U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN L. BROWN and DEPARTMENT OF THE ARMY, U.S. ARMY TANK-AUTOMOTIVE AND ARMAMENTS COMMAND, Warren, MI

Docket No. 97-218; Oral Argument Held July 7, 1999; Issued September 28, 1999

Appearances: *Gary A. Benjamin, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

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

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 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 Act. 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] 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

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[1] *Lillian Cutler,* 28 ECAB 125 (1976).

sustained in the performance of duty within the meaning of the Act.[2] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to her 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.[3]

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.[4] This burden includes the submission of a detailed description of the employment factors or conditions, which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[5]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in 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 factors of employment and may not be considered.[6] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[7]

In the present case, appellant alleged that she sustained depression, anxiety, angina and a skin condition due to employment-related stress. Appellant stopped work on September 10, 1992 after which the employing establishment terminated her employment on March 31, 1993. Appellant alleged that she experienced stress due to: (1) adjudication of her Equal Employment Opportunity (EEO) claims; (2) personnel actions which took place after she stopped work on September 10, 1992; (3) abuse, threats and racial slurs uttered by her coworkers; (4) not being provided with training; (5) having to fill out a request for leave when her son was ill; (6) a threat made by her supervisor to "get" her for insubordination; and (7) being rushed to file her claim with the Office in a timely manner. Medical evidence regarding the claimed conditions was also submitted. By decision dated January 17, 1996, the Office denied appellant's emotional

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[2] *Artice Dotson,* 41 ECAB 754 (1990); *Allen C. Godfrey,* 37 ECAB 334 (1986); *Buck Green,* 37 ECAB 374 (1985); *Peter Sammarco,* 35 ECAB 631 (1984); *Dario G. Gonzalez,* 33 ECAB 119 (1982); *Raymond S. Cordova,* 32 ECAB 1005 (1981); *John Robert Wilson,* 30 ECAB 384 (1979).

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

[4] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[5] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[6] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[7] *Id.*

condition claim on the grounds that she did not establish any compensable employment factors and, by decision dated July 12, 1996, the Office affirmed its January 17, 1996 decision.[8] The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant made an allegation that her emotional condition was due to harassment and mistreatment by her supervisors and coworkers. The Board has held that a verbal altercation with a supervisor may constitute a factor of employment.[9] If the supervisor is giving an oral reprimand for a violation of work rules, the conversation is considered to be an administrative matter.[10] In this case, appellant reported that her supervisor threatened to "get" her for insubordination. Appellant has also made a general allegation that her emotional condition was due to harassment by her supervisors and coworkers. The actions of a supervisor which an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perception of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[11] However, even if harassment is not established, the inquiry does not stop there. The issue then becomes not whether in fact harassment or discrimination occurred but whether the disabling emotional reaction was precipitated or aggravated by the conditions of the employment.[12] The Board has also held that a tense relationship with a superior may constitute a factor of employment.[13] Appellant alleged harassment in what she perceived to be abuse, threats and racial slurs by her supervisors and coworkers. The Office found that the Equal Employment Opportunity Commission (EEOC) decision of February 8, 1994, which granted summary judgment to the employer as there was no issue to any material fact, supported the fact that there was no evidence of racial or sexual discrimination. Thus, the Office concluded that appellant's allegations were unsubstantiated. The Board notes that the February 8, 1994 EEOC decision, which is the only EEOC decision of record, discussed only the fourth, fifth and sixth complaints appellant filed with the EEOC and did not include the charges concerning threats and name calling. Appellant's complaints concerning threats and name calling were within her first three EEOC complaints and the record is devoid of a formal resolution concerning these allegations. Thus, the EEO complaints by appellant and the February 8, 1994 EEOC decision only allege harassment; they do not establish that it occurred.[14] In this case, there is no evidence of record submitted by

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[8] By decision dated March 25, 1996, the Office denied as untimely appellant's request for a hearing in connection with the Office's January 17, 1996 decision.

[9] *Georgia F. Kennedy*, 35 ECAB 1151 (1984); *Rita L. Power*, 35 ECAB 403 (1983).

[10] *Joseph F. McHale*, 45 ECAB 669 (1994).

[11] *Joan Juanita Greene*, 41 ECAB 760 (1990).

[12] *Leonard Dureseau, Jr.,* 39 ECAB 1062; *Stanley Smith, D.O.,* 29 ECAB 652 (1978).

[13] *Neil R. Carney*, 36 ECAB 289 (1984); *Dorothy J. Williams*, 32 ECAB 665 (1981).

[14] In the February 8, 1994 EEOC decision, Judge Paul D. Borman found that appellant did not establish a *prima facie* case of racial discrimination and, even if appellant had met that hurdle, the employer had presented

appellant, in the form of witness statements or other written documentation that would establish that harassment occurred.[15] The Office has the responsibility to assist in the development of a claim once appellant has made a *prima facie* case. Although appellant has not established a *prima facie* case here, the Board notes that the Office's responsibility applies more appropriately to any occasion when information must be obtained from the employing establishment.[16] Inasmuch as the Office failed to investigate appellant's allegations by making inquiries of the employing establishment to determine whether appellant's allegations of discrimination and harassment actually occurred, the case must be remanded for further development on this issue.

On remand, the Office should develop the factual evidence further, by making inquiries of the employing establishment to determine whether appellant was subjected to unwarranted verbal abuse and threats by her supervisor and whether she was subjected to abuse, threats and racial slurs by her coworkers. The Office should determine whether appellant was subjected to such allegations and should then prepare a statement of accepted facts, describing the factors of employment which were accepted as occurring and compensable. After further development as it may find necessary, the Office should issue a *de novo* decision.

As to appellant's other allegations, she has primarily attributed her emotional condition to abuse and harassment by her supervisors in the administration of an administrative or personnel action of the employing establishment. An employee's emotional reaction to an administrative or personnel matter is not generally covered under the Act. Thus, an emotional reaction to matters pertaining to leave are not generally covered under the Act without error or abuse on the part of the employing establishment.[17] Likewise, an employee's complaints concerning the manner, in which a supervisor performs his duties as a supervisor or the manner, in which a supervisor exercises his supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act, absent evidence that the supervisor acted unreasonably in the administration of a personnel matter.[18] Appellant has alleged that she experienced stress due to the adjudication of her EEO claims, not receiving the training she wanted, personnel actions which occurred after she stopped work and being required to fill out a leave request when her son was ill. The Board has generally held that mere allegations by a claimant are insufficient without evidence corroborating the allegations.[19] Although appellant has provided vague

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sufficient evidence to rebut the claims.

[15] The Office must make its own determination of whether harassment has occurred. The determinations of other agencies serve as evidence one way or another on whether harassment has occurred but does not remove from the Office its own obligation to make a factual finding on whether harassment has occurred as alleged.

[16] *See Leon C. Collier*, 37 ECAB 378 (1986).

[17] *Daryl R. Davis*, 45 ECAB 907 (1994).

[18] *Abe E. Scott*, 45 ECAB 164 (1993).

[19] *See Kathleen D. Walker*, 42 ECAB 603 (1991); *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each of these cases the Board has looked beyond appellant's allegations of unfair treatment to determine if there was evidence corroborating such allegations).

testimony in this regard, there is no objective evidence in the record that the employing establishment erred or acted abusively in the administration of its personnel policies.

Finally, appellant alleges that she experienced stress when she had to file her compensation claim within the provisions of the Act. The record indicates that appellant's formal separation with the employing establishment became effective at close of business on March 31, 1993. Appellant has indicated that her stress was due to the difficulty she had obtaining a claim form from the employing establishment following her separation. Section 8102(a) of the Act[20] states that an employee is eligible for compensation benefits and "[t]he United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance if his duty." Inasmuch as appellant was no longer an "employee" of the employing establishment after March 31, 1993, any alleged stress occurring after that date is outside the coverage provided by section 8102(a) of the Act.

The Board, however, finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[21]

A claimant requesting a hearing after the 30-day period is not entitled to a hearing as a matter of right.[22] In this case, the record contains a letter dated and postmarked February 19, 1996 from appellant's attorney requesting a hearing on appellant's behalf. As noted above, a hearing request must be filed within 30 days of the final decision to be timely. In this case, the February 19, 1996 letter was clearly not filed within 30 days of the January 17, 1996 Office decision and, thus, appellant was not entitled to a hearing as a matter of right. Hence the Office was correct in stating in its March 25, 1996 letter decision that appellant was not entitled to a hearing as a matter of right because her February 19, 1996 hearing request was not made within 30 days of the January 17, 1996 decision.

Although appellant's request for a hearing was untimely, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[23] In the March 25, 1996 letter decision, the Office advised appellant that the request for a hearing was further denied because the issue in the case could be addressed by requesting

[20] 5 U.S.C. § 8102(a).

[21] 5 U.S.C. § 8124(b)(1).

[22] *See Robert Lombardo*, 40 ECAB 1038 (1989).

[23] *See Herbert C. Holley,* 33 ECAB 140 (1981).

reconsideration and submitting relevant evidence. This is considered a proper exercise of the Office's discretionary authority.[24] There is no evidence of an abuse of discretion in this case.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated July 12 and January 17, 1996 are set aside and the case is remanded for further action in accordance with this decision. The decision of the Office dated March 25, 1996 is affirmed.

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

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[24] *Mary B. Moss,* 40 ECAB 640, 647 (1989).