

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNESTINE ALLEN and DEPARTMENT OF JUSTICE, U. S.
ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF NEW YORK,
New York, N.Y.

Docket No. 97-1373; Submitted on the Record;
Issued January 26, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

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

On May 22, 1996 appellant, then a 37-year-old legal secretary, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware that her stress-related condition was caused or aggravated by her employment on April 24, 1996.

Appellant's claim was accompanied by her undated narrative statement alleging that she was "pressured" at work and that she was given a "hard time" with her use of annual/sick leave especially when she had to take her son to the doctor or had to stay home with him when he was sick. Appellant also alleged that she was being placed on absence without official leave (AWOL) status even if she had home emergencies with her children. She further alleged that on May 3, 1996, she was reviewing her performance appraisal for the year and was shocked at the performance overall. Appellant stated that she remembered going into a state of confusion and did not feel well. She then stated that all she remembered was waking up and being taken to the hospital by ambulance. Appellant's claim was also accompanied by an undated statement from Jonathan A. Willens, appellant's supervisor, controverting appellant's claim. Mr. Willens stated that appellant's allegation that she was placed on AWOL status was not true. Further, appellant's claim was accompanied by leave records, a medical appointment slip, disability certificates dated May 13 and November 26, 1996 from Dr. M. Berkowitz, a Board-certified family practitioner, indicating that appellant was under doctor's care due to stress and upper back pain, hospital records, her April 25, 1996 memorandum to Mr. Willens requesting three hours of leave to have a stress test performed by her physician and her position description.

By letter dated June 4, 1996, the Office of Workers' Compensation Programs advised appellant that the evidence submitted was insufficient to establish her claim. The Office further advised appellant to submit specific factual and medical evidence supportive of her claim.

In a July 2, 1996 response letter, appellant stated that her medical condition was very good before she was placed on restricted leave in January 1996. She further stated that she was placed on AWOL status after she took two days off from work during the furlough between November 18, 1995 and January 5, 1996. Appellant then stated that when she discussed this with Mr. Willens, he told her that she was placed on AWOL status because she made trouble. Additionally, appellant stated that her subsequent requests for leave were denied, specifically, her February 26, 1996 request for leave on February 29, 1996. Appellant alleged that on March 28 and 29, 1996, she was placed on AWOL status when she had to care for her sick son. She also alleged that her physician had to call her supervisor to let him know that she had emergency appointments because her supervisor would disapprove the leave. Appellant reiterated her reaction to receiving her performance appraisal. Her response letter was accompanied by hospital records from a physician whose signature is illegible revealing that appellant's condition was caused by stress from her employment and children's medical conditions. Appellant's response letter was also accompanied by medical treatment notes covering the period March 28 through May 13, 1996 regarding appellant's emotional condition, medical appointment slips, a May 30, 1996 note from Dr. Gary Portadin, a Board-certified psychiatrist, indicating appellant's medical treatment and an April 26, 1996 prescription.

By decision dated November 18, 1996, the Office found the evidence of record insufficient to establish that the claimed injury occurred in the performance of duty. In an accompanying memorandum, the Office found that appellant's allegations regarding the use of leave and her performance appraisal constituted administrative actions, which were not compensable under the Federal Employees' Compensation Act. The Office also found the evidence of record insufficient to establish that the employing establishment had committed error or abuse in handling these matters.

In a December 30, 1996 letter, appellant requested reconsideration of the Office's decision. Appellant stated that on October 1, 1996, Mr. Willens ceased being her supervisor based on her request for a new supervisor. She also stated that she had been assigned a new supervisor and since that time she was more relaxed and could perform her work at ease. Appellant further stated that she was still placed on restricted leave by the employing establishment, which left her feeling tense and stressed. In addition, appellant stated that when Mr. Willens was her supervisor, she was constantly depressed and unable to concentrate on her work. She then stated that she heard other attorneys complaining about her work performance because she was constantly making errors. Appellant alleged that Mr. Willens made her nervous and uncomfortable every time he approached her. She also alleged that Mr. Willens always criticized her no matter how hard she tried to improve her work.

Appellant's request for reconsideration was accompanied by the Office's November 18, 1996 decision. Appellant's request was also accompanied by her October 1, 1996 letter, to James L. Cott, deputy chief of the employing establishment's civil division, revealing her receipt of an August 1996 letter from Mr. Willens, advising her that she was to remain on restricted leave, an allegation that she was discriminated against by Mr. Willens, her desire to file a grievance against Mr. Willens regarding his decision to keep her on restricted leave and her request that Mr. Willens be removed as her supervising attorney. Further, appellant's letter revealed that it was not healthy for her to be exposed to Mr. Willens's constant rejections and that he did not give her enough or any work at all to be able to rate her. In addition, appellant's

request was accompanied by her July 2, 1996 response letter. Further, appellant submitted a December 3, 1996 letter from Dr. Brian J. Sweeney, a psychologist, revealing that she had been receiving psychoanalytic, psychotherapy since June 27, 1996. Dr. Sweeney indicated that on July 19, 1996 appellant was evaluated by Dr. Augustin, who diagnosed adjustment disorder with depressed mood, with consideration of a possible single mild episode of major depression. Dr. Sweeney noted appellant's medical treatment and that her treatment focused on work-related issues, including her distress about her leave restriction.

By decision dated January 15, 1997, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found that appellant's October 1, 1996 letter, was insufficient to support her allegation of discrimination, that appellant's December 30, 1996 letter, was insufficient to establish error or abuse and that Dr. Sweeney's report addressed a noncompensable employment factor.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an emotional condition while in the performance of duty.

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. To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹

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. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to her 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.²

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors 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

¹ *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

² *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

factors of employment and may not be considered.³ Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁴

Appellant has alleged that harassment and discrimination, specifically, by Mr. Willens, appellant's supervisor, caused her emotional condition. The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment and discrimination may constitute factors of employment giving rise to coverage under the Act.⁵ Mere perceptions of harassment and discrimination are not compensable under the Act.⁶ To discharge her burden of proof, a claimant must establish a factual basis for her claim by supporting her allegations of harassment and discrimination with probative and reliable evidence.⁷ In the present case, appellant has failed to provide any such probative and reliable evidence to support her allegations of harassment and discrimination. Appellant has not submitted any witness statements corroborating her allegations. Since appellant has not submitted specific evidence to support her claim of harassment and discrimination by Mr. Willens, she has not substantiated a compensable factor of employment.⁸

Appellant's other allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.⁹ However, the Board has held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹⁰ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

³ *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 2.

⁴ *Donald E. Ewals*, 45 ECAB 111 (1993).

⁵ *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990); *Pamela R. Rice*, 38 ECAB 838, 843 (1987).

⁶ *Wanda G. Bailey*, *supra* note 1; *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁷ *Ruthie M. Evans*, *supra* note 6.

⁸ *James W. Griffin*, 45 ECAB 774 (1994).

⁹ See *Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁰ See *Richard J. Dube*, 42 ECAB 916 (1991).

Appellant's allegations regarding the use and denial of leave,¹¹ being placed on AWOL status,¹² her low performance appraisal¹³ and her request for a transfer to a different supervisor¹⁴ fall into this category of administrative or personnel actions. Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions. Further, regarding appellant's allegation that she was placed on AWOL status, Mr. Willens stated in his undated narrative statement that appellant's allegation was untrue. Inasmuch as appellant has failed to establish that the employing establishment committed error or abuse, the Board finds that she has not established a compensable employment factor under the Act.¹⁵

Since appellant has not established a compensable employment factor under the Act, the Board will not address the medical evidence.¹⁶

The January 15, 1997 and November 18, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
January 26, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹¹ See *Diane C. Bernard*, 45 ECAB 223 (1993); *Sharon R. Bowman*, 45 ECAB 187 (1993); see also *Sheila Arbour*, 43 ECAB 779 (1992).

¹² *Id.*

¹³ *James E. Woods*, 45 ECAB 556 (1994).

¹⁴ *Goldie K. Behymer*, 45 ECAB 508, 511 (1994); *Thomas D. McEuen*, *supra* note 9.

¹⁵ On appeal, appellant has submitted additional medical evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; see 20 C.F.R. § 501.2(c)(1).

¹⁶ *Margaret S. Krzycki*, *supra* note 3.