# United States Department of Labor
# Employees' Compensation Appeals Board

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| **GINA G. SANDERS, Appellant** | ) | |
| **and** | ) | **Docket No. 04-1588** |
| | ) | **Issued: January 11, 2005** |
| **DEPARTMENT OF AGRICULTURE, FARM SERVICE AGENCY, GEORGIA STATE OFFICE, Eatonton, GA, Employer** | ) | |

*Appearances:*
*Thomas P. DeBerry, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On June 4, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 4, 2003, denying her emotional condition claim and a November 7, 2003 decision, denying her October 31, 2003 request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has merit jurisdiction over the emotional condition issue and the November 7, 2003 nonmerit decision.[1]

### ***ISSUES***

The issues are: (1) whether the Office properly denied appellant's claim for an emotional condition; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

## ***FACTUAL HISTORY***

On June 27, 2002 appellant, then a 49-year-old program technician, filed an occupational disease claim (Form CA-2), alleging that she sustained an emotional condition in the performance of duty. She first became aware of her condition and its relation to her employment on June 20, 2001. Appellant alleged that Louise Lloyd, a supervisor, "harassed [her], among other things, by demanding [she] perform duties outside [her] job and to do illegal acts. She then castigated [appellant] for [her] refusal." Appellant also attributed her condition to Ms. Lloyd denying leave requests, providing improper instructions and preventing her from taking corrective actions. The employing establishment noted that she stopped work on June 20, 2001 and had not returned.

In support of her claim, appellant submitted an April 29, 2002 report by Dr. Steven Marinson, PhD., an attending clinical psychologist. He related her account of Ms. Lloyd harassing her by sending her letters seeking medical justification for her work absences and noting that she would be charged as absent without leave (AWOL) if she did not return to work. Appellant related her embarrassment regarding a get well card signed by Ms. Lloyd.[2] Dr. Marinson diagnosed major depression with psychotic and paranoid features due to "the failure of her return to work effort."

In a December 10, 2002 letter, the Office advised appellant of the additional medical and factual evidence needed to establish her claim, including a detailed statement of the work factors alleged and a treatment history. In a January 3, 2003 letter, she stated that she had not been hospitalized for a psychiatric condition prior to the present claim. Appellant submitted additional evidence which she asserted established the factual basis for her claim.

In August 24 and September 18, 2000 slips, Dr. Carley S. Ebanks, an attending Board-certified gastroenterologist, held appellant off work from August 22 to December 1, 2000. Ms. Lloyd initially approved her request for leave from September 11 to December 1, 2000, but on October 11, 2000 requested additional medical justification by November 2, 2000 or appellant would face disciplinary action. Dr. Ebanks submitted a November 9, 2000 letter explaining that severe abdominal pain and hospital visits for tests made it "impossible for [appellant] to work." In a November 16, 2000 letter, Ms. Lloyd advised her that Dr. Ebanks' reports were insufficient and directed that she submit an additional narrative by November 24, 2000 or face disciplinary action. Appellant did not submit the requested medical report and Ms. Lloyd placed her in AWOL status as of November 24, 2000. Ms. Lloyd again requested a narrative report in a November 28, 2000 letter. In a December 4, 2000 note, Dr. Ebanks authorized appellant to return to unrestricted duty. Ms. Lloyd directed her to return to work on December 11, 2000. She changed appellant's duty schedule from four, 10-hour days with Mondays off to 8:00 a.m. to 5:00 p.m. Monday through Friday. Dr. Ebanks submitted a December 14, 2000 letter releasing her to full duty as there was no objective basis for her symptoms. Appellant returned to work on or about January 8, 2001.

[2] Appellant submitted a copy of an undated greeting card. On the cover the card said: "[t]his is a test of the emergency sanity system. This is only a test." On the inside of the card is the sentiment "Hang in there." The card was signed by "Shirley," "Eva," "Tracy" and Ms. Lloyd.

In a January 8, 2001 letter, Ms. Lloyd placed appellant on leave restriction for 12 months, requiring her to request leave 6 working days in advance. Ms. Lloyd noted in a January 8, 2001 memorandum, that appellant was seen at the grocery store, beauty salon and riding in a truck while out on sick leave. Appellant then filed an "informal grievance."[3] In May 2001, the employing establishment reduced the leave restriction from six working days to three days.

Appellant requested leave from June 21 to July 6, 2001 due to a psychiatric condition. In a June 25, 2001 slip, Dr. Cesar Y. Figueroa, an attending Board-certified psychiatrist, released her to return to work with no restrictions as of July 9, 2001. Ms. Lloyd placed appellant in leave without pay (LWOP) status for July 2, 4, 5 and 6, 2001, as Dr. Figueroa did not explain why she was disabled for work. She ordered appellant to return to work on July 9, 2001 or face disciplinary action. Appellant then submitted a July 5, 2001 report from Naomi Berg, a licensed social worker, noting her participation in an outpatient program from June 20 to August 3, 2001 and releasing her to unrestricted duty as of August 6, 2001. Ms. Lloyd granted her leave from July 9 to 24, 2001 and directed her to report for duty on July 25, 2001 or face disciplinary action. She sent Ms. Berg a July 17, 2001 letter requesting a "narrative report on [appellant's] condition … so that a determination can be made on [her] fitness for duty."

Dr. Figueroa submitted a July 20, 2001 report noting appellant's treatment, including a June 2001 hospitalization. She was discharged to a required outpatient program on June 25, 2001. Dr. Figueroa diagnosed recurrent, severe major depressive disorder, personality disorder not otherwise specified, arthritis or fibromyalgia and Axis 4 stressors of severe occupational problems. He released appellant to full duty on August 20, 2001. In an August 13, 2001 letter, Ms. Lloyd noted that appellant would receive donated leave or LWOP to cover her absence from August 6 to 17, 2001. Ms. Lloyd advised appellant that, if she did not return to work on August 20, 2001, she would be charged AWOL and face further disciplinary action, including removal. Dr. Figueroa then extended appellant's absence, releasing her to full duty on November 5, 2001. Ms. Lloyd advised her by October 15, 2001 letter, to work on November 5, 2001 or face disciplinary action. In an October 31, 2001 note, Cookie Noel, a licensed social worker, stated that appellant was "in treatment for affective difficulties" and would be "able to return to work November 12, 2001 with no limitation."

In a November 5, 2001 letter, Ms. Lloyd advised appellant that, as she did not report to work as directed and had not contacted her, she was placed in AWOL status beginning that day. Ms. Lloyd stated that Ms. Noel's note was unacceptable as it did not describe appellant's condition. She directed appellant to report for work on November 12, 2001 or face additional disciplinary measures. Appellant then submitted notes from Dr. Figueroa dated through January 2002, holding her off work indefinitely.

Appellant submitted forms related to October and November 2001 Equal Employment Opportunity (EEO) complaints, alleging discrimination and retaliation on the basis of mental disability and prior grievance activity. She alleged that Ms. Lloyd spoke to her sarcastically,

[3] Ms. Lloyd initially denied appellant's request for four hours of annual leave on January 19, 2001 to prepare for the grievance, then approved it on January 25, 2001.

gave her "impossible work time frames," refused to allow coworkers to assist her, locked needed documents in her car or cabinets, refused to sign producer payment statements then disciplined her for failing to issue payments and improperly contacted Ms. Berg. In investigative reports dated December 20, 2001 and July 31, 2002 and a June 26, 2002 affidavit, Ms. Lloyd denied harassing appellant. She explained that appellant incurred disciplinary action for failing to comply with leave and attendance rules. Ms. Lloyd noted that the get well card was purchased by an employee in another agency and was meant to be humorous as appellant had enjoyed such jokes in the past. She noted writing a fitness-for-duty inquiry to Ms. Berg, who did not telephone her or speak with her as appellant alleged. Ms Lloyd submitted a list of accommodations she provided, including relocating appellant to a private office, purchasing a chair, electric stapler, electric pencil sharpener and computer terminal stand and approving her desired schedule. Ms. Lloyd's account of events was corroborated in June and July 2002, affidavits by personnel specialist Kula Moore, district director E. John Rudowski, appellant's coworker Shirley J. Blizzard and employee relations specialist Regina Bigelow.

By decision dated June 4, 2003, the Office denied appellant's claim on the grounds that she did not establish any compensable factors of employment. The Office found that she did not establish any incidents of harassment or abuse or that she was asked to perform duties outside of her job or illegal acts. The Office found that appellant's reaction to being denied leave was not considered to be within the performance of duty.

In an October 31, 2003 letter, appellant requested reconsideration. She asserted that Dr. Marinson's April 29, 2002 report was sufficient to establish her allegations as factual. Appellant asserted that her claim should be accepted as the Office of Personnel Management (OPM) accepted her application for a disability retirement as of September 23, 2001.

By decision dated November 7, 2003, the Office denied reconsideration on the grounds that the evidence submitted was not relevant to the issue of whether the claimed harassment had occurred. The Office found that Dr. Marinson's April 29, 2002 report was previously considered and, therefore, constituted repetitive evidence insufficient to warrant reopening of the claim. The Office further found that OPM documents were irrelevant as they did not establish that appellant was harassed or abused by management.

## ***LEGAL PRECEDENT -- ISSUE 1***

The Federal Employees' Compensation Act provides for payment of compensation for personal injuries sustained while in the performance of duty.[4] Where disability results from an employee's reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[5] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[6] This burden includes the submission of a detailed

[4] 5 U.S.C. § 8102(a).

[5] 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[7]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing 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.[8] If a claimant implicates 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.[9]

## ***ANALYSIS -- ISSUE 1***

Appellant attributed her emotional condition to the actions of her supervisor, Ms. Lloyd. She alleged that Ms. Lloyd wrongly denied her leave requests and administered improper disciplinary actions related to her work absences and leave use. 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.[10] Although the handling of disciplinary actions and leave requests are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] 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.[12]

The Board finds that appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to the disciplinary and leave matters. In December 20, 2001 and July 31, 2002 investigative interviews and a June 26, 2002 affidavit, Ms. Lloyd noted that she denied appellant's requests for leave as she failed to submit sufficient medical evidence to justify her absences. In nine letters dated from October 11, 2000 to November 5, 2001, Ms. Lloyd advised appellant of the need to submit narrative medical evidence explaining the nature and duration of any disability for work. However, she did not submit such evidence for most of the periods of absence from August 22 to December 22, 2000 and from June 21, 2001 through January 2002 and was charged as AWOL for periods beginning November 24, 2000 and November 5, 2001. The Board notes that the medical evidence

[7] *Effie O. Morris*, 44 ECAB 470 (1993).

[8] *See Normal L. Blank*, 43 ECAB 384 (1992); *see Barbara Bush*, 38 ECAB 710 (1987).

[9] *Marlon Vera*, 54 ECAB ___ (Docket No. 03-907, issued September 29, 2003).

[10] *Lori Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004); *see Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

[11] *Lori Facey*, *supra* note 10.

[12] *See Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

appellant submitted in support of her work absences consist largely of leave slips or brief notes, unsupported by details of her condition as Ms. Lloyd had requested. Therefore, the Board finds that she has not established error on the part of Ms. Lloyd to deny unsubstantiated leave requests or to impose AWOL charges for such periods. Appellant has not established a compensable factor of employment with regard to the denial of her leave requests or the imposition of AWOL status for unsubstantiated absences.

The Board finds that the leave restriction imposed on January 8, 2001 was reasonable given the lack of medical evidence substantiating her work absence from August 22, 2000 through early January 2001, as well as a history of possible leave abuse as she was seen being active in the community while on sick leave. Regarding the May 11, 2001 modification of the six working days' notice for medical appointments to three days, it is well established that the modification or rescission of a disciplinary action does not, in and of itself, establish error or abuse.[13] Appellant has not established a compensable factor of employment with regard to the leave restriction or its modification.

Appellant attributed her emotional condition, in part, to Ms. Lloyd changing her work schedule in January 2001 from a compressed four-day schedule to a five-day work week. The assignment of work schedules is an administrative action that is not considered to be within the performance of duty in the absence of error or abuse.[14] In this case, appellant did not submit evidence demonstrating that the change of work schedules was erroneous or abusive. Thus, she has not established a compensable work factor in this regard.

Appellant also attributed her condition to an alleged pattern of harassment and discrimination by Ms. Lloyd, including verbal "castigation" for refusing to follow unspecified instructions. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[15] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[16] In this case, Ms. Lloyd asserted in two EEO interviews and a June 26, 2002 statement that she did not harass or retaliate against appellant. She noted making accommodations for her, including purchasing electronic desk equipment, moving her to a private office and granting a desired schedule. Ms. Lloyd's account of events was corroborated by affidavits of other agency personnel. In contrast, appellant did not submit any witness statements or other evidence corroborating any incidents of harassment or discrimination by Ms. Lloyd. The grievance forms and worksheets she submitted do not contain any admissions or findings of wrongdoing by the employing establishment. The Board has held

[13] *See Michael Thomas Plante*, 44 ECAB 510 (1993); *Richard J. Dube*, 42 ECAB 916 (1991) (reduction of a disciplinary letter to an official discussion did not constitute abusive or erroneous action by the employing establishment ). The record does not contain a grievance decision finding error in an administrative action.

[14] *Michael A. Salvato*, 53 ECAB ___ (Docket No. 01-1790); *Alice M. Washington*, 46 ECAB 382 (1994).

[15] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[16] *Linda J. Edwards-Delgado*, 55 ECAB ___ (Docket No. 03-823, issued March 25, 2004).

that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[17] Thus, appellant has not established harassment or discrimination as compensable factors of employment as she did not submit sufficient evidence to establish her allegations as factual.

Regarding appellant's allegation that the get well card signed by Ms. Lloyd constituted harassment, the Board has held that remarks made in jest, although they could possibly be interpreted as offensive, do not give rise to coverage under the Act. Ms. Lloyd explained that the card was meant to be humorous as appellant enjoyed such jokes in the past. Under the circumstances of the case, the Board finds that the greeting card did not constitute harassment.[18]

Appellant also attributed her condition, in part, to "impossible work time frames." While an emotional reaction to demands of assigned duties may be compensable, she did not provide sufficient factual evidence to demonstrate that there were unreasonable demands placed upon her. Without such corroboration, appellant has not established the alleged deadlines as a compensable factor of employment.[19]

Appellant also alleged that Ms. Lloyd gave her improper instructions, refused to allow her to take corrective actions, refused to assist her, locked away documents she needed to perform her work, refused to sign payment statements, disciplined her for failing to issue payments and improperly telephoning Ms. Berg. However, she did not give specific examples or provide corroborating evidence to support any of these allegations. Ms. Lloyd noted that she wrote to Ms. Berg on July 17, 2001 to obtain fitness-for-duty information but did not telephone her. Thus, these vague or unsubstantiated allegations cannot constitute compensable factors of employment.[20]

For the foregoing reasons, the Office correctly found in its June 4, 2003 decision, that appellant did not establish 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. As appellant failed to establish a compensable factor of employment, it is not necessary to address the medical evidence in this case.[21]

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[17] *James E. Norris*, 52 ECAB 93 (2000).

[18] *Cyndia R. Harrill*, 55 ECAB ___ (Docket No. 04-399, issued May 7, 2004).

[19] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984).

[20] *See Ruthie M. Evans*, *supra* note 6.

[21] *Garry M. Carlo*, 47 ECAB 299 (1996); *see Margaret S. Krzycki*, 43 ECAB 496 (1992). The Board notes that the reports of Ms. Berg and Ms. Noel, licensed social workers, do not constitute probative medical evidence, as a licensed social worker is not a physician as defined under the Act. *See* 5 U.S.C. § 8101(2); *Ernest St. Pierre*, 51 ECAB 623, 626 (2000).

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[22] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[23] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[24]

## ***ANALYSIS -- ISSUE 2***

In the present case, appellant did not submit relevant and pertinent new evidence accompanying her October 31, 2003 request for reconsideration. Her October 31, 2003 letter merely repeats her prior assertions. Appellant also submitted a copy of Dr. Marinson's April 29, 2002 report, which was previously of record and considered by the Office prior to the issuance of the Office's June 4, 2003 merit decision. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.[25]

Appellant also submitted documents from OPM regarding the acceptance of her application for disability retirement. The underlying issue in the claim, whether she established any compensable factors of employment, was not addressed by these forms. Therefore, the new evidence submitted is not relevant to the issue.

The Office correctly found in its November 7, 2003 decision, that appellant did not submit relevant and pertinent new evidence not previously considered by the Office establishing any compensable factors of employment. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office properly refused to reopen her claim for a merit review. Consequently, she is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2) of the Act's implementing regulation. Accordingly, the Board finds that the Office properly denied appellant's October 31, 2003 request for reconsideration.

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[22] 20 C.F.R. § 10.606(b)(2) (2003).

[23] 20 C.F.R. § 10.608(b) (2003).

[24] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[25] *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

## ***CONCLUSION***

The Board finds that the Office properly found that appellant did not establish that she sustained an emotional condition in the performance of duty. The Board further finds that the Office properly refused to reopen her case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 4 and November 7, 2003 are affirmed.

Issued: January 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member