

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY H. SILVA *and* DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, DEFENSE CONTRACT MANAGEMENT COMMAND,
Lynn, Mass.

*Docket No. 97-2304; Submitted on the Record;
Issued January 28, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

On April 29, 1996 appellant, then a 56-year-old contract administrator, filed an occupational disease claim alleging that she sustained an emotional condition which she attributed to her belief that a supervisor, Walter Blazewicz, Jr., had lied to her regarding a position in Boston for which she had applied. She stated that in late June or July 1995 a coworker, Barbara Brewer, heard Mr. Blazewicz reply to a telephone call requesting information about her employment and her abilities and, according to the coworker, Mr. Blazewicz said "I do n[o]t know her knowledge of that area" and "I do n[o]t know her capabilities." Appellant stated that several days later she asked Mr. Blazewicz if he had received a call from Boston about her and he said "no." She asserted that she called the personnel office in Boston and asked if Mr. Pillai,¹ who was interviewing for the position in Boston, had called Mr. Blazewicz and she was told that Mr. Pillai had called Mr. Blazewicz. Appellant stated that she requested a meeting with Roger Pawlyk, Mr. Blazewicz's supervisor, and that meeting was held on or about July 25, 1995. Mr. Blazewicz stated to her "you have asked me [three] times if I received a call from Boston, and [three] times I have told you no." She stated that Mr. Blazewicz became "agitated" with her when she started to take notes regarding the meeting. Appellant stated that she became physically and emotionally ill because Mr. Blazewicz had lied to her. Appellant also alleged that she sustained an emotional reaction due to a hostile work environment.²

¹ The record shows that in her claim appellant erroneously referred to Mr. Pillai as Mr. Patel.

² At the hearing held in this case, appellant explained that what she meant by "hostile work environment" was that she could not look at Mr. Blazewicz without getting upset because she believed that he had lied to her.

In a disability certificate dated October 22, 1995, Dr. Majed Mouded, a Board-certified internist and endocrinologist, indicated that appellant was disabled from October 9 through November 20, 1995 due to an elevated glucose level and severe anxiety.

In a report dated April 21, 1996, Dr. Donald L. Sherak, a Board-certified psychiatrist, stated that appellant had developed an adjustment disorder with depressive and anxiety features which had greatly impaired her capacity to perform or return to her work. He stated that there was a direct causal relationship between appellant's adjustment disorder and her stressful experiences at work.

In an investigative memorandum dated May 23, 1996, an employing establishment representative noted that appellant's performance rating for the last three years, under two different supervisors, had been recorded as fully successful and she had not been assigned any duties which were different or more stressful than other employees of the same series and grade. The employing establishment representative stated that the Mr. "Patel" alluded to by appellant was actually a Mr. Pillai who was the selecting official for the position for which appellant had applied. He related that Mr. Pillai stated that he could not confirm or deny any contact he might have had with appellant's supervisory chain of command as such contact was privileged but that the selections would not normally have required any communication with the candidate's supervisor.

The representative noted that he had interviewed Barbara Brewer, the coworker who appellant stated had overheard a telephone conversation between Mr. Blazewicz and a selecting official for the job for which appellant had applied. He related that Mrs. Brewer stated that she had made an assumption that the telephone call she overheard was in regard to appellant's job application but that she never heard Mr. Blazewicz mention a name.

The representative interviewed Mr. Blazewicz and related that he had no recollection of any telephone call received from the selecting official regarding appellant's job application. He advised the representative that the only telephone call he remembered concerned another employee, not appellant, and that he advised the caller that he did not have detailed knowledge of the employee's qualifications. The representative related that Mr. Blazewicz stated that appellant had requested a meeting to discuss her performance evaluation and that he did not recall appellant raising the matter of a telephone call from Boston at the meeting.

By decision dated September 13, 1996, the Office of Workers' Compensation Programs denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that she had sustained an emotional condition in the performance of duty.

By letter dated September 30, 1996, appellant requested an oral hearing before an Office hearing representative.

On April 2, 1997 a hearing was held before an Office hearing representative at which time appellant testified.

Subsequent to the hearing, appellant submitted additional evidence.

In a report dated January 25, 1996, Dr. Dennis J. Rog, a licensed psychologist, related that he had been treating appellant since November 24, 1995 for severe anxiety and depression. He stated that appellant's symptoms were initially in reaction to increasing stress at work, reportedly related to evaluations, job interviews, promotions, and communication problems with her superiors. Dr. Rog stated that it appeared that appellant's symptoms worsened following a stressful meeting with her superiors. He stated that a complicating factor was appellant's reported diabetic condition.

In a report dated April 5, 1996, Dr. Mouded stated that appellant was under his care for diabetes mellitus, hypertension, chest pain, asthma and depression. He noted that appellant had complained of harassment from supervisors which caused stress.

In a report dated October 18, 1996, Dr. Sherak diagnosed major depression, single episode, moderate anxiety disorder and stated his opinion that there was a direct causal relationship between her condition and her stressful experiences at work.

In a letter dated January 6, 1997, Ellen Bonin, a personnel management specialist in Boston, advised appellant that the job selection process included Mr. Pillai contacting the supervisors of each applicant.

In an affidavit dated April 24, 1997, Mr. Pillai stated that he was the selecting official for a position for which appellant had applied and that appellant had been interviewed for the position but that two other candidates had been selected for the two available jobs. He stated that after appellant's interview and prior to the selection, he had a conversation with one of appellant's supervisors. Mr. Pillai stated that he was not able to get in touch with appellant's current supervisor and so he contacted one of her previous supervisors but did not recall the individual's name. He stated that the information received from the individual regarding appellant was positive and had no negative impact on the decision making process. Mr. Pillai noted that an employing establishment representative had indicated that he had said that selections would not normally have required any communication with a candidate's supervisor but that this was incorrect and that contacts were made to supervisors to verify statements made in the job applications and during the interview. He noted that appellant had alleged that Mr. Blazewicz had a conversation with him in June or July 1997 but that this would not have occurred because the job selection had been made prior to May 30, 1995.³ Mr. Pillai included a copy of a May 30, 1995 memorandum indicating that the job selection process was complete and providing the names of the two individuals selected for the positions. A June 6, 1995 memorandum also lists the names of the two individuals selected for the positions as well as names of the applicants who were not selected which included appellant's name.

By decision dated May 29, 1997, the Office hearing representative affirmed the Office's September 13, 1996 decision.⁴

³ Although Mr. Pillai referred to May 30, 1997 on the second page of his letter, it is clear from the description of the job selection process on the first page of his letter that he meant May 30, 1995.

⁴ The Board notes that the case record contains new evidence which was not before the Office at the time it issued its May 29, 1997 and September 13, 1996 decisions. The Board has no jurisdiction to review this evidence

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

To establish her occupational disease claim that she 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 employment factors are causally related to her emotional condition. 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 appellant.⁵

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁶ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷

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 employment factors.⁸

In this case, appellant alleged that she sustained an emotional condition because her supervisor, Mr. Blazewicz, lied to her when he denied that he spoke to a selecting official about appellant's qualifications for a job for which she had applied.

for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

⁵ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1989).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

Administrative or personnel matters such as evaluating an employee's qualifications for a position are unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁹ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.

In this case, the evidence of record does not support appellant's allegation that Mr. Blazewicz lied to her regarding her job application. Appellant stated that in late June or July a coworker, Ms. Brewer, heard Mr. Blazewicz reply to a telephone call requesting information about her employment and her abilities and, according to the coworker, Mr. Blazewicz said "I do n[o]t know her knowledge of that area" and "I do n[o]t know her capabilities." Appellant stated that several days later she asked Mr. Blazewicz if he had received a call from Boston about her and he said "no." She asserted that she called the personnel office in Boston and asked if Mr. Pillai had called Mr. Blazewicz and she was told that he had called Mr. Blazewicz. However, the evidence of record does not indicate the name of the person in Boston to whom appellant spoke and there are no statements in the record from anyone asserting that he or she told appellant that Mr. Pillai spoke to Mr. Blazewicz. There is of record a letter dated January 6, 1997 from Ellen Bonin, a personnel management specialist in Boston, who advised appellant that the job selection process included Mr. Pillai contacting the supervisors of each applicant. However, Ms. Bonin did not state whether Mr. Pillai contacted Mr. Blazewicz or another of appellant's supervisors.

In an affidavit dated April 24, 1997, Mr. Pillai stated that after appellant's interview and prior to the job selection, he had a conversation with one of appellant's supervisors. Mr. Pillai stated that he was not able to get in touch with appellant's current supervisor and so he contacted one of her previous supervisors but did not recall the individual's name. He stated that the information received from the individual regarding appellant was positive and had no negative impact on the decision making process. As noted above, in the conversation overheard by Ms. Brewer, Mr. Blazewicz indicated to the caller (who could not be identified by Ms. Brewer) that he did not have knowledge of the employee's capabilities. Having no knowledge of an employee's capabilities is not "positive" information and suggests that the conversation overheard by Ms. Brewer was not the conversation described by Mr. Pillai and most likely involved another employee, not appellant. This would be consistent with Mr. Blazewicz's statement to the employing establishment investigator that he had no recollection of receiving a telephone call concerning appellant's job application and is also consistent with his statement that the only telephone call he remembered concerned another employee, not appellant, and that he stated in that telephone call regarding another employee that he did not have detailed knowledge of the employee's qualifications. Furthermore, Mr. Pillai noted that appellant had alleged that Mr. Blazewicz had a conversation with him in June or July 1995 concerning her job application but that this would not have occurred because the job selection had been made prior to May 30, 1995. Mr. Pillai provided documents which established that as of May 30, 1995 the selection process was completed. The fact that the job selection was made in May 1997 is not

⁹ See *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

consistent with appellant's allegation that Mr. Pillai and Mr. Blazewicz had a discussion in late June or July 1995 regarding her qualifications for that position.

In a investigative memorandum dated May 23, 1996, an employing establishment representative noted that he had interviewed Ms. Brewer, the coworker who appellant stated had overheard a telephone conversation between Mr. Blazewicz and a selecting official for the job for which appellant had applied. He related that Mrs. Brewer indicated that she had made an assumption that the telephone call she overheard was in regard to appellant's job application but that she actually never heard Mr. Blazewicz mention appellant's name. As Ms. Brewer did not know to whom Mr. Blazewicz was speaking and did not hear Mr. Blazewicz mention appellant's name, this evidence does not establish that Mr. Blazewicz had a telephone conversation with Mr. Pillai or anyone else regarding appellant's application for the job in Boston.

Considering all the evidence of record, appellant has not established any error or abuse on the part of the employing establishment regarding her job application and therefore has not established a compensable factor of employment in this regard.

Regarding the fact that appellant was not selected for the position in Boston, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.¹⁰

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.¹¹

¹⁰ *Michael Thomas Plante, supra* note 9 at 515-16.

¹¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The May 29, 1997 and September 13, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
January 28, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member