U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERESA ULRICH and U.S. POSTAL SERVICE,
POST OFFICE, Orangevale, Calif.

Docket No. 95-2489; Submitted on the Record;
Issued February 18, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, to reflect her wage-earning capacity based upon her actual wages as a modified letter carrier; and (2) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

The Board has duly reviewed the case on appeal and finds that the Office properly determined that appellant's actual wages fairly and reasonably represented her wage-earning capacity.

Appellant filed a claim on February 7, 1989, alleging she injured her back in the performance of duty. The Office accepted appellant's claim for muscle spasm and subluxation of the thoracic spine on February 23, 1989. Appellant filed a second claim for a back injury on August 1, 1991. The Office accepted this claim for thoracic strain on August 23, 1991. Appellant returned to limited duty on September 1, 1991. Appellant sustained a recurrence of disability on June 22, 1992 and the Office authorized compensation. By decision dated September 12, 1994, the Office terminated appellant's compensation benefits finding that her position of modified-duty letter carrier, effective September 9, 1991, fairly and reasonably represented her wage-earning capacity and that her earnings exceeded those of her date-of-injury position.

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of her wage-earning capacity.[1]

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[1] *Anthony W. Warden,* 40 ECAB 168, 181-82 (1988).

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between her monthly pay and her monthly wage-earning capacity after the beginning of partial disability.[2] With regard to section 8115(a), this section of the Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.[3]

In the present case, appellant returned to limited duty, as a letter carrier and was employed from September 10, 1991 through June 22, 1992 in this capacity. Appellant stopped work on August 1, 1992 alleging that she developed an emotional condition due to factors of her federal employment. Appellant has not alleged that her actual wages do not fairly represent her wage-earning capacity. As noted above, actual wages are generally considered the best measure of wage-earning capacity and, absent evidence to the contrary, will be accepted as fairly and reasonably representing wage-earning capacity. The Board finds that appellant's actual earnings of $624.08 fairly and reasonably represent her wage-earning capacity.

The Board further finds, however, that the Office failed to properly calculate appellant's loss of wage-earning capacity.

Loss of wage-earning capacity is determined in accordance with the principles set forth in *Albert C. Shadrick*.[4] The current pay rate for the date-of-injury job is compared with, in this case, the actual earnings of $624.08 per week. The record does not contain the current pay rate of the date-of-injury job nor any of the Office's calculations used in reaching the loss of wage-earning capacity determination. Accordingly, the case will be remanded for proper calculation of appellant's loss of wage-earning capacity. After such further development as it deems necessary, the Office should issue an appropriate decision.

The Board further finds that appellant's claim for an emotional condition is not in posture for decision.

Appellant filed a claim on August 10, 1992, alleging that she developed an emotional condition due to factors of her federal employment. The Office denied appellant's claim for an emotional condition, causally related to factors of her federal employment on March 23, 1993. Appellant requested reconsideration on July 22, November 26, 1993 and January 6, 1995 and by decisions dated September 16, 1993, January 12, 1994 and April 6, 1995, the Office denied modification of the March 23, 1993 decision.

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (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

[2] 5 U.S.C. § 8106.

[3] *Pope D. Cox*, 39 ECAB 143, 148 (1988).

[4] 5 ECAB 376 (1953).

employment factors are causally related to her emotional condition.[5] Rationalized medical opinion evidence is medical evidence which includes a physician's, rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship, between the diagnosed condition and the specific employment factors identified by the claimant.[6]

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 of workers' compensation. When disability results from an emotional reaction, to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as 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.[7]

Appellant attributed her emotional to the failure of the employing establishment to call her at home when overtime was available, to the mention of her name in a meeting, to the employing establishment's untimely processing of her claim and to the announcement of her stress claim at an employing establishment meeting.[8]

These employment events are administrative or personnel matters, conducted by the employing establishment. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[9]

In this case, appellant has not submitted any evidence that the employing establishment acted unreasonably in processing her claim, in failing to call her at home for overtime, in mentioning her name at a meeting, nor informing her coworkers at a safety discussion that she

[5] *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[6] *Id.*

[7] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

[8] Appellant initially appeared to attribute her emotional condition to additional events relating to her employment. However, in a statement dated July 22, 1993, appellant stated that she was not attributing her emotional condition to the fear of losing her date-of-injury position, to the requirement of medical documentation for sick leave, to a "Health Alert" distributed around the employing establishment, to nightmares she experienced after stopping work, nor to seeing her supervisor in a social setting.

[9] *Martha L. Watson*, 46 ECAB 407 (1995).

had filed a claim. As the record does not contain supportive evidence establishing that the employing establishment erred in carrying out administrative matters, appellant has failed to establish these events as compensable factors of employment.

Appellant also alleged that a supervisor harassed her by stating that she was not ill enough to require sick leave. She also attributed her emotional condition to the actions of a coworker, Stewart Lutche.

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. Unsubstantiated allegations of harassment or discrimination, are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[10]

In this case, appellant has not submitted evidence establishing that her supervisor harassed her, by stating that she was not ill enough to require sick leave. Appellant's supervisor, Mark Stanfield, denied harassing appellant. Therefore, appellant has not established this compensable factor of employment.

However, appellant, the employing establishment and Mr. Lutche agree that he watched appellant and took notes on her behavior while she was at work. Appellant has substantiated that a coworker harassed her by watching and taking notes on her work habits. Therefore, appellant has established a compensable factor of employment.

The Board finds, however, that there is a conflict of medical opinion evidence regarding whether appellant has sustained any emotional condition due to the accepted factor of employment.

Appellant's attending physician, Dr. Ralph L. Anderson, a clinical psychologist, submitted a series of reports, noting that appellant was watched by a coworker, diagnosing simple phobia and finding that she was disabled. The Office referred appellant for a second opinion evaluation with Dr. Miles L. Weber, a psychiatrist. In a report dated April 2, 1993, Dr. Weber noted appellant's accepted and alleged factors of employment and found that appellant did not manifest psychiatric symptomatology. He diagnosed an occupational problem and found no convincing evidence of a present or past psychiatric illness or mental disorder.

Section 8123(a) of the Act,[11] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination." As there is a conflict between appellant's physician, Dr. Anderson, who found that appellant had developed a simple phobia due to her employment and Dr. Weber, the Office referral physician, who found that appellant did not have a mental or psychiatric condition, the Office should prepare a statement of accepted

[10] *Alice M. Washington*, 46 ECAB 382 (1994).

[11] 5 U.S.C. §§ 8101-8193, 8123(a).

facts, a list of specific questions and refer appellant along with the case record to an appropriate Board-certified specialist to resolve the conflict of medical opinion evidence in this case.

The decision of the Office of Workers' Compensation Programs dated April 6, 1995 is hereby set aside and remanded for further development consistent with this decision.

Dated, Washington, D.C.
February 18, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member