

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JALEH AKERT and DEPARTMENT OF HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Dallas, Tex.

*Docket No. 95-1744; Submitted on the Record;
Issued January 13, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

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 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. 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.¹

Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.² The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. 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 alone of harassment or discrimination are not compensable

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Michael Thomas Plante*, 44 ECAB 510 (1993).

under the Act.³ Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.⁴

In the present case, the Office of Workers' Compensation Programs, by a hearing representative's decision dated January 19, 1995, found that appellant had not established that she sustained an emotional condition in the performance of duty on the basis that she had not implicated any compensable factors of employment that were substantiated by the evidence in the case record.

The Board finds that appellant has established compensable factors of employment that are substantiated by the evidence in the case record, but she has not shown that her emotional condition is causally related to these compensable factors of employment.

A supervisor's review and correction of an employee's work product may be a compensable factor of employment.⁵ Appellant's supervisor acknowledged that there were meetings with appellant in which errors in her work product were discussed. Appellant, however, has not submitted any evidence to substantiate her allegations that her supervisor accused her of errors not made or made by others. This applies to a September 1, 1992 letter appellant's second-level supervisor wrote to an office manager in another branch of the employing establishment apologizing for errors made in handling of cases. Appellant has not substantiated her allegation that this letter refers to errors that were not, in fact, made.

Appellant also has not substantiated that on September 11, 1991 her supervisor instructed her to ask a question of coworkers the supervisor had instructed not to talk to appellant. Appellant has alleged that her second level supervisor pressured employees to buy copies of a magazine article the supervisor had written. The supervisor's October 6, 1991 memorandum gives employees an opportunity to obtain copies of her article, but no improper pressure to buy it is reflected. Appellant also has not established that a change in procedures to use coding sheets rather than files to enter data into the computer was applied only to her. A December 2, 1992 memorandum on this procedure was directed to six docket clerks. Appellant has not established that a supervisor threw appellant's 7B file at her on January 22, 1993. Not only has the supervisor denied throwing the file, but the reason appellant claimed it was thrown -- that the supervisor was angry because appellant objected to her refusal to certify the file as true and complete -- is refuted by a January 21, 1993 memorandum advising appellant that the file was true and complete. Appellant also has not substantiated that she received disparate treatment regarding training.

Appellant has substantiated that certain incidents related directly to her assigned duties occurred: she was directed to use a computer on January 28, 1993 that was functioning at a lesser speed than other computers in the office and she was not timely informed of a change in the case tracking system about May 1992.

³ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁵ *Angie Brumfield*, 46 ECAB ____ (Docket No. 94-114, issued July 12, 1995).

With regard to appellant's allegation that she received a docket file in which a note had been placed containing the phrase, "You idiot" or words to this effect, Theresa Yates, a coworker, explained that she wrote this note to herself and that the file was inadvertently transferred to appellant's desk. The Board finds that appellant's reaction to this incident arose from her perception that the note was directed at her and does not constitute a compensable factor of employment.⁶

Appellant has substantiated that a compensable incident occurred on September 29, 1992. The evidence, consisting of appellant's statements and those of the other participant, shows that on that date appellant and a coworker had a loud argument over the use of a cart to transport case files. As this dispute involved regular duties -- the transportation of case files -- it is compensable under the Act.⁷ Appellant, however, has not substantiated that she had received disparate treatment regarding use of the carts. The evidence indicates there were five carts for use by the docket clerks and that these carts were not assigned to specific clerks. Appellant also alleged that the coworker pushed the cart over her foot and this is substantiated by a medical report indicating that a severe contusion of the foot was diagnosed when appellant was examined on September 29, 1992. While appellant has not substantiated her allegation that the coworker intentionally pushed the cart over her foot, physical contact by a coworker can be a compensable factor of employment regardless of the coworker's intent.⁸ The evidence also establishes that appellant's second-level supervisor requested that appellant come to her office, that this supervisor prevented appellant from first calling one of the administrative law judges, that appellant told this supervisor that her foot hurt, that this supervisor threatened to discipline appellant if she continued to refuse to come to her office and that appellant went to the supervisor's office and was told yelling would not be tolerated. These, however, were administrative matters and appellant has not shown error or abuse by her supervisor. Appellant also has not shown that her supervisors required her to stay one hour and answer phones before she was allowed to seek medical attention. The first and second-level supervisors both indicate appellant was asked whether her foot was too painful to perform reception duties and there was no objection when appellant asked to go home one hour later. The evidence does establish that on October 6, 1992 appellant's supervisor suggested that appellant find another job because she was so unhappy in her present one, but this suggestion does not appear abusive or erroneous.

Regarding appellant's allegations that on April 22, 1992 her second-level supervisor ordered her to falsify case receipt dates, appellant has not substantiated that this incident occurred as alleged. Appellant contended that there were witnesses to this order, but has not produced statements from such witnesses. The fact that appellant wrote requests to several officials urging that this incident be investigated does not establish that it occurred as alleged. There is no evidence that any investigation of this serious allegation of falsification of government documents took place. An April 24, 1992 memorandum to appellant from the supervisor involved states, "I concur with you that we should not alter the date stamps. I, in fact,

⁶ See *Alfred Arts*, 45 ECAB 530 (1994).

⁷ *Id.*

⁸ *Constance G. Patterson*, 41 ECAB 206 (1989).

had already set up a system to insure that these cases were correctly receipted into the office.” Appellant has not substantiated that she was ordered to falsify case receipt dates on April 22, 1992.

Appellant last worked for the employing establishment on April 7, 1993. Appellant stated that on that date she passed out after her union representative explained to her that the performance improvement plan (PIP) issued to appellant on March 11, 1993 was a possible precursor of her imminent firing. Insofar as appellant’s reaction was to a fear of being fired, as she indicated at a July 25, 1994 hearing before an Office hearing representative, it is not covered under the Act.⁹ Appellant’s reaction to the performance improvement plan itself also is not covered under the Act, as reactions to assessments of performance are not covered by the Act, absent evidence of error or abuse by the employing establishment.¹⁰ There is no evidence to substantiate appellant’s allegation that the March 11, 1993 PIP, which described unacceptable performance in two critical elements of appellant’s standards and detailed action needed to improve her performance, was erroneous or abusive.

The evidence also does not establish that the employing establishment’s attempts to contact appellant in the hospital on April 21 and 22, 1993 were erroneous or abusive. Appellant’s second-level supervisor stated that she sent flowers and cards to the hospital only after she contacted the hospital and was advised they could be sent. Although appellant’s representative told the employing establishment on April 7 or 9, 1993 to contact her rather than appellant, the representative herself was hospitalized for surgery the following day and did not return to work for a month. While this representative had requested advanced sick leave for appellant on April 9, 1993, this does not show error or abuse in the employing establishment’s unsuccessful attempts to contact appellant by telephone on April 21 and 22, 1993 or its April 22, 1993 letter to appellant advising her that continuation of pay had erroneously been paid and that it needed information from her on pay coverage for the period beginning April 7, 1993. Appellant replied to the Office’s April 22, 1993 letter on April 26, 1993. The first indication from appellant’s physician that appellant was to be kept in relative isolation was an April 28, 1993 letter from her attending Board-certified psychiatrist, Dr. Burton C. Einspruch.

As appellant has substantiated some compensable factors of employment, the Board will analyze the medical evidence to determine whether it establishes that such compensable factors of appellant’s employment caused or contributed to her emotional condition.¹¹ In a report dated October 21, 1992, Dr. John R. Baugh, a Board-certified obstetrician and gynecologist, stated that appellant’s “stress, emotionalism and personal problems have increased as a direct result of the problems in the workplace.” Dr. Baugh, however, provided only a general description of

⁹ *Gracie A. Richardson*, 42 ECAB 850 (1991); *Artice Dotson*, 42 ECAB 754 (1990).

¹⁰ *Mildred D. Thomas*, 42 ECAB 888 (1991); *Jack Hopkins, Jr.*, 42 ECAB 818 (1991); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991).

¹¹ Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment. As part of this burden she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. *Bruce E. Martin*, 35 ECAB 1090 (1984).

employment factors, concentrating on mental and physical abuse and discrimination, which, as found above, have not been established. Dr. Mark P. Unterberg, a Board-certified psychiatrist, examined appellant on April 7, 1993 and stated that her depression and stress were work related. Dr. Unterberg, however, like Dr. Baugh, described appellant's employment stressors only in general terms, citing stress with her supervisor, criticism and inappropriate attacks. As noted above, the last of these has not been substantiated.

Dr. Einspruch, appellant's attending Board-certified psychiatrist, also described appellant's employment stressors in primarily a general way, such as a "friction laden relationship ... with one of her supervisors" and "significant emotional stress in trying to carry out her work duties." Although Dr. Einspruch also noted a history of having to carry loads of records instead of using a cart, working in a cold and remote room and being hit by a cart, his reports make it clear that he considered the cause of appellant's emotional condition to be the conversation appellant had on April 7, 1993 during which her union representative explained that the PIP could be a prelude to firing. In a report dated April 26, 1993, Dr. Einspruch noted that he saw appellant on April 6, 1993, "at which time she complained of increasing distress at her job and also growing emotional lability." This distress and emotional lability were not considered disabling on April 6, 1993, but Dr. Einspruch noted that on April 7, 1993 appellant's "distress had grown to an alarming proportion. She had developed increasing symptomatology while at work, growing uncontrollably upset, collapsing to the ground, weeping hysterically and developing hyperventilation with carpal-pedal spasms." In a report dated July 21, 1994, Dr. Einspruch specifically attributed appellant's condition to the events of April 7, 1993, stating, "When [appellant] learned that morning [of April 7, 1993] that the PIP was a prelude to the real possibility that she could be fired in the near future following her poor performance appraisal for 1993, [appellant] became overwhelmingly fearful that she would lose her only means of support and became emotionally devastated. ... [I]t is my opinion that [appellant's] accelerated depression and hospitalization was specifically precipitated by her PIP. The stress of the PIP superimposed upon [appellant's] extreme need for employment, overwhelmed [her] and ultimately caused an emotional condition warranting hospitalization for depression and continued psychiatric care." Since appellant's reaction to the PIP is not covered under the Act for the reasons described above, Dr. Einspruch's reports are not sufficient to meet appellant's burden of proof.

The decision of the Office of Workers' Compensation Programs dated January 19, 1995 is affirmed.

Dated, Washington, D.C.
January 13, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member