United States Department of Labor
Employees' Compensation Appeals Board

RENEE SMITH, Appellant	)	
and	)	**Docket No. 05-104**
	)	**Issued: March 23, 2006**
U.S. POSTAL SERVICE, SUBURBAN PROCESSING CENTER, Gaithersburg, MD, Employer	)	

Appearances:
Renee Smith, pro se
Paul J. Klingenberg, Esq., for the Director

Oral Argument February 23, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 25, 2004, denying her claim that she sustained an emotional condition in the performance of duty. 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 sustained an emotional injury in the performance of duty.

FACTUAL HISTORY

On March 5, 2003 appellant, a 38-year-old mail processor, filed an occupational disease and claim for compensation Form (CA-2) alleging that her emotional condition was a result of her federal employment. She claimed that she experienced anxiety and stress due to willful discriminatory acts on the part of her supervisor, Daryl Martin. Appellant alleged that on

February 11, 2003 he refused to allow her to work the day shift and told her that she would be required to return to "tour three" the following day.

In a work slip dated March 3, 2003, Dr. Jyoti Behl, a Board-certified psychiatrist, recommended that appellant remain off work for an illegible period of time. In a note dated October 7, 1997, Dr. Stacy R. Meus, a treating physician, recommended that she be assigned to a position that required no heavy lifting. In an April 4, 2003 attending physician's report containing an illegible diagnosis and an April 15, 2003 duty status report, Dr. Behl noted that appellant was "psychiatrically ill" due to "stress at work." In a March 3, 2003 psychiatric evaluation, she related appellant's reported history, indicating that her supervisor caused her emotional stress in February 2003 by denying her job relocation request. Dr. Behl opined that because she had never experienced psychological problems in the past, the "stress at appellant's job seems to be the precipitating factor for the onset of major depression."

In a statement dated May 18, 2003, Dorris Samuel, appellant's mother, indicated that working tour three was difficult for her daughter, due to day care problems and that her daughter's manager had refused to allow her to transfer to the day shift or move to another location. In a statement dated April 7, 2003, appellant alleged that Mr. Martin refused her request to either continue on tour two or transfer her assignment so that she could complete a computer class in which appellant was enrolled. She also alleged that he "refused to make any concessions and would not allow [her] to stay on [her] detail." Appellant stated that, when she returned to work after two years following a work-related injury, she was assigned to tour three (night shift). She related that she was granted a transfer to a day shift by acting MDO Rosetta Watkins, in order to accommodate daycare arrangements for her six month old baby, but that on February 11, 2003 Mr. Martin informed her that she would have to report to tour three the following day. Mr. Martin allegedly told appellant that he could not reassign her because he needed people on tour three. She claimed that he refused to assign her to any position other than tour three "for no valid reason." Appellant alleged that there were others who were reassigned to detail positions under Mr. Martin and that he had "malicious and willful discontent" for her. She alleged that she was subjected to a constant stream of resistance and denial at every attempt to either better [herself] or make life a little easier because of [her] circumstances."

In a statement dated June 4, 2003, Mr. Martin, appellant's supervisor, denied her allegations. He contended that he did not treat her differently from other employees and that he directed all employees that had been converted to full-time status to work their assigned positions. Mr. Martin indicated that appellant had not provided any medical documentation of restrictions. He reported that, when she asked for a reassignment in order to complete her classes, he told her that she had the option of adjusting her scheduled reporting time or changing her nonscheduled days to accommodate her classes. Mr. Martin stated that he granted appellant a six-month schedule change, but was unable to extend this beyond six months because there were other employees with personal needs.

By decision dated August 28, 2003, the Office denied appellant's claim, finding that she failed to establish any compensable factors of employment.

On September 25, 2003 appellant requested an oral hearing. She alleged stress due to "prolonged exposure to hostile work environment and blatant d[i]sparate treatment practiced by

Mr. Martin." Appellant claimed that assignments that were initially approved by him, were denied upon his discovering that she was the individual making the request.

By letter dated February 22, 2003, Ozzie Alston, supervisor of distribution operations, stated: "I believe this to be a case of blatant discrimination and an outright attempt to hold [appellant] back because there have been others, previously and currently, who have been allowed the same privileges that [she] has requested and been denied." He also indicated that he had been in the presence of fellow supervisors when they made harsh and derogatory comments against appellant regarding her ability to move from her current position.

On November 11, 2003 appellant submitted a request that witness subpoenas be issued to Mr. Austin and Greg Frazier. She stated that the witnesses would be able to provide key testimony as to why she was the victim of discrimination.

On March 30, 2004 the Office hearing representative denied appellant's request for the issuance of witness subpoenas, in that she failed to state why the subpoenas were necessary to fully present the facts in her case.

Appellant submitted an April 4, 2004 statement from Cecil R. Harriston, indicating that, during November 2003 appellant's detail to McPherson Station had been approved by himself and Harry Smith, but was later denied by Maryland management.

At the April 29, 2004 hearing, appellant reiterated her claim that Mr. Martin had denied the request to adjust her schedule so that she could complete her computer classes and repeatedly denied her positions that she requested. Appellant also testified that, when she returned to work on August 10, 2002 after a two-year leave of absence due to a work-related injury, she was permitted by MDO Watkins to work the day shift to accommodate her day care situation. On February 10, 2003 Mr. Martin informed her that she would be required to return to tour three the next day. She claimed that she was unable to make day care arrangements for her child and that she "went out on stress." Appellant indicated that she filed an Equal Employment Opportunity (EEO) claim, which resulted in a mediated agreement. The agreement provided that she would be permitted to remain on tour two for an additional 60 days, at which point appellant would return to tour three if no position had been agreed upon. The hearing representative left the record open for 30 days so that she could submit additional evidence.

Appellant submitted time and attendance records for three employees with less seniority than her, who were allegedly allowed to remain on detail or assigned to tour two during the time she was denied permission, namely Lisa Hunter, Robin Martin (wife of Mr. Martin), and Renee Edger-Brown.

By decision dated August 4, 2004, the Office hearing representative affirmed the August 28, 2003 decision, finding that appellant had established no compensable factors of employment.

LEGAL PRECEDENT

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 or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act.[1] The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her duties.[2] By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from 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.[3] Moreover, although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Thus, the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.[4]

The Board has recognized the compensability of verbal altercations or abuse in certain circumstances; however, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[5] For harassment or discrimination to give rise to a compensable disability, there must be evidence that the alleged actions did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[6] When an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is whether sufficient evidence has been submitted to factually support the claimant's allegations.[7]

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 which may be considered by a physician when providing an opinion on causal relationship and which are not deemed factors of employment and may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of

[1] 5 U.S.C. §§ 8101-8193.

[2] *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *Id*. *See also Peter D. Butt, Jr*., 56 ECAB ___ (Docket No., issued October 13, 2004).

[4] *See Charles D. Edwards*, 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004); *see also Ernest J. Malagrida*, 51 ECAB 287, 288 (2000).

[5] *See Charles D. Edwards, supra* note 4.

[6] *See Peter D. Butt, Jr., supra* note 3.

[7] *Id.*

record substantiates that factor.[8] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.[9] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim but rather must be corroborated by the evidence.[10]

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment.[11] 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 a causal relationship.[12]

ANALYSIS

The Board finds that appellant has not established any compensable employment factors under the Act.

Appellant has not attributed her emotional condition to the performance of her regular duties or to any special work requirement arising from her employment duties under *Cutler*, nor has she implicated her workload as having caused or contributed to her emotional condition. Rather, she has alleged discrimination on the part of her supervisor. 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.[13] 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.[14] In the present case, appellant's supervisor denied that she was subjected to discrimination and she has not submitted sufficient evidence to establish her claim.[15] She alleged that Mr. Martin was "malicious and willful" and engaged in "a constant stream of

[8] *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[9] *See Charles D. Edwards, supra* note 4.

[10] *Charles E. McAndrews*, 55 ECAB ___ (Docket No. 04-1257, issued September 10, 2004); *see also Arthur F. Hougens*, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence corroborated such allegations).

[11] *See Charles D. Edwards, supra* note 4.

[12] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997)

[13] *See Lori A. Facey*, 55 ECAB ___ (Docket No. 03-2015, issued January 6, 2004). *See also David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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

[15] *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).

resistance and denial" at every attempt appellant made to better herself or make life a little easier. The only evidence provided by appellant was a statement by Mr. Alston, who expressed his belief that this was "a case of blatant discrimination" and indicated that he had heard supervisors make "harsh comments and other derogatory statements" about appellant's ability to transfer from her current position. His allegations are subjective, vague and do not specifically address the actions allegedly taken by Mr. Martin against appellant. Therefore, they do not corroborate her allegations. Mr. Martin denied that he treated appellant differently from other employees. He stated that he had directed all employees that had been converted to full-time status to work their assigned positions. Mr. Martin reported that, when appellant asked for a reassignment in order to complete her classes, he told her that she had the option of adjusting her scheduled reporting time or changing her nonscheduled days to accommodate her classes, as he would have informed any other employee. He granted appellant a six-month schedule change, but was unable to extend the change beyond six months because there were other employees with personal needs and he needed her to work on tour three. Her general allegations that she was discriminated against by management are insufficient to establish that harassment did, in fact, occur. Thus, appellant has not established a compensable employment factor under the Act, with respect to these above-described allegations of discrimination.

The record reflects that appellant filed an EEO complaint. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[16] Where an employee alleges discrimination and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether appellant has established harassment or discrimination under EEO Commission standards. Rather, the issue is whether she, under the Act, has submitted sufficient evidence to establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.[17] In the instant case, there was no finding of discrimination, error or abuse on the part of the employing establishment. Rather, the parties entered into a mediated settlement, resolving the issue without admission of wrongdoing on the part of either party.

The Board finds that appellant's allegations that her supervisor wrongly refused to modify her work assignment transfer so that she could complete a computer class, assigned her to the evening shift (tour three), on February 11, 2003 and otherwise unfairly regulated appellant's work assignments, 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.[18] Although the assignment of work duties and the monitoring of work activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[19] However, the Board has also found that an administrative or

[16] *See James E. Norris*, 52 ECAB 93 (2000). *See also Parley A. Clement*, 48 ECAB 302 (1997).

[17] *See James E. Norris, supra* note 16. *See also Michael Ewanichak*, 48 ECAB 354 (1997).

[18] *See Lori A. Facey*, *supra* note 13. *See also 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, 66-67 (1988).

[19] *Id.*

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.[20] In this case, appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. The Board also finds that denying appellant's request to work the day shift so that she would be able to attend school was reasonable under the circumstances. Thus, she has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant generally indicated that she felt miserable as a result of her supervisor's treatment and believed that his actions were malicious and willful. However, under the circumstances of this case, the Board finds that her emotional reaction must be considered self-generated in that it resulted from her perceptions regarding her supervisor's actions.[21] Appellant alleged that she was depressed as a result of being forced to work the evening shift and being prevented from obtaining assignments that would make her life a little easier. Her frustration from not being permitted to work in a particular environment is not a compensable factor under the Act.[22]

For the foregoing reasons, appellant has not established 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.[23]

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

[21] *See David S. Lee*, 56 ECAB ___ (Docket No. 04-2133, issued June 20, 2005).

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

[23] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, *supra* note 8.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board further finds that the Office properly denied her subpoena request.[24]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 25 and March 30, 2004 are affirmed.

Issued: March 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[24] The Board also finds that, in her March 30, 2004 decision, the Office hearing representative properly denied appellant's request to subpoena witnesses for the oral hearing. Section 8126 of the Act provides that the Secretary of Labor may "issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." 5 U.S.C. § 8126. Section 10.619 of the Code of Federal Regulations provides that a claimant may request a subpoena as part of the hearings process but that the decision to grant or deny the request is within the discretion of the Office hearing representative. The claimant's request must explain why the testimony is directly relevant to the issues at hand and why a subpoena is the best method to obtain such evidence considering the other possible means of obtaining it. 20 C.F.R. § 10.619. The Office hearing representative did not abuse her discretion in denying appellant's subpoena request in that she explained that appellant did not show that the information sought from the witnesses would be necessary to fully present the facts in the case or that it could not be obtained by means other than the issuance of subpoenas. *See Tina D. Francis*, 56 ECAB ___ (Docket No. 04-965, issued December 16, 2004).