

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

A.C., Appellant)

and)

SOCIAL SECURITY ADMINISTRATION,)
OFFICE OF HEARINGS & APPEALS,)
Hato Rey, PR, Employer)

**Docket No. 08-2032
Issued: May 18, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated February 5 and May 20, 2008 that 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 a stress-related condition causally related to her federal employment. On appeal she alleged that her condition was employment related and that she was exposed to asbestos during her federal employment.

FACTUAL HISTORY

On May 3, 2007 appellant, then a 54-year-old senior legal claims technician, filed a Form CA-2, occupational disease claim alleging severe depression and anxiety caused by harassment and persecution. She was first aware of her condition on August 6, 1979 and its relationship to

her employment on December 16, 1985.¹ In attached statements, appellant alleged that she had been physically and mentally ill for many years and sustained mini-strokes, facial paralysis with loss of memory and vision and speech impediment in 2003. She was allegedly harassed and discriminated against by her supervisors, Pablo Rodriguez and Jesus Rodriguez-Noble, who lied on her compensation claim form, violated her privacy, forced her to retire, and improperly called police on two occasions. Appellant's requests for special accommodation were denied. Because her computer did not work properly, her ability to perform her work was impeded, she was given inadequate training and improperly suspended from April 19 to 30, 2004. Mr. Rodriguez also placed negative comments regarding her job performance in her personnel file.

Appellant submitted documents regarding an Equal Employment Opportunity Commission (EEOC) claim, including an informal resolution finalized on January 11, 2007. The agreement, which was in full satisfaction of all claims filed by her, allowed her to retire on disability no later than October 31, 2006. The employing establishment agreed to remove from appellant's personnel file any reference to a 10-day suspension served in 2004 and any reference to a September 2006 proposed removal and agreed to pay her \$7,500.00. The agreement neither confirmed nor denied her allegations and the employing establishment admitted to no discrimination or retaliation or other prohibited personnel practices.

In a March 14, 2003 letter, Mr. Rodriguez advised appellant that she needed to submit medical reports to establish that she was fit to return to work due to her physical and emotional conditions. The reports were to provide mental and physical work limitations. Mr. Rodriguez noted that appellant's work was mostly sedentary with some walking, standing, bending and carrying of files and records. He noted that she had been provided accommodation limiting the scope of her duties. In a November 16, 2004 statement, he responded to appellant's EEOC complaint contending that she was not discriminated against. Mr. Rodriguez stated that in 2003 and 2004 appellant had severe health problems related to depression and a stroke but never requested reasonable accommodation under the handicapped guidelines. Based on her health, management and union officials agreed to a reduced, temporary workload. She was only assigned case preparation duties and was relieved of mailroom, scheduling, typing, master docket and receptionist duties and responsibilities, even though the modification of appellant's duties adversely impacted the group. Mr. Rodriguez stated that she was not discriminated against by either the March or April 2004 management actions.

In a proposal to terminate dated September 20, 2006, Lillian Rodriguez, group supervisor, stated that on August 22, 2003, appellant was reprimanded because of disruptive behavior at work on two occasions. On October 9, 2003 she became extremely disruptive, screaming, ranting and verbally threatening her own life and the lives of other employees. Ms. Rodriguez stated that local police and Federal Protective Service officers were called due to safety concerns for appellant and coworkers. She also described events that occurred on June 15, 2006, stating that appellant walked into an awards meeting and began speaking very loudly as it was concluding and disregarded a directive by the director and chief judge that the meeting had ended, continuing to speak loudly, accusing management of awarding employees who had testified against her in an EEOC case. Ms. Rodriguez related that appellant then walked to a

¹ Appellant stopped work on November 3, 2006.

coworker's workstation and accused her of participating in a plot and that the chief judge had to intervene due to appellant's aggressive attitude towards the employee. Appellant refused to leave the premises when ordered by the director and chief judge and returned to her workstation where she continued to speak loudly. A union representative was called and, after a 20-minute telephone conversation, appellant left the premises. Ms. Rodriguez noted that the Federal Protective Service had been called but the officer waited in reception and did not come into contact with appellant. She stated that for two hours appellant interfered with the mission and operation of the employing establishment. Ms. Rodriguez proposed to remove her from her position as senior case technician, noting that she was on administrative leave and was not to enter the employing establishment premises.

By letter dated December 4, 2007, the Office advised appellant to submit a statement which clearly outlined the basis of her claim, and a chronological account of all factors that she considered responsible for her condition. On December 26, 2007 appellant requested 30 additional days to submit information.

In a decision dated February 5, 2008, the Office denied her claim. It found that appellant failed to establish a compensable factor of employment or that she sustained a stress-related condition in the performance of duty.

On February 18, 2008 appellant requested reconsideration, reiterating her allegations of harassment and discrimination at work. In a January 15, 2008 statement, appellant stated that her emotional and physical conditions were caused by discrimination, harassment and chastisement by her managers, who showed favoritism to other employees. She also alleged harassment by coworkers. Appellant alleged that Ms. Rodriguez was given too much work, that management did not provide accommodation for her health needs or take her health problems into consideration when assigning work. It did not allow her to deal with the public because of her facial paralysis. Appellant contended that her privacy was violated, that her time and attendance were monitored, that she was given insufficient training, that her computer was damaged, and she was improperly suspended for disruptive behavior. In letters dated January 29 and February 8, 2008, she alleged that she was forced to retire on disability.

In a January 28, 2008 report, Dr. Luis M. Dorta Hernandez, a psychiatrist, noted that appellant had been under his care since July 2004. He described symptoms of acute anxiety, anguish and melancholia with frequent episodes of agitation, irritability and hostility, frequent episodes of auditory and visual hallucinations, episodes of acute disorientation and suicide attempts in 1998 and November 2006, with only a partial response to treatment. Dr. Hernandez stated that in June 2006 appellant was wrongfully accused of threatening coworkers. She experienced anguish, anxiety and fear when the state police were called and from that day on she was prohibited from returning to work. He advised that appellant's psychiatric illness was incapacitating with persistent dysphoria, melancholy, anxiety and irritability that obstructed her capacity to assume and finish tasks, maintain minimally healthy social relations, caused memory deficits, difficulty in concentrating and frequent episodes of agitation and hostility which impeded her capacity to develop and maintain adequate relations with others. Dr. Hernandez diagnosed schizoaffective disorder, depressed type, rule out multiple sclerosis, gastroesophageal reflux, history of multiple cerebrovascular accidents, and partial gastric resection.

By decision dated May 20, 2008, the Office denied modification of the February 5, 2008 decision.²

LEGAL PRECEDENT

To establish an emotional or stress-related condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; and (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.³ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁴ 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.⁵

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*,⁶ 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.⁷ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁸ 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 his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁹ A claimant must support his or her allegations with probative and reliable evidence. Personal perceptions alone are insufficient to establish an employment-related emotional condition.¹⁰

² On September 18, 2008 appellant requested reconsideration with the Office and submitted additional evidence. By letter dated October 22, 2008, it informed appellant that, as she had an appeal before the Board, no further action would be taken on her reconsideration request.

³ See *Pamela D. Casey*, 57 ECAB 260 (2005).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Id.*

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Pamela D. Casey*, *supra* note 3.

⁹ *Lillian Cutler*, *supra* note 6.

¹⁰ *Jeral R. Gray*, 57 ECAB 611 (2006).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.¹¹ Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.¹²

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.¹³ 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 and feelings of harassment will not support an award of compensation.¹⁴

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty causally related to factors of her federal employment. She alleged that she worked in a hostile work environment and was harassed by her managers. Appellant alleged that her privacy was violated, that she was improperly suspended and forced to retire, police were improperly called, that she was not provided the accommodation of working at home four days a week, was given additional work, provided inadequate training, which her computer did not work properly and negative comments were placed on her performance appraisal.

Regarding appellant's claim that she was improperly suspended and forced to retire, an EEOC informal resolution finalized on January 11, 2007 stipulated that she agreed to retire. While the resolution also noted that her suspension would be removed from her personnel file, the findings of other federal agencies are not dispositive with regard to questions arising under the Act and the Office is not bound by the findings and conclusions of or the EEOC.¹⁵ The agreement between appellant and the employing establishment explicitly stated that it was not to

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² *Kim Nguyen*, 53 ECAB 127 (2001).

¹³ *James E. Norris*, 52 ECAB 93 (2000).

¹⁴ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁵ *Irene St. John*, 50 ECAB 521 (1999).

be construed as an admission of any wrongdoing. She did not establish an employment factor in this regard.¹⁶

Regarding appellant's contentions that the employing establishment provided inadequate training and that her computer was broken, these allegations relate to administrative or personnel matters and appellant did not submit evidence to show that the employing establishment committed error or abuse with respect to these matters.¹⁷ She also alleged that she should have been allowed to work at home four days a week. Not being permitted to work in a particular environment or to hold a particular position is not compensable.¹⁸ Similarly, appellant's contention that comments were improperly appended to her performance appraisal is not compensable. This allegation, too, relates to administrative or personnel matters and again, she did not submit evidence to show that the employing establishment committed error or abuse in that regard.¹⁹ The Board finds that appellant's contentions regarding these administrative matters are not compensable.²⁰

Regarding the police, Ms. Rodriguez described appellant's disruptive behavior on October 9, 2003 and June 15, 2006. Generally, complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.²¹ The Board finds that it was reasonable for the police to be called on these two occasions when appellant's behavior became disruptive and threatening. She therefore did not establish this as a compensable factor.

Appellant also generally alleged that her privacy was violated. She, however, did not refer to specific incidents. There is therefore no factual evidence to establish this assertion. While appellant generally alleged that she was given extra work, she did not provide any evidence to document the alleged overwork. Consequently, this allegation is not established by the evidence.²² Appellant contended that she was harassed by the employing establishment. However, mere perceptions of harassment or discrimination are not compensable under the Act.²³ Unsubstantiated allegations of harassment or discrimination are not determinative of

¹⁶ *Lori A. Facey*, 55 ECAB 217 (2004).

¹⁷ *Brian H. Derrick*, 51 ECAB 417 (2000).

¹⁸ *Peter D. Butt, Jr.*, 56 ECAB 117 (2004).

¹⁹ *Jamal A. White*, 54 ECAB 224 (2002).

²⁰ *Charles D. Edwards*, *supra* note 11.

²¹ *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006).

²² *Bonnie Goodman*, 50 ECAB 139 (1998).

²³ *James E. Norris*, *supra* note 13.

whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.²⁴ As noted, appellant submitted an EEOC informal resolution. This agreement, however, neither confirmed nor denied her allegations and the employing establishment admitted to no discrimination or retaliation or other prohibited personnel practices. Appellant was not to use the agreement in any judicial or other administrative proceeding as evidence to prove the existence of discrimination or retaliation or other prohibited personnel practices. She submitted no evidence to show a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or workers.²⁵ The Board therefore finds that appellant did not establish a factual basis for her claim of harassment by probative and reliable evidence.²⁶

As the record lacks probative evidence to support appellant's claim, the Board finds that she has not established a compensable employment factor of employment. She therefore did not establish that she sustained a stress-related condition in the performance of duty as alleged.²⁷

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a stress-related condition in the performance of duty.

²⁴ *Id.*

²⁵ *Beverly R. Jones, supra* note 14.

²⁶ *See Robert Breeden, 57 ECAB 622 (2006).*

²⁷ As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Katherine A. Berg, 54 ECAB 262 (2002)*. Regarding her claim on appeal that she was exposed to asbestos at the employing establishment, the record does not indicate that she has filed a claim for compensation for asbestos exposure and the Office has not issued a final decision in that regard. The Board's jurisdiction is limited to reviewing final decisions of the Office. *Karen L. Yaeger, 54 ECAB 323 (2003)*. Lastly, the Board notes that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as the Board's review is limited to the evidence in the case record at the time the Office issued its final decision. *D.E., 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007)*.

ORDER

IT IS HEREBY ORDERED THAT the May 20 and February 5, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: May 18, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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