

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY A. FOX and U.S. POSTAL SERVICE,
POST OFFICE, Boston, Mass.

*Docket No. 96-1899; Submitted on the Record;
Issued October 28, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

On November 28, 1995 appellant, a 35-year-old automation clerk, filed an occupational disease claim (Form CA-2) for employment-related emotional stress, seeking an award for continuation of pay. Accompanying the claim was a handwritten statement from appellant wherein she alleged that on November 28, 1995 she was returning from a break when her supervisor confronted her and began screaming and yelling at her because she was late. Appellant alleged that she suffered employment-related stress and a headache because of this argument. The form also contained a witness statement from her union steward, who stated that on November 28, 1995 appellant came to his desk visibly shaken and that minutes later the supervisor arrived and began instructing appellant in a loud and abusive manner until it reached the point where he had to remove the supervisor from the area to separate him from appellant. The union steward further stated that following this incident appellant became too upset to continue working, which he thought was understandable based on his observations of the incident.

Appellant also submitted a handwritten statement from another coworker who stated that on November 28, 1995 her supervisor "lit into" appellant, making her "very upset" and that a short time, thereafter, the supervisor chastised appellant again and again made her very upset.

In an undated letter, the employing establishment controverted the claim and appellant's supervisor responded to appellant's allegations by submitting a handwritten statement dated November 28, 1995. In this statement appellant's supervisor asserted that when he spoke to appellant on November 28, 1995, she had returned late from her break and he, therefore, instructed her not to be late in the future. However, he claimed that he did not yell at her. The supervisor stated that after this conversation with appellant he went on his break and when he returned another supervisor informed him that appellant was allowing the bins at her work

station to fill up, causing the alarms to go off. When he approached appellant to ask what the problem was, appellant allegedly responded that she was not going to work hard anymore. The supervisor stated that when he reproached her for making this comment, appellant simply left the work site to go to the employing establishment's medical unit.¹

In a treatment note dated December 7, 1995, the Goddard Medical Associates indicated that appellant was treated on November 28, 1995 for a stress reaction that she related to an event at work that day. The note further indicated that appellant was "in distress" and unable to work and that she was advised to remain home until December 4, 1995, when she was released to return to work without restrictions.

Appellant also submitted a November 29, 1995 treatment note, from a physical therapy clinic, which stated that "this office has been treating [appellant] for stomach pain, persistent headaches and insomnia and elevated blood pressure due to anxiety. It is my understanding that these symptoms are job related."

By letter dated December 14, 1995, the Office of Workers' Compensation Programs advised appellant that the evidence she submitted was not sufficient to determine whether she was eligible for compensation benefits and that she needed to submit a detailed description of the specific employment-related conditions or incidents she believed contributed to her illness. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, at her employing establishment contributed to her condition.

In response to the Office's May 25, 1995 letter, appellant submitted a letter, in which she stated that she returned to her work station, that she did not deliberately neglect her duties and that the alarm at her work station began to ring because of the large amount of mail accumulating in the trays, not because of her neglect. She asserted that on November 28, 1995 she was working to the best of her ability and that this incident was the only thing that caused her stress.

In addition, the union steward who witnessed the incident submitted to the Office a handwritten letter, which it received on June 16, 1995. In this letter the union steward expanded on his previous account of the November 28, 1995 incident, as stated in the Form CA-1 filed on that date. The union steward stated that appellant came to his desk and told him she had just had a verbal confrontation with the supervisor, which had escalated to the point where he was practically screaming at her and as a result she had requested a steward and had gone to the medical unit. The union steward stated that a short time later the supervisor also came to his desk and in a loud voice demanded to know why she was at the desk and not working. According to the union steward, as he tried to explain the situation to the supervisor he kept repeating that appellant had no right to be there, that no one had given her permission, while his voice kept getting louder. The union steward stated that he repeatedly tried to calm the

¹ A treatment note from the employment establishment's medical clinic dated November 28, 1995 states that appellant reported to the clinic at 12:10 PM that day relating that she had an argument with her boss and that she became upset and complained of a headache.

supervisor down, whom he feared was on the verge of a heart attack. Appellant then returned to her work area, whereupon the supervisor began screaming at her again, at which point appellant was on the brink of tears, stating that she did not think she could work under those conditions and was feeling ill to the point that she needed a doctor. The union steward asserted this was not the first time the supervisor became verbally abusive toward an employee and he had been asked to intervene.

In addition, appellant submitted a November 28, 1995 letter from Dr. Richard Lubens, Board-certified in internal medicine, wherein Dr. Lubens stated:

“[Appellant] is here today in follow-up. She is under stress. She had a bad day. She went to work feeling well. Apparently her boss at work got very upset. She got into a couple of big fights with him. She has been crying most of the day. It was rather unexpected. She had otherwise been feeling well. She thought she had gotten along with him in the past. She felt it was all very unreasonable. This was a sort of an out of the blue, sudden barrage and it has left her somewhat weepy and emotional. She really does [not] have any other focal physical symptoms. I think that she is clearly having a stress response and in part, because of the unexpected nature of the event. She has reported things at work apparently through her union. I am going to give her a couple of days to sort of recuperate and she will return to work Monday.”

By decision dated February 28, 1996, the Office found that fact of injury was not established, as the evidence of record did not establish that an injury was sustained in the performance of duty. In an accompanying memorandum to the Director, the claims examiner stated that, the fact that appellant was counseled because of not being at her work station after returning from her break and not performing her work duties was not a compensable factor of employment. The claims examiner further stated that appellant’s going to see her union steward was also not a factor of employment indicating that she had sustained an emotional injury in the performance of duty.

The claims examiner found that appellant had been advised that additional factual and medical sufficient to establish that she suffered an emotional injury in the performance of duty on November 28, 1995, but had failed to provide this evidence. The Office, therefore, denied the claim.

The Board finds that this case is not in posture for decision.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² There must be

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.³

The first issue to be addressed is whether appellant has cited factors of employment that contributed to her alleged emotional condition or disability. Where the 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 Federal Employees' Compensation Act.⁴ On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.⁵

The Board finds that appellant has established a factor of employment, which may have resulted in a compensable emotional condition; *i.e.*, verbal abuse and harassment by a supervisor. Appellant's account of the November 28, 1995 confrontation, in which she claimed that her supervisor verbally abused her, causing her to become extremely upset and ill to the point where she required medical attention, was corroborated by the statements from her union steward and a coworker, both of whom witnessed the event. However, appellant's burden of proof is not discharged by the fact that he has established an employment factor, which may give rise to a compensable disability under the Act. Appellant also has the burden of submitting sufficient medical evidence to support her claim that the employing establishment's harassment resulted in an employment-related emotional condition.⁶

Appellant has submitted supporting medical evidence in the present case; *i.e.*, the November 28, 1995 medical report from Dr. Lubens. Dr. Lubens stated that appellant had been crying most of the day, was emotional and had experienced a stress response to a bad day at work, which entailed "a couple of big fights" with her boss at work, who had made her "very upset" on the date of her alleged emotional injury.

The Board finds that the evidence submitted by appellant, which contains a history of the development of the condition and a medical opinion that the condition found was consistent with the history of development, given the absence of any opposing medical evidence, is sufficient to require further development of the record.⁷

On remand, therefore, the Office should further develop the medical evidence as is appropriate. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

³ See *Ruth C. Borden*, 43 ECAB 146 (1991).

⁴ *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Id.*

⁶ *Chester R. Henderson*, 42 ECAB 352 (1991).

⁷ *John J. Carlone*, 41 ECAB 354 (1989).

The decision of the Office of Workers' Compensation Programs dated February 28, 1996 is set aside and the case is remanded for further action in accordance with this decision.

Dated, Washington, D.C.
October 28, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member