United States Department of Labor
Employees' Compensation Appeals Board

N.P., Appellant	)	
and	)	**Docket No. 07-1459**
	)	**Issued: October 18, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Rocky Mount, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 5, 2006 merit decision denying her emotional condition claim and July 26, 2006 and March 14, 2007 nonmerit decisions denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied appellant's requests for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 21, 2004 appellant, then a 56-year-old general clerk, filed an occupational disease claim alleging that she sustained an emotional condition in the performance of duty. She

alleged that the employing establishment improperly changed her work on January 31, 2004 and placed her in a job that involved sitting and standing in a "very small area" while she answered the telephone or door 10 to 20 times per day. Appellant indicated that her prior job involved physical work and was mentally stimulating but that her new duties did not require any productive work. She claimed that the new job brought about changes in her hours, days off and workplace. Appellant stopped work for intermittent periods after she filed her claim.

In several statements of record, appellant indicated that the transfer to a new job made her "feel like an outsider" who was not needed and that her coworkers did not want her at work because she was not productive. She asserted that Larry Taylor, a supervisor, facilitated the transfer because he wanted her out and knew that she would "go crazy" if she had nothing to do. Appellant claimed that Mr. Taylor also ordered her transfer in retaliation for filing Equal Employment Opportunity (EEO) complaints on her own behalf and filing grievances for coworkers in her capacity as a union steward. She claimed that Mr. Taylor's assertion that there was no other work within her work restrictions was a "fabrication."[1] Appellant submitted journal entries dated beginning in early 2004 that showed how many times she answered the telephone or door during her workday.[2] She claimed that when she gave these logs to Mr. Taylor he threw them in the trash without looking at them.

The record contains documents which describe the job to which appellant was transferred effective January 31, 2004. It involved working Monday to Thursday at the Westridge Station in Rocky Mount and Saturday at the Rocky Mount Carrier Annex between the hours 7:30 a.m. and 4:00 p.m.[3] The duties included assisting in answering the telephone, assisting customers who came in the side door with mail pickup notices, change of address inquiries and other customer needs, completing accountable notices and maintaining the P.O. Box section book. Appellant accepted the position on January 23, 2004. The record also contains a document which describes the job which she performed prior to January 31, 2004. The job involved working Monday to Thursday and Saturday at the Rocky Mount Carrier Annex in Rocky Mount between the hours of 6:30 a.m. and 3:00 p.m. The duties of the job included putting mail in carrier cases, transporting mail between post offices, delivering express mail, answering the telephone, and waiting on customers at the door.[4]

Appellant filed an EEO complaint in connection with the January 31, 2004 transfer and submitted documents regarding her complaint. The record contains an April 13, 2004 document which indicates that her complaint was resolved such that her nonscheduled days "shall be Sunday/Friday unless a valid 3189 is used." The document does not contain any findings or indicate wrongdoing by any party. Appellant also submitted medical reports in which Dr. David

[1] Appellant had work restrictions due to an accepted carpal tunnel syndrome condition.

[2] Appellant indicated in her logs that she tended to answer the telephone or door about 10 to 20 times per day.

[3] There is some indication in the record that, for a while, appellant's nonscheduled days in this new position were Sunday and Monday, but it appears that these were not her permanent nonscheduled days.

[4] The record contains documents which describe slightly different hours for appellant's job before and after January 31, 2004 but these recitations of appellant's hours do not show a change of more than an hour in her starting and ending times before and after January 31, 2004.

Browder, an attending Board-certified internist, described her physical and emotional condition beginning in February 2004.

On May 10, 2004 Stamie Perryman, the postmaster at the employing establishment, asserted that there was nothing improper about appellant's January 31, 2004 transfer. Mr. Perryman stated that the main reason for the transfer was to allow appellant to perform work within her medical restrictions. He indicated that the Westbridge Station was chosen for the transfer because it was one of the busier stations and would allow appellant to be productive while still working within her restrictions. Mr. Perryman stated that the transfer only involved a half hour change in her starting and ending times, that her nonscheduled days remained Friday and Sunday, and that the Westridge Station and the Rocky Mount Carrier Annex were only three miles apart. He observed on several occasions that appellant had chosen not to perform many of the duties of her new position, such as helping customers with their needs, despite the fact that these duties were within her work tolerance restrictions.

In a September 2, 2004 decision, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Office found that appellant did not show that the employing establishment committed error or abuse with respect to any aspect of her January 31, 2004 job transfer. It also determined that she had not shown that she was subjected to harassment or discrimination.

Appellant submitted additional medical evidence, including reports of Dr. Browder and Dr. Judith Yongue, an attending Board-certified psychiatrist. She requested a review of the written record by an Office hearing representative. In a March 31, 2005 decision, the Office hearing representative affirmed the September 2, 2004 decision.

On June 22, 2005 appellant requested reconsideration of her claim. She reiterated arguments similar to those contained in her previous statements. Appellant submitted additional medical reports and numerous new entries from her logs of work activities. In a June 28, 2005 decision, the Office found that appellant had not established any compensable employment factors.

On September 9, 2005 appellant requested reconsideration of her claim and asserted that the attached documents would support her claim. She submitted a February 12, 2004 settlement of a grievance she filed against Mr. Taylor. The settlement indicated that it was without prejudice to all parties, provided that appellant would accept a verbal apology and would accept overtime pay of $350.00. She also submitted an August 11, 2005 letter from David Morris, a customer service supervisor. He indicated that appellant reported that she did not have enough productive work to do and spent much of her time reading novels. Mr. Morris arranged for appellant to start another limited-duty job earlier in 2005 at the Rocky Mount Processing and Distribution Facility which involved carrying express and improperly sent mail and that appellant reported that she felt more productive in this position.[5]

In a April 5, 2006 decision, the Office affirmed its prior decisions indicating that appellant had not established any compensable employment factors. The Office found that the

[5] Appellant submitted logs of her work in this new position.

evidence submitted by appellant did not establish that the employing establishment committed error or abuse in connection with the January 31, 2004 transfer. In a June 5, 2006 letter, appellant requested reconsideration of her claim. She argued that the Office misidentified that date she sustained a recurrence of disability in a prior claim for a physical injury. Appellant indicated that she used sick leave between January 2004 and January 2005 and was confused about why the Office did not consider her medical evidence.

In a July 25, 2006 decision, the Office denied appellant's request for further review of the merits of her claim.

In a March 5, 2007 letter, appellant requested reconsideration of her claim. She attached a perfect attendance award that she received in February 2007 and asserted that it showed that she had been subjected to a hostile work environment which forced her to use sick leave.

In a March 14, 2007 decision, the Office denied appellant's request for further review of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[6] 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[7]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[8] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[9]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[8] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[9] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[10] If a claimant does implicate 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.[11]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether the alleged incidents and conditions of employment are compensable employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment improperly transferred her to a new limited-duty position on January 31, 2004[12] and did not give her productive work duties, 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.[13] Although the handling of transfers and the assignment of work duties are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.[14] 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.[15]

Appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. She did not submit evidence, such as the results of grievances, which would show that the employing establishment committed error or abuse in effectuating this transfer. The record contains an April 13, 2004 document which indicates that appellant's complaint was resolved such that her nonscheduled days "shall be Sunday/Friday unless a valid 3189 is used." However, it does not contain any findings or establish wrongdoing by any party.

[10] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[11] *Id.*

[12] Appellant indicated that a supervisor, Mr. Taylor, was responsible for this transfer.

[13] *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).

[14] *Id.*

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

Appellant argued that the January 31, 2004 transfer was improper because she was not given any productive work. She submitted personal work logs in which she indicated that she tended to answer the telephone or door 10 to 20 times per day. However, appellant's belief that she was underutilized would not show that the January 31, 2004 transfer or the job itself was improper. The Board has held that an employee's dissatisfaction with holding a position in which she feels underutilized, performing duties for which she feels overqualified, or holding a position which she feels to be unchallenging or uninteresting is not compensable under the Act. Such dissatisfaction would constitute frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[16] Moreover, Mr. Perryman, the postmaster, stated that the main reason for the transfer was to allow appellant to perform work within her medical restrictions. He indicated that the Westbridge Station was chosen for the transfer because it was one of the busier stations and would allow her to be productive while still working within her restrictions.[17] Appellant has not established a compensable employment factor under the Act with respect to these administrative matters.[18]

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. She alleged that Mr. Taylor engineered her January 2004 transfer because he wanted to force her out of the employing establishment as a means of retaliation for filing grievances.[19] Appellant also claimed that coworkers resented her presence and made her feel unwelcome in her new job because she was not productive. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[20] 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.[21]

The employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was

[16] *See Purvis Nettles*, 44 ECAB 623, 628 (1993).

[17] Moreover, it should be noted that the new position involved duties other than answering the telephone and door and Mr. Perryman observed on several occasions that appellant had chosen not to perform many of the duties of her new position, such as helping customers with their needs, despite the fact that these duties were within her restrictions. Appellant submitted evidence showing that she was transferred to another limited-duty position in May 2005, but this evidence does not show that there was anything improper about her January 2004 transfer.

[18] Appellant's January 31, 2004 transfer would not constitute a case where changes in a work shift constituted an employment factor. The starting and ending times of the new job only differed from those of her old job by less than an hour and her new workplace was only about three miles from her old one. *Compare Gloria Swanson*, 43 ECAB 161, 165-68 (1991) (finding that some shift changes, such as a change from a day shift to a night shift, could constitute a compensable employment factor).

[19] Appellant claimed that Mr. Taylor threw away her personal work logs without looking at them.

[20] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

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

harassed or discriminated against by his supervisors or coworkers.[22] Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[23] Appellant submitted a February 12, 2004 settlement of a grievance she filed against Mr. Taylor which indicated that she would "accept the verbal apology" and would accept "the overtime pay of $350.00." However the settlement stated that it was without prejudice to all parties and it does not appear to relate to the January 2004 transfer or any other implicated employment factor. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that she sustained an emotional condition in the performance of duty.[24]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[25] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[26] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[27] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[28] The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record[29] or the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[30] While a reopening of a case may be predicated solely on

[22] *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).

[23] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[24] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[25] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[26] 20 C.F.R. § 10.606(b)(2).

[27] 20 C.F.R. § 10.607(a).

[28] 20 C.F.R. § 10.608(b).

[29] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[30] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[31]

ANALYSIS -- ISSUE 2

In connection with her June 5, 2006 reconsideration request, appellant argued that the Office misidentified that date she sustained a recurrence of disability in a prior claim for a physical injury. However, appellant did not explain how this matter concerning an entirely different claim would be relevant to the main issue of the present case, *i.e.*, whether the Office properly denied her emotional condition claim by finding that she did not establish any compensable employment factors. Appellant suggested that the Office should have considered the medical evidence she submitted, but this would not constitute a legal contention with a reasonable color of validity because the Office is not required to consider the medical evidence when no compensable employment factors have been established.[32] In connection with her March 5, 2007 reconsideration request, appellant attached a perfect attendance award that she received in February 2007 and asserted that this award showed that she had been subjected to a hostile work environment which forced her to use sick leave. However, appellant did not adequately articulate how her perfect attendance award would show that management created a hostile work environment and this argument would not be relevant to the main issue of the present case.

Appellant has not established that the Office improperly denied her June 2006 and March 2007 requests for further review of the merits of its April 5, 2006 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office. Therefore, the Office properly denied appellant's reconsideration requests in its July 25, 2006 and March 14, 2007 decisions.

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 appellant's requests for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[31] *John F. Critz*, 44 ECAB 788, 794 (1993).

[32] *See supra* note 22 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 14, 2007, July 26 and April 5, 2006 decisions are affirmed.

Issued: October 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board