

FACTUAL HISTORY

On May 16, 2007 appellant, then a 48-year-old patient advocate, filed an occupational disease claim alleging that she sustained an emotional condition in the performance of duty.¹ She claimed that she was exposed to unfair labor practices at work.

Appellant submitted statements dated May 16 and June 20, 2007 in which she described her claimed employment factors. She alleged that she was subjected to harassment and discrimination by Robin Cook, a supervisor, including an occasion on May 2, 2007 when Ms. Cook wrongly accused appellant of calling her a liar. Appellant asserted that Ms. Cook mishandled a number of her leave requests and subjected her to unfair scrutiny with respect to various work matters. She claimed that a coworker in the quality management office yelled at her when she submitted a leave request. Appellant alleged that she was singled out to work in the employing establishment's Seattle office more than her coworkers and asserted that changes in her schedule were made on a discriminatory basis. She claimed that she was subjected to a hostile work environment after declining to attend a retirement lunch in August 2005 and that, in connection with this matter, Ms. Cook asked her, "Does this have to do with color?"

Appellant claimed that her filing of an Equal Employment Opportunity (EEO) claim on April 10, 2007 led to retaliation at the employing establishment. She claimed that she was targeted for allegedly blowing the whistle on the minority veteran's program and the quality improvement program by stating that these programs were biased. Appellant claimed that she was subjected to a hostile work environment when she "spoke up." She alleged that she was subjected to discrimination because Tom Rogers, a coworker, was promoted from the GS-9 to the GS-11 grade level in one year. Appellant claimed that the employing establishment's Seattle and American Lake offices were not cleaned on a regular basis. She asserted that traffic from the Seattle minority veteran's program office was diverted into the patient advocate office because their sign was not removed from the door after moving to the fifth floor. Appellant claimed that in 2006 and early 2007, she was exposed to constant noise from construction work and that she was the frontline person for dealing with threatening comments from extremely agitated veterans. She alleged that her office was short of staff and that therefore there were numerous days when she "could not get out of the office."

Appellant submitted numerous documents including e-mail communications with coworkers and supervisors, performance evaluations, leave records and position descriptions. In a series of e-mail communications from early 2007, she indicated that there were problems with the cleaning service in her office. Appellant submitted numerous medical records from Dr. Norman D. Farley, an attending clinical psychologist, who discussed her emotional condition.

In June 11 and July 5, 2007 statements, Ms. Cook denied that appellant was subjected to harassment and discrimination or wrongdoing with respect to various administrative matters. She denied making any harassing or abusive comments to appellant. Ms. Cook asserted that the employing establishment did not mishandle work assignments, leave requests, promotions and other administrative matters. She stated that appellant's perception that she had to work in certain

¹ Appellant asserted that she sustained depression and migraine headaches due to work-related stress.

offices more than similarly-situated coworkers was not supported by the evidence. Ms. Cook indicated that the employing establishment had been advised of problems with the cleaning of offices and the placement of signage but that these problems were appropriately handled. She indicated that she had seen no independent evidence that patients threatened appellant. Ms. Cook indicated that on May 2, 2007 she did ask appellant if she was calling her a liar but asserted that she only made this comment after she repeatedly denied, despite the existence of contrary facts, that patient complaints against her had increased.

In a December 10, 2007 decision, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. It found that appellant did not submit evidence showing that she was harassed and discriminated against or that the employing establishment erred in handling administrative matters.

Appellant requested reconsideration and submitted several documents, including July and November 2007 documents concerning the handling of her EEO claim, a January 2003 document from the Department of the Army notifying her of medical disqualification and a March 2006 document regarding a veterans disability classification. She also submitted additional medical evidence and resubmitted e-mail communications regarding cleaning issues which were already in the record.

In an April 2, 2008 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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.² 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.³

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.⁴ This burden includes the submission of a detailed

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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 providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁶ 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.⁷

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 appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant claimed that she was subjected to harassment and discrimination by Ms. Cook, a supervisor, including an occasion on May 2, 2007 when Ms. Cook accused her of being a liar.⁸ She asserted that Ms. Cook subjected her to unfair scrutiny with respect to various work matters and that work assignments and changes in her schedule were made on a discriminatory basis. Appellant claimed that she was subjected to a hostile work environment after declining to attend a retirement lunch in August 2005 and after she filed an EEO claim on April 10, 2007. She alleged that she was targeted for allegedly blowing the whistle on the minority veteran's program and the quality improvement program by stating that these programs were biased. Appellant alleged that she was subjected to discrimination because Mr. Rogers, a coworker, was promoted from the GS-9 to the GS-11 grade level in one year.

To the extent that disputes and incidents alleged as constituting harassment and discrimination are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.⁹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ Appellant also alleged harassment by coworkers, including an occasion when a coworker in the quality management office yelled at her after she submitted a leave request.

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁰

Ms. Cook denied that appellant was subjected to harassment or discrimination. Appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.¹¹ Ms. Cook acknowledged that on May 2, 2007 she did in fact ask appellant if she was calling her a liar. However, she indicated that she only made this comment after appellant repeatedly denied, despite facts to the contrary, that patient complaints against her had increased. Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹² Appellant has not shown how such an isolated comment by Ms. Cook would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.¹³ With respect to her other alleged instances of harassment, she provided no evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁴ Appellant alleged various discriminatory actions but she did not submit evidence, such as the findings of grievances, to support these claims. Thus, she has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that a number of matters relating to her leave requests, work assignments and work schedules were mishandled by management. She suggested that she should have been promoted over her coworkers and that she was subjected to unwarranted criticism by supervisors. Appellant asserted that traffic from the Seattle Minority Veteran's Program office was diverted into the patient advocate office because their sign was not removed from the door after moving to the fifth floor.

Regarding appellant's allegations that management wrongly denied leave, improperly assigned work duties, mishandled promotion matters and the placement of signage and unreasonably criticized her activities at work, 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.¹⁵ Although such matters are generally related to the employment, they are administrative functions of the employer, and not

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ *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).

¹² *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹³ *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

¹⁴ *See William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁵ *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).

duties of the employee.¹⁶ 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.¹⁷ Again, appellant did not submit sufficient evidence to establish that the employing establishment committed error or abuse with respect to these matters. For example, she did not submit the findings of grievances to support that management committed error or abuse.¹⁸ Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant alleged that her office was short of staff and that therefore there were numerous days when she “could not get out of the office.” The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.¹⁹ However, appellant did not present factual evidence to support the claim that her office was shorthanded such that she had difficulty in meeting her position requirements.²⁰ She alleged that she had to work in a noisy and unclean environment. The Board has recognized that unsafe and environmentally unpleasant work conditions can constitute a factor of employment, but appellant only described these claims in a generalized manner and did not submit sufficient factual evidence to support them.²¹

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 he sustained an emotional condition in the performance of duty.²²

¹⁶ *Id.*

¹⁷ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁸ Ms. Cook stated that appellant’s perception that she had to work more in certain offices than similarly-situated coworkers was not supported by the evidence. She indicated that the employing establishment had been advised of problems with the placement of signage but that these problems were appropriately handled.

¹⁹ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

²⁰ Appellant also alleged that she was exposed to threatening comments from extremely agitated veterans. She did not submit evidence to support this claim and Ms. Cook indicated that she did not have independent evidence that appellant was threatened.

²¹ See *Peggy Ann Lightfoot*, 48 ECAB 490, 494 (1997). The record contains email communications in which appellant complained about the cleaning services, but these documents would not establish the nature of the actual condition she had to work in.

²² 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).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²³ 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.²⁴ 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.²⁵ 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.²⁶ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record²⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁸

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant submitted several documents which she believed supported her claim, including July and November 2007 documents concerning the handling of her EEO claim, a January 2003 document from the Department of the Army notifying her of medical disqualification, and a March 2006 document regarding a veterans disability classification. However, the submission of these documents does not require the reopening of appellant's claim because they are not relevant to her claims regarding employment factors.²⁹ The EEO documents do not contain any findings and, with respect to the other documents, the Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under the Act.³⁰ Appellant also submitted additional medical evidence but the underlying issue is factual rather than medical. She submitted e-mail communications regarding cleaning issues but these document were already of record and were previously considered by the Office.³¹

²³ 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).

²⁴ 20 C.F.R. § 10.606(b)(2).

²⁵ *Id.* at § 10.607(a).

²⁶ *Id.* at § 10.608(b).

²⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

²⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁹ *See supra* note 28 and accompanying text.

³⁰ *See Donald Johnson*, 44 ECAB 540, 551 (1993).

³¹ *See supra* note 27 and accompanying text.

Appellant has not established that the Office improperly denied her request for further review of the merits of its December 10, 2007 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.

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 2, 2008 and December 10, 2007 decisions are affirmed.

Issued: January 23, 2009
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