United States Department of Labor
Employees' Compensation Appeals Board

ANN P. NICHOLS, Appellant	)	
and	)	**Docket No. 05-801**
	)	**Issued: February 17, 2006**
DEPARTMENT OF THE NAVY, SUPERVISOR OF SHIPBUILDING, Newport News, VA, Employer	)	

Appearances:
C. Gerard Thompson, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument January 17, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 18, 2005 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated March 18 and November 22, 2004, which denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On March 28, 2002 appellant, then a 56-year-old quality assurance specialist, submitted an occupational disease claim alleging that she suffered from worked-related depression. In a comment appended on April 11, 2002, her supervisor, Charles A. Forrest, Jr. stated that appellant's current absence was not related to the claimed condition. Appellant submitted factual evidence including statements in which she alleged that in 1996 she was discriminated against in

a promotion process, that her performance appraisals had dropped in retaliation for filing an Equal Employment Opportunity Commission (EEOC) claim, that she was not selected for other promotions, was denied transfers, could not switch her day off, that her privacy was violated and her work was micromanaged. She also generally alleged that she was constantly harassed by management, particularly her supervisor, Mr. Forrest. She also submitted statements from family members who described her mental condition and union representatives who generally alleged that she had been harassed and information regarding grievances and EEOC claims.

Appellant also submitted medical evidence including a November 29, 2001 report in which Dr. Santiago Nunez, a psychiatrist, stated that he first saw appellant on September 27, 2001 with symptoms of depression. He noted her report of job stress and advised that he had referred her to a social worker for therapy "to deal with her alleged conflicts created in her job and to determine the origin of anxiety, depression and relationships with her job situation." Dr. Douglas H. Chessen, her attending Board-certified psychiatrist, provided reports dated January 31 and March 18, 2002, in which he noted treating her since December 5, 2001, described her report of work incidents and diagnosed depressive disorder, rule out dysthymic disorder.

On April 24, 2002 M.M. Zurowski, quality assurance officer with the employing establishment, responded to appellant's claim by addressing each of her allegations. He included a controversion and a statement, appellant had submitted regarding her claim.

In letters dated June 14, 2002, the Office informed appellant of the type evidence needed to support her claim and requested that the employing establishment respond to her allegations. Appellant thereafter submitted additional supportive evidence including personal statements in which she noted health problems[1] and reiterated her previous contentions. She also stated that she became very depressed in September 2001, upon hearing of Pat Molnar's transfer and that Mr. Forrest harassed her about performing Combined Federal Campaign (CFC) duties and for working on an EEOC claim in June 2002. In a report dated August 7, 2002, Dr. Michael W. Bowler, a dentist, diagnosed a temporomandibular joint condition. Dr. Chessen's associate, Dr. Thomas Wessells, Jr. Ed. D., provided a report dated June 14, 2001,[2] in which he advised that the focus of his sessions with appellant had been job-related stress, stating "[t]his stress would appear to be less related to the nature of the work than the quality of her relationships on the job. [She] sees herself as an object of harassment. This seems to make her work far more stressful than it needs to be." In a July 10, 2002 report, Dr. Chessen again noted appellant's report of harassment at work and described her symptoms and treatment regimen. He additionally diagnosed anxiety disorder.

[1] These included a history of colon cancer, periodontal problems, a recurring hip problem and a sprained Achilles tendon.

[2] It is unclear if this is the correct date of the report or a typographical error because Dr. Chessen asserted that appellant began treatment at his clinic on December 5, 2001. Dr. Wessells' report was received by the Office on July 12, 2002.

Ray Novey, quality assurance deputy, submitted a June 19, 2002 statement in which he attested, *inter alia*, that Mr. Forrest had gone out of his way to accommodate appellant's health needs in the past.

By decision dated February 3, 2003, the Office found that appellant established one compensable factor of employment, that she was discriminated against in the selection process for a promotion in 1996. The Office denied the claim, however, finding that the medical evidence of record failed to establish that her emotional condition was caused by the accepted factor.

Appellant requested a hearing and submitted additional supportive evidence. In a November 3, 2003 report, Dr. Chessen noted that appellant believed her work situation was hostile and that she felt harassed and singled out by management, who treated her inequitably, which made it increasingly difficult for her to maintain adequate functioning on the job. He stated that his opinion was gained through multiple interviews with appellant and his review of her correspondence and medical record. He concluded that appellant's continuing depression and anxiety were "exacerbated by and are a consequence of, job-related stress and are unlikely to improve until the job stress is resolved or her employment is terminated."

At the hearing, held on November 18, 2003, appellant testified regarding her contentions and medical condition. She specifically stated that she had been harassed since 1997 but that it intensified in 2000 after her successful EEOC claim and described how her work was tracked. Two union representatives/coworkers also testified, opining that they felt appellant had been singled out. Richard Wayne Austin, appellant's supervisor since July 2002, testified that he had known her since 1980 when she was a "go-getter." He stated that appellant was no longer that person, noting that she missed a lot of work and that he had to be careful about what he assigned her or she would lose her composure, which affected her job performance.

By decision dated March 18, 2004, an Office hearing representative modified the prior decision to find that appellant established an additional factor of employment, that her work was inappropriately tracked, but affirmed the prior decision as modified, finding that the medical evidence of record did not establish that her emotional condition was caused by the accepted employment factors.

On March 24, 2004 appellant, through her attorney, requested reconsideration and submitted treatment notes dating from December 5, 2001 to January 8, 2004, in which Drs. Chessen and Wessells noted appellant's progress. In a June 22, 2004 report, Dr. Chessen stated that when appellant was first seen in December 2001, her anxiety increased "as she felt she was being micro-managed by her superiors," that in February 2002 she had surgery necessitating a 60-day work absence and "felt she was being harassed at her job" during this time. He reported her continued treatment, stating that in August 2002 she received a minimal performance rating and stated that she "felt this to be very unfair and another form of harassment." Dr. Chessen concluded by stating that from November 2002 to the present, "she continues to have problems with depression and anxiety secondary to work-related stress." In a September 2, 2004 report, he again reported that appellant "states she was unfairly singled out by a supervisor for close performance monitoring and was downgraded," and had "conveyed to us how anxious and depressed she had become ... over job stress and harassment she had been

experiencing." Dr. Chessen concluded: "these specific work factors have contributed to [her] ongoing psychiatric and emotional condition."

In a November 22, 2004 decision, the Office denied modification of the prior decision.

LEGAL PRECEDENT

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

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*,[4] 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.[5] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[6] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, 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 a emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[7] 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 frustration from not being permitted to work in a particular environment or to hold a particular position.[8]

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.[9] An administrative or personnel matter will be considered to be an employment

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[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

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

[7] *Lillian Cutler, supra* note 4.

[8] *Kim Nguyen*, 53 ECAB 127 (2001).

[9] *Felix Flecha*, 52 ECAB 268 (2001).

factor, however, where the evidence discloses error or abuse on the part of the employing establishment.[10]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced, which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[12] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 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.[13] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[14]

ANALYSIS

In this case, the Board agrees that appellant established as compensable factors of employment that she was discriminated against in the selection process for a promotion in 1996 and that her work was inappropriately tracked. The Board finds, however, that she has not met her burden of proof to establish that the additional claimed factors are compensable. Regarding her contentions that she was denied leave, grade increases, other promotions and did not receive appropriate awards, these matters are administrative in nature and, absent error and abuse, generally fall outside the scope of coverage under the Act.[15] In this case, there is nothing in the record to indicate that the employing establishment erred in these matters. The employing establishment submitted statements from Mr. Zurowski and Mr. Novey, who explained that

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

[11] *Id.*

[12] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[13] *Leslie C. Moore, supra* note 3; *Gary L. Fowler*, 45 ECAB 365 (1994).

[14] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[15] *See Felix Flecha, supra* note 9.

appellant was not singled out or treated differently than other employees. She therefore failed to establish these as compensable factors of employment.[16]

Appellant also stated that grievances and additional EEOC complaints had been filed. In assessing the evidence, the Board has held that grievances and EEOC complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[17] In this case, other than the EEOC decision, which established the compensable factor of employment regarding a 1996 selection process for promotion, the record does not contain a final decision regarding a grievance or any other EEOC claim. Furthermore, the findings of other administrative agencies have no bearing on proceedings under the Act, which is administered by the Office and the Board.[18] The employee therefore failed to establish a compensable factor of employment regarding these matters.

While appellant described specific incidents of disagreement with her supervisor, Mr. Forrest, an employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties, that employees will at times dislike the actions taken.[19] Furthermore, mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.[20] The Board thus finds that, while the record establishes that the employee and Mr. Forrest disagreed at times, there is no evidence of record to establish that any of the events described by appellant constituted compensable factors of employment under the Act.

Appellant also generally contended that she was harassed by management, particularly Mr. Forrest. With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEOC, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions of harassment or discrimination are not compensable under the Act,[21] and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or

[16] *James E. Norris, supra* note 10.

[17] *Michael L. Deas*, 53 ECAB 208 (2001).

[18] *James E. Norris, supra* note 10.

[19] *Judy L. Kahn*, 53 ECAB 321 (2002).

[20] *Id.*

[21] *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[22]

While appellant submitted supportive statements from family members and union representatives, these do not provide substantive evidence that she was harassed as none witnessed specific incidents which would constitute harassment or discrimination. Hence, the Board finds that her allegations do not rise to a level to establish harassment, rather they constitute her perception. As appellant did not establish as factual a basis for her perceptions of discrimination or harassment by the employing establishment, she did not establish that harassment and/or discrimination occurred.[23] The evidence instead suggests that the employee's feelings were self-generated and thus not compensable under the Act.[24]

Nonetheless, as appellant established two compensable factors of employment, that she was discriminated against in a promotion process in 1996 and that her work was inappropriately tracked in 1998, the medical evidence must be analyzed.[25] The medical evidence includes a November 29, 2001 report, in which Dr. Nunez neither identified any specific employment factors or opined that work caused appellant's emotional condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[26] Dr. Wessells advised that appellant saw herself as the object of harassment and opined that her stress appeared to be related to her relationships on the job and not to the nature of the work. He therefore did not opine that appellant's condition was caused by the accepted work factors and to establish causal relationship.[27]

In several reports, Dr. Chessen noted treating appellant since December 5, 2001 for depressive and anxiety disorders and in a November 3, 2003 report, stated that appellant believed her work situation was hostile and felt harassed and singled out by management who treated her inequitably. He advised that her condition was exacerbated by and was a consequence of, job-related stress. In a June 22, 2004 report, the physician again stated that appellant felt that she was being harassed on the job and gave as an example that she felt her minimal performance evaluation was "unfair and another form of harassment." He also stated that appellant felt she was being micro-managed by her superiors. In a September 2, 2004 report, Dr. Chessen again reported that appellant "states she was unfairly singled out by a supervisor for close performance monitoring and was downgraded," and had "conveyed to us how anxious and depressed she had become ... over job stress and harassment she had been experiencing." He concluded, "these specific work factors have contributed to [her] ongoing psychiatric and emotional condition."

[22] *James E. Norris, supra* note 10.

[23] *Id.*

[24] *See Gregorio E. Conde*, 52 ECAB 410 (2001).

[25] *See Dennis J. Balogh*, 52 ECAB 232 (2001).

[26] *Willie M. Miller*, 53 ECAB 697 (2002).

[27] *See Roger W. Robinson*, 54 ECAB 846 (2003).

The Board finds these reports insufficient to meet appellant's burden of proof to establish that her emotional condition was caused by the two accepted factors of employment. While Dr. Chessen's reports suggest a causal relationship between appellant's condition and by the accepted employment factors, his reports do not contain a firm medical opinion with supporting rationale specifically attributing appellant's condition to these two factors.[28] Rather, the physician couched his opinion in terms such as appellant "felt" she was being harassed and "felt" her treatment to be unfair. He did not explain from a medical perspective the nature of the relationship between appellant's diagnosed condition and the established employment factors. His reports are therefore inadequate to establish the critical element of causal relationship.[29]

As he did not support his opinion with sufficient medical reasoning to demonstrate that the conclusion reached was sound, logical and rational.[30]

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.[31]

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[28] *See David Apgar*, 57 ECAB ____ (Docket No. 05-1249, issued Oct. 13, 2005).

[29] *Beverly R. Jones, supra* note 21.

[30] *See John W. Montoya*, 54 ECAB 306 (2003).

[31] The Board notes that appellant retains the right to submit a valid request for reconsideration with the Office within one year of this decision. Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). 20 C.F.R. § 10.606(a). This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and March 18, 2004 be affirmed.

Issued: February 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board