United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 09-673**
	)	**Issued: October 26, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Albuquerque, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2009 appellant filed a timely appeal of the decision of the Office of Workers' Compensation Programs dated March 19, 2008 and the decision of the hearing representative dated December 1, 2008 denying appellant's claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the 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.

On appeal, appellant alleges that the Office failed to consider her medical reports. She also contends that the hearing representative erroneously found that she only took 12 days of leave when she actually took off 3 months plus 12 days of leave. Finally, appellant contends that the Office failed to consider a statement from Jacquin Sandoval that documented that she was harassed at work.

FACTUAL HISTORY

On January 24, 2008 appellant, then a 45-year-old rural carrier filed a traumatic injury claim for emotional distress which she attributed to issues with her supervisor. She noted that she was unable to concentrate and was not sleeping. Appellant also listed depression, headache, and clenching teeth, and noted that she had problems with her shoulder and hip. In a statement on the claim form controverting her claim, her supervisor indicated that appellant never had any problem with her working relationship with the supervisor until she was told that the supervisor was going to testify against her in court.

By letter dated February 4, 2008, the Office asked appellant to submit evidence in support of her claim.

In support of her claim, appellant submitted two certificates of health care provider under the Family and Medical Leave Act of 1993 completed by Dr. Edward Chelist, a family practitioner, noting that appellant was totally incapacitated and suffered from, *inter alia*, fibromyalgia, depression and anxiety.[1]

By letter dated February 8, 2008, the employing establishment indicated that it was controverting appellant's claim as appellant has not submitted substantive medical evidence supporting that the alleged working conditions and supervisor incident related to her complete incapacitation or that this condition was caused in the performance of duty. In an accompanying description of accident, the form indicates that on January 24, 2008 appellant alleged that she was approached by her supervisor while in her case and was told to put up the new labels on her route. At that time, appellant indicated that she became short of breath and anxious in her case. In a statement dated February 8, 2008, John Gilliam, appellant's supervisor, at this time, indicated that on January 24, 2008 at approximately 7:40 a.m., appellant approached his desk and started talking about her route. The supervisor indicated that after talking about five minutes, he started going around to check on carriers. He noted that about 10 to 15 minutes later he came back to his desk and there was a claim form on his keyboard from appellant. The supervisor indicated that he spoke with appellant and that they completed the accident report before she left. He noted that she did not return to work.

In a March 2, 2007 note, appellant stated that on that date she was filing a class action in that on that date all auxiliary routes were told they would be taking their mail to the streets beginning March 6, 2007 and that "no legitimate reason has been given for this action." She alleged that the carriers have to use their own vehicles for delivery and that there were no accommodations for extra trays on the side or extra time allotted for delivery.

[1] In an undated form received by the Office on January 29, 2008, Dr. Chelist indicated that appellant suffered from stress, anxiety, depression and poor concentration and sleep. He noted that the duration of these conditions was approximately one year but that it had worsened in the past one to two months. Dr. Chelist noted that appellant was 100 percent incapacitated and was off work for at least 8 to 12 weeks. In a form dated February 3, 2008, he found that appellant had fibromyalgia, depression, anxiety, diffuse pain and poor sleep which commenced on January 25, 2008 and that appellant was to be off work until "at least" May 12, 2008.

Appellant also submitted an article entitled, "Question Box: Workplace Environment" regarding appropriate actions a person should take if the person feels threatened at work.

In a February 12, 2008 note, Dr. Chelist noted that he had been treating appellant since January 12, 2008 for what he believed to be fibromyalgia, or a combination of chronic, diffuse pain, depression and insomnia. He indicated that he "believed this is probably related to, and exacerbated by, a stressful work environment." Dr. Chelist noted that he has referred her for physical therapy and would like her to also have psychotherapy.

In a letter received by the Office on February 19, 2008, appellant indicated that when she started working at the Pino station for the employing establishment she "was singled out by the supervisor Frank Ortega as a focus of his attention for harassment for reasons unbeknownst to me." She alleged that he called appellant a "cabrona," "hideous" and an "ass." Appellant noted that the supervisor cornered her in her case, swept mail off her case with his arm, and announced to other employees, "You do not want to be as slow as [appellant]." She noted that he would not schedule her for work even though she had seniority. Appellant noted that other employees engaged in a fight on the workroom floor that she attributed to a hostile atmosphere at work and management's lack of training in addressing personnel issues. She noted that a case had been filed against her by the postal inspection services in District Court that alleged that she had defrauded the Housing Department, and she alleged these charges were brought shortly after she came to the attention of the inspection service for reporting the hostile work environment. Appellant indicated that this case was still pending and that the employing establishment distorted the facts. She also noted that she has been followed on her route by different postal authorities and that the station manager went on her route with her. Appellant indicated that she has been accused of misdelivery on routes that were carried by several different carriers. She noted her supervisor has found minor infractions almost every day. Appellant also noted that her route was evaluated by the station manager and found to be undervalued, so she was not slow but was not given enough time to complete the route. She stated that on the day she filed her claim, she found out that her present supervisor was going to be testifying against her in District Court and that this was the "proverbial 'straw that broke the camel's back.'" Appellant noted that she became extremely anxious and developed a very bad headache and became "very fearful of every day ordinary work being turned into disciplinary action at every turn." She alleged that the employing establishment "wants to fire [her] for making allegations about the hostile and violent work atmosphere, but I have done nothing to justify being fired."

Appellant also submitted notes that appear to be journal entries from January through February 2007 documenting issues with job assignments, issues with manager, and incidents of yelling.

The record also contains an inspector's report from the employing establishment's Office of Inspector General noting that it has referred appellant to the Sandoval County District Attorney's Office for prosecutorial consideration for underreporting income for the Department

of Housing and Urban Development's (HUD) Rental Assistance Program.[2] The agent noted that the joint investigation determined that appellant received $7,242.00 in excess housing benefits under HUD's Section 8 Housing Choice Voucher Program between March 2005 and March 2006 due to unreported and underreported income.

By decision dated March 19, 2008, the Office denied appellant's claim as the evidence failed to establish that she sustained an emotional condition as alleged which was caused during the performance of her federal duties.

On April 8, 2008 appellant requested an oral hearing.

In a letter to the Postmaster General dated June 27, 2007, appellant alleged that the employing establishment "trumped up charges with the District Attorney, indicted her and are trying to convict her of a crime she did not commit" in retaliation for her reporting the beginning of a violence in the workplace issue. She alleged that the employing establishment indicated that she had underreported her income by $33,000.00, when her total income for 2005 was $22,000.00. Appellant also alleged that she had a break in service in June 2005, which the employing establishment covered up. She also contended, *inter alia*, that she had been called names and belittled in front of her fellow employees, was starved out of work, and that management singles her out for investigation. Appellant further alleged that she was not assigned work as entitled by her seniority.

Appellant also submitted a statement written to the Postmaster General by Marion R. Montano, a fellow employee. Ms. Montano alleged that appellant reported a violence in the workplace issue and the employing establishment responded by initiating an investigation of her housing situation and "trumped up charges with the District Attorney, indicted her and are trying to convict her of a crime she did not commit." She noted that the employing establishment, in "an effort to get rid of appellant, "trumped her charges with the District Attorney and erroneously reported that appellant underreported her income by $33,000.00 when her income for 2005 was only $22,000.00. Ms. Montano also indicated that in June 19, 2007 a situation developed in the workplace from when police were called when violence broke out between two employees. She requested an investigation by the Postmaster General. Ms. Montano also wrote a letter to Office indicating that appellant suffered from pain and anxiety due to the revelation that her supervisor intended to testify against her on a matter that had nothing to do with her employment. She also indicated that postal authorities followed appellant in a concerted effort to harass and intimidate her, which caused anxiety and pain.

In a statement Joaquin Sandoval, indicated that, when Supervisor John Stout left and was replaced by Frank Ortega, the environment at work became hostile and abusive. He noted the hostility was directed towards appellant and himself. Mr. Sandoval noted that on several

[2] In this report, the case agent was initiated as part of an ongoing collaborative effort between the employing establishment and HUD to identify employees receiving excess housing assistance due to unreported or underreported income. The employing establishment noted that appellant's annual income is listed as $33,785.00, but that she only reported $14,872.00 income to HUD. The case agent noted that appellant began work with the employing establishment on March 19, 2005 at a starting salary of $16.24 per hour, that she received income every two weeks with the exception of the period May 28 through June 10, 2005.

occasions he heard Mr. Ortega making abusive demands of appellant. He noted that he would tell appellant one day to take mail on the side and that the next day she would have to case it. Mr. Sandoval also alleged that Mr. Ortega discussed appellant's work performance with other employees. He noted that, after Mr. Ortega left, the situation became better. Mr. Sandoval noted that Mr. Ortega would say things such as "Don't be as slow as [appellant]" and "You [appellant] are not going to last."

At the hearing held on August 14, 2007, appellant testified that she worked for the employing establishment for almost three years as a rural carrier associate. She noted that her primary duty was to case mail and to load a vehicle and take that vehicle to the streets and deliver mail. Appellant indicated that, on January 24, 2008, she was told that her supervisor who has previously been cordial, John Gillium, was going to testify against her in a court case with the postal inspectors. When she confronted him she felt a sharp pain in her jaw and an upset stomach. Appellant noted that the case has not gone to court yet, and that the supervisor was removed as her supervisor because of the pending case. She indicated that she filed this claim for an emotional condition as a result of that and many other things prior to that. Appellant indicated that Supervisor Ortega screamed at her on the floor, flailed his arms and allowed two or three other male employees to berate her on the floor. Mr. Ortega told others not to be as slow as her. Appellant had another employee stick her finger in her face and scream at her. She indicated that her supervisor never did anything to stop this. Appellant testified that she missed maybe 10 to 12 days of work since January. She testified that even though she has the highest seniority and should be working 40 hours a week, she is assigned between 28 to 30 hours a week. Appellant's friend, Inez Arroyo, also testified that she was retired from the employing establishment. She testified that appellant was subjected to her supervisor calling her names, calling her down on the working floor, and pushing her in her cage. Ms. Arroyo also noted that the fight was due to the bad conditions at work which resulted in one employee putting her hands around other person's neck. She indicated that this hostile environment was made possible by the way appellant was treated. Ms. Arroyo testified that there were special rules and disciplinary actions that only applied to appellant.

Appellant also submitted a newspaper article dated July 13, 2003 and further medical reports.

By decision dated December 1, 2008, the hearing representative denied appellant's claim as she had not met her burden to establish that she sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

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 factors of her federal employment.[3] This burden includes the submission

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

of detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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 coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. However, when disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[5]

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.[6] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[7] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[8]

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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[9] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[10] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in

[4] *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

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

[6] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[7] *See William H. Fortner*, 49 ECAB 324 (1998).

[8] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[9] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[10] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[12]

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.[13] If a claimant does implicate a factor of employment, it 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.[14]

ANALYSIS

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 causally related to factors of her federal employment.

Appellant alleged that she suffered from stress from various actions of management. She objected to a management change wherein carriers with auxiliary routes were told that they would be taking their mail to the streets. Appellant noted that she was followed on her route by different postal authorities. She noted that she had been accused of minor infractions and misdelivery of mail. Appellant claimed that her route was undervalued and that she did not have enough time to complete her route. She contended that her seniority was not honored by management when assigning routes. Although the handling of disciplinary actions and the assignment of work duties are generally related to employment, they are administrative functions of the employer and not duties of the employee. Absent error or abuse, these matters would not be compensable.[15] The Board finds that there is no evidence sufficient to establish error or abuse of the employing establishment regarding the administrative matter of the assignment of work duties.[16] Furthermore, to the extent that appellant alleged that she was overburdened on her route, she did not provide details about this allegation or supporting evidence to establish a factual basis for this claim. With regard to appellant's allegations against her supervisor following her on her route and reprimanding her for minor infractions, 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 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

[12] *Beverly R. Jones*, 55 ECAB 411 (2004).

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

[14] *Id.*

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

[16] *Id.*

duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of supervisory or managerial actions will not be compensable, absent evidence of error or abuse.[17] Although Mr. Sandoval and Mr. Montano allege that appellant was treated particularly harshly by her supervisor, their general allegations are insufficient to establish that appellant was treated in an abusive manner by her supervisor in the monitoring of her duties.

Appellant also alleged that Supervisor Ortega would tell other employees not to be as slow as her. In support of this allegation, appellant submitted a statement by Joaquin Sandoval wherein he indicated that he heard Mr. Ortega say things like, "Do n[o]t be as slow as [appellant]"; and "You [appellant] will not last." Appellant correctly asserts that the hearing representative did not specifically address Mr. Sandoval's statement in her opinion. However, the Board finds that even with Mr. Sandoval's statement, appellant did not establish a compensable factor of employment with regard to this matter. Mr. Sandoval did not provide dates for the alleged mistreatment nor a description of specific circumstances. The Board has weighed this evidence and concludes that it is insufficient to sustain corroboration of her allegation.

Appellant also asserted that she was harassed by her supervisor. The Board has held that actions of the employing establishment which the employee characterizes as harassment or retaliation may constitute factors of employment giving rise to coverage under the Act.[18] Mere perceptions of harassment and retaliation are not compensable under the Act. To discharge her burden of proof, appellant must establish a factual basis for her claim by supporting her allegations of harassment with probative and reliable evidence.[19] Appellant has not provided probative evidence in support of her allegations of harassment. She alleges that she was called "cabrona," "hideous" and an "ass." Appellant also alleged that management did not properly control the other employees who berated her. There is no support in the record that the supervisor actually called appellant these names or that other employees berated appellant. Although Ms. Arroyo did testify at the hearing that appellant was physically pushed in her case by her supervisor, there is no further support with regard to the date of this occurrence nor is it clear that Ms. Arroyo actually observed the behavior or is merely repeating what appellant told her.

Appellant also asserts that the employing establishment filed a case with the District Attorney on "trumped up charges" alleging housing fraud and that when she discovered that her supervisor was going to testify against her she became extremely stressed. The reporting of appellant for failure to report her full income from the employing establishment to HUD is an administrative matter and not a duty of the employee and is only considered compensable if the employing establishment acted unreasonably or abusively.[20] Although there may be some dispute as to the amount of income that appellant did not report to HUD, it appears evident that

[17] *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006).

[18] *Tanya A. Gaines*, 44 ECAB 923 (1993).

[19] *J.F.*, 59 ECAB ___ (Docket No. 07-308, issued January 25, 2008).

[20] *See Ronald K. Jablanski*, 56 ECAB 616, 621 (2005) (use of photo on identification badge to make a positive identification of person involved in theft of gift certificates did not constitute a compensable factor of employment).

there was underreported income and the employing establishment acted reasonably in making the report. Although appellant testified that this District Court case was filed in retaliation for her making allegations about a hostile and violent workplace, there is no persuasive evidence to support this allegation. Mr. Montano's statement does not involve first hand factual accounts of what happened but rather her theories with regard to how she believed appellant was treated. Accordingly, appellant has not established a compensable factor of employment with regard to the filing of the housing fraud case.

The Board finds that between the testimony of Ms. Arroyo and appellant, it is established that there was a fight on the workplace floor. This is not sufficient to establish a hostile work place as the fight could have been caused by any number of factors. Furthermore, although general allegations were made that this fight somehow involved appellant, it is not clear that this fight had anything to do with appellant at all.

The Board notes that appellant submitted newspaper articles in support of her claim. The Board has held that newspaper clippings are of no evidentiary value in establishing causal relationship between a claimed factor and federal employment as such materials are of general application and not specific to whether the specific condition claimed is related to the particular employment factors alleged by the employee.[21]

With regard to appellant's allegation that the hearing representative erred in finding that she only took 12 days of leave for the injury as she was on leave from January 24 to May 10, 2008, the Board notes that appellant testified at the hearing that she missed about 10 to 12 days since January 2008. Furthermore, this is not relevant to whether appellant established a compensable factor of employment.

For the foregoing reasons, appellant has not established any compensable factors of employment. Consequently, it is not necessary to review the medical evidence.[22]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

[21] *Eugene Van Dyk*, 53 ECAB 706 (2002).

[22] *See Margaret S. Krzycki*, 43 ECAB 496 (1992) (where a claimant has not established a compensable employment factor, the Board has held that it need not address the medical evidence of record.)

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 1 and March 19, 2008 are affirmed.

Issued: October 26, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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