

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARIE LESTINO and U.S. POSTAL SERVICE,
POST OFFICE, Bellmar, N.J.

*Docket No. 97-274; Submitted on the Record;
Issued November 2, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she sustained an emotional condition while in the performance of duty.

On November 11, 1994 appellant, then a 45-year-old mail processor, filed an occupational disease claim, alleging that she sustained nervousness, crying, and sleep disorders as a result of factors of her federal employment. She indicated that she was first exposed to these factors and became aware that her conditions were causally related to her employment on October 25, 1994. In supplemental statements, appellant reported that the following incidents or events were causative factors for her conditions: in January 1994, appellant's supervisor, Leroy Nesbitt, Jr., became angry with her and found her at fault when the delivery bar code sorter (DBSC) and optical character reader (OCR) machines on which she was working started to jam and back up. Mr. Nesbitt yelled at appellant for calling the front office about this problem; the machines on which appellant worked frequently jammed and caused appellant stress; appellant was harassed by Mr. Nesbitt due to her race; appellant was expected to work without error; on October 25, 1994 Mr. Nesbitt yelled at appellant and humiliated her in front of her coworkers after she returned from lunch due to a complaint by a casual employee about the backlog of work appellant left in her area before lunch.

In a decision dated May 10, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that evidence of record was insufficient or conflicting with respect to whether the claimed events, incidents or exposures occurred at the time, place, and in the manner alleged. Therefore, fact of injury was not established. By decision dated February 23, 1996, an Office hearing representative found that the January 1994 incident was substantiated by appellant, but further found that the medical evidence did not establish that appellant sustained any injury as a result of this factor. Therefore, the Office hearing representative affirmed the May 10, 1995 decision of the Office. In a decision dated July 11, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to modify the Office's prior decisions.

The Board has carefully reviewed the entire case record on appeal and finds that this case is not in posture for decision.¹

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment that contributed to her condition. Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from factors such 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. Disabling conditions resulting from an employee's feeling of job insecurity or desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.² When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.³ In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.⁴

In the present case, the Office found that the only causative factor substantiated by appellant was the January 1994 incident and that this was a compensable factor. However, the Office further found that appellant did not provide any probative medical evidence to establish that she sustained an injury as a result of this factor and therefore denied her claim for an emotional condition.

The evidence submitted in relation to the alleged October 25, 1994 incident does not support appellant's version of events. Appellant contends that she was verbally abused by Mr. Nesbitt in front of her coworkers and was therefore humiliated. However, Mr. Nesbitt denied that he yelled at appellant, and statements provided by three of appellant's coworkers and one supervisor indicate that Mr. Nesbitt did not yell at appellant and that she was the one who became loud and angry in relation to his criticism of her work backlog. Appellant's contention

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on October 8, 1996, the only decisions before the Board are the Office's February 23 and July 11, 1996 decisions. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985).

⁴ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

that she had to work without error is also not substantiated as she has not presented any evidence to support this allegation. Appellant also contends that she was harassed because she is the only Caucasian female working in her division and due to her leave usage. Actions by coworkers or supervisors that are considered offensive or harassing by a claimant may constitute compensable factors of employment to the extent that the implicated disputes and incidents are established as arising in and out of the performance of duty.⁵ Mere perceptions or feelings of harassment, however, are not compensable. To discharge her burden of proof, a claimant must establish a factual basis for her claim by supporting her allegations of harassment with probative and reliable evidence.⁶ Appellant failed to provide any such probative and reliable evidence in the instant case. Appellant submitted statements from three coworkers in the OCR section, however, while these statements do not portray Mr. Nesbitt and his supervisory actions in the best light, they also do not address any incidents of harassment of appellant due to her race or otherwise. Thus, this is not a compensable causative factor under the Act.

Appellant has substantiated one compensable causative factor in her claim. The January 1994 incident in which Mr. Nesbitt yelled at appellant when she reported a machinery malfunction to the front office is substantiated by the statement of Frank Balchunas. In addition, appellant also identified machine malfunctions as an additional source of stress. Mr. Balchunas has corroborated that the machines did malfunction on January 1994, however, the issue of the degree to which such malfunctions impacted appellant's work needs to be further developed by the Office. Appellant intimates that this was a common occurrence. While appellant's belief that she had to work without error was self-generated, appellant's contention that there were problems with the machinery she was to use in performing her duties and that she sustained an emotional condition as a result, if substantiated factually and medically, would be a compensable factor of employment.⁷ Therefore, this case is remanded for such further development of this issue as the Office deems necessary to be followed by a *de novo* decision on the merits.⁸

The decisions of the Office of Workers' Compensation Programs dated July 11 and February 23, 1996 are set aside and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
November 2, 1998

⁵ See *Marie Boylan*, 45 ECAB 338 (1944); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

⁶ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ *Lillian Cutler*, *supra* note 2.

⁸ The Board notes that with her request for reconsideration, appellant submitted a report by Dr. Arnold D. Goldman, a psychiatrist, who noted both the January 1994 incident and appellant's frustration in operating the postal machinery due to problems with the equipment. If both indicated potentially compensable factors are substantiated, the Office should further develop the medical evidence in this case where the physician has presented a causal nexus between appellant's claimed condition and a compensable factor of employment. See *Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Margaret S. Krzycki*, 43 ECAB 496 (1992); *Norma L. Blank*, 43 ECAB 384 (1992); see generally *Dodge Osborne*, 44 ECAB 869 (1993).

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member