U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSE JOHNSON and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Indianapolis, Ind.

Docket No. 96-918; Submitted on the Record;
Issued May 26, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether appellant has established that she sustained a stroke in the performance of duty.

On June 1, 1993 appellant, then a 52-year-old military pay technician, filed a claim for occupational disease alleging she sustained a stroke on May 27, 1993, causally related to her federal employment. Appellant explained that prior to her employment with the current employing establishment, she was employed by the Department of the Army at the Presidio of San Francisco. She stated that she and eight other employees of the Presidio brought an Equal Employment Opportunity Commission (EEOC) suit against the Presidio alleging that they had been the victims of discriminatory treatment. Subsequently, while employed by the Department of Defense in Indianapolis, appellant traveled to California to attend and testify in the previously filed EEOC suit. Her current employing establishment, in compliance with an Order from the EEOC, made appropriate travel arrangements for appellant, and paid her travel expenses. Appellant testified on the first day of the hearing, and on the fourth day, while observing the proceedings, suffered a stroke. Appellant alleges that the stroke was due to the tremendous stress of the hearing in general and the abusive behavior of her former employing establishment's attorney in particular. Appellant submitted medical and documentary evidence in support of her claim.

In a decision dated April 7, 1994, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of file failed to establish that her stroke was sustained in the performance of duty.

Subsequent to the Office's decision, appellant requested an oral hearing before an Office hearing representative. At the hearing, appellant testified to the above facts, and further stated that the EEOC claim had been decided in favor of the employing establishment, as the administrative law judge found no discrimination had occurred.

In a decision dated March 31, 1995, the Office hearing representative denied appellant's claim. The hearing representative initially found that appellant had not established a factual basis for her claim of discrimination by her former employing establishment, as the EEOC claim had not been resolved in her favor. In addition, the hearing representative found that the stress of attending and testifying at the EEOC hearing itself did not constitute a compensable factor of employment as the stress associated with filing and pursuing an EEOC complaint is not covered under the Act. Finally, the hearing representative found that the fact that appellant's current employing establishment had been required to finance appellant's attendance of the hearing did not bring the stress of the hearing and resultant stroke into the performance of appellant's duty with the current employing establishment, as appellant's attendance at the hearing in no way constituted her regular or special duties for her current employing establishment. The hearing representative therefore concluded that appellant failed to establish that her stroke was sustained in the performance of duty.

The Board finds that appellant was not injured in the performance of duty.

The Federal Employees' Compensation Act[1] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The term "in the performance of duty" has been interpreted to be the equivalent of the commonly found prerequisite in workers' compensation law, "arising out of and in the course of employment."[3] "In the course of employment" deals with the work setting, the locale, and time of injury.[4] In addressing this issue, this Board has stated:

> "In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his master's business; (2) at a place where he may reasonably be expected to be in connection with the employment; and (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto."[5]

This alone, however, is not sufficient to establish entitlement to compensation benefits. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[6]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8102(a).

[3] *James E. Chadden, Sr.*, 40 ECAB 312, 314 (1988).

[4] *Denis F. Rafferty*, 16 ECAB 413, 414 (1965).

[5] *Carmen B. Gutierrez (Neville R. Baugh)*, 7 ECAB 58, 59 (1954).

[6] *See Eugene G. Chin*, 39 ECAB 598, 602 (1988).

The Board has recognized the rule that the Act covers an employee 24 hours a day when he or she is on travel status, a temporary-duty assignment, or a special mission and engaged in activities essential or reasonably incidental to such duties.[7] The Board further notes that 29 C.F.R. § 1614.605(f) provides that "[w]itnesses who are federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint." The evidence therefore establishes that appellant, who was undisputedly in pay status while attending the EEOC hearing, was in the course of employment at the time she suffered her stroke. However, as noted above, the fact that an employee was "in the course of employment" when an injury occurs does not alone establish entitlement to compensation benefits. In addition, the fact that no deduction was made from appellant's salary for the time she spent attending the hearing, or the fact that the employing establishment paid appellant's travel expenses does not, by itself, constitute that activity as being incidental to the employment.[8] Appellant must further establish that a factor of the employment caused her injury, and that, therefore, the injury occurred "in the performance of duty."[9]

Appellant has not shown that a factor of her employment caused her injury and therefore has not established that her injury occurred in the performance of duty. Appellant alleges that the tremendous stress of the EEOC hearing in general, and the allegedly abusive behavior of opposing counsel, in particular, were in large part responsible for her suffering a stroke. The Board finds that the employment factors appellant alleged which are not covered under the Act include her involvement with her own and her former coworkers' EEOC complaints.[10] The Board has held that stress or frustration resulting from failure to obtain appropriate redress or corrective action from other administrative agencies with which the complaints are filed against the employing establishment are not compensable under the Act because such actions of the particular administrative agency in reviewing and investigating the charges and rendering a decision thereon do not have any relationship to the employee's regular or specially assigned employment duties.[11] In addition, with respect to the administrative aspects of the EEOC hearing, the Board has held that an employee's emotional reaction to administrative actions or personnel matters 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.[12] However, coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action directed at an employee rose to the level of

[7] *See Lawrence J. Kolodzi*, 44 ECAB 818 (1993).

[8] *Mary Keszler*, 38 ECAB 735 (1987); *see Zahra Musa Anise-Levine*, 34 ECAB 716 (1983).

[9] *See Eugene G. Chin*, *supra* note 6.

[10] *See David F. Cianciolo*, 45 ECAB 731 (1994); *Eileen P. Corigliano*, 45 ECAB 581 (1994); *Isabel Apostol Gonzales*, 44 ECAB 901 (1993).

[11] *Id.*

[12] *Janet I. Jones*, 47 ECAB 345 (1996); *Martin Standel*, 47 ECAB 306 (1996).

error or abuse.[13] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In the present case, appellant asserts that she and other witnesses at the EEOC hearing were subjected to abusive conduct and harassment by counsel for her former employing agency. While the Board has held that actions on the part of the employing establishment which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act, for harassment or discrimination to give rise to a compensable disability under the Act, there must be some evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment are not compensable under the Act.[14] In this case, the record contains several witness statements describing the defending counsel's zealous defense of the former employing establishment, however, the Board has found that rudeness, or discourteous or insulting behavior does not automatically rise to the level of error or abuse.[15] Finally, with respect to the root of the reason that appellant was in attendance at the EEOC hearing, appellant's claims of discrimination on the part of her former agency, evidence of record establishes that the EEOC ruled in favor of appellant's former agency, and constitutes substantial evidence that the discrimination alleged did not in fact occur.[16] Therefore, while appellant has established that she was in the course of her employment while attending the EEOC hearing, as she has not shown that her stroke was caused by a factor of her employment, she has failed to establish that her injury occurred in the performance of duty, a requisite element of entitlement to compensation benefits.

[13] *Janet I. Jones, supra* note 12; *Joe L. Wilkerson*, 47 ECAB 604 (1996).

[14] *David G. Joseph*, 47 ECAB 490 (1996); *Helen P. Allen*, 47 ECAB 141 (1995).

[15] *See generally Leroy Thomas, III*, 46 ECAB 946 (1995) (where the Board held that a statement by a claimant's supervisor that he was going to kill the claimant was not a credible threat and therefore did not constitute a compensable factor of employment); *Sandra F. Powell*, 45 ECAB 877 (1994) (where the Board held that despite evidence that claimant's treating psychiatrist specifically asked the employing establishment not to contact the claimant while she was in the hospital, the employing establishment's action in sending the claimant a notice proposing to terminate her compensation benefits was not unreasonable and did not constitute abusive conduct).

[16] *See Donna Faye Cardwell*, 41 ECAB 730 (1990); *Walter Asberry, Jr.*, 36 ECAB 686 (1985).

The decision of the Office of Workers' Compensation Programs dated March 31, 1995 is hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member