworked and that there was an error in her 1998 performance appraisal. In support of her claim, appellant submitted a report from a licensed clinical social worker. A social worker is not within the definition of a “physician” under the Act¹³ and cannot submit the necessary probative medical evidence to establish a causal relationship between appellant’s compensable employment factors and her diagnosed emotional condition.¹⁴

Appellant also submitted several reports from Dr. Ralph W. Wadson, Jr., a Board-certified psychiatrist. On January 3 and May 19, 2000 and March 19, 2001 Dr. Wadson diagnosed major depressive disorder, recurrent and post-traumatic stress disorder. He described the work factors which he believed led to appellant’s diagnosed conditions:

“[Appellant] has experienced her supervisor as being extremely harassing, hostile and punitive towards her. [Appellant] feels that she has been singled out. She believes that work assignments are inequitable distributed, that male counterparts have to produce relatively little and imposed deadlines are unreasonable, that she is unfairly harassed about not meeting deadlines and her work criticized and diminished.... [Appellant] believes [that] this supervisor is trying to document a case to downgrade or remove her....”

This report is insufficient to meet appellant’s burden of proof as Dr. Wadson attributed appellant’s emotion condition to factors of employment which are found by the Board as noncompensable or have not been substantiated, *i.e.*, her fear of losing her job, harassment and discrimination. Although appellant has established that she was unable meet the deadlines imposed, a regularly assigned duty, she has not established that these deadlines were unreasonable, the basis on which Dr. Wadson reached his conclusions.

As appellant has failed to submit rationalize medical opinion evidence addressing the causal relationship between her diagnosed emotional conditions and her accepted employment factors, the Office properly denied her claim.

¹² *Id.*

¹³ 5 U.S.C. § 8101(2).

¹⁴ *Frederick C. Smith*, 48 ECAB 132, 134 (1996).

The April 24, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 12, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member