U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NILSA SOTO and U.S. POSTAL SERVICE,
POST OFFICE, Secaucus, NJ

Docket No. 97-2783; Submitted on the Record;
Issued September 28, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On February 6, 1996 appellant, then a 46-year-old window clerk, filed a notice of traumatic injury and claim for compensation alleging that she sustained a hysterical and nervous breakdown with severe headaches and vomiting due to stress and harassment caused by management. The date of injury was listed as January 18, 1996. On the reverse side of the CA-1 form, the employing establishment controverted the claim, noting appellant was "throwing flats on the ledge in disrespect to Postmaster Pat Foster and for also muttering disrespectfully." The employing establishment acknowledged that some witnesses to the incident suggested that appellant was agitated, loud and disrespectful, while other witnesses suggested that the postmaster was loud.

In a statement accompanying her claim, appellant related that on January 18, 1996 while she was boxing flat mail, the postmaster yelled at her to come to his office, in response to which she dropped the few flats of mail that she had in her hands on a ledge and commented, "Now what did I do wrong?" Appellant stated that she picked up a can of soda and her jacket and followed the postmaster into his office with him yelling at her again on the way to the office: "I saw what you did." She further stated that once they were in the office, she saw Mr. Lure, an acting supervisor, on the phone with his back to her, at which time she asked the postmaster whether she should close the door but he told her to leave it open. Appellant described the supervisor as having a harsh look on his face. She related that the postmaster told her that he had called her into the office to give her something she had received in the mail but commented that she was never at work. According to appellant, the postmaster then told her that she had committed "an act of violence" and threatened: "the next time you do that I'm going to call security and have you put out of this building so go ahead and try to do it again and see how fast you will be put out." Appellant noted that she then took her mail, thanked the postmaster and

went to the locker room where she told two fellow coworkers that she was unaware of what she had done and had never been so humiliated.[1]

The employing establishment submitted a statement from Mr. Foster, who related that he had initially asked appellant to come to his office in order to give her some mail, but that in direct response to his request she threw down the mail she had in her hands in an agitated, unprovoked and angry fashion onto the mail ledge. He related that he told appellant that he never wanted to see her do that again to which she yelled "Do What?" in rude tone. The postmaster further stated that he heard appellant remark in a rude tone, "What does he want now?" He stated that once in the office, he advised appellant that he would be discussing her actions with the union steward but denied raising his voice to her. He noted that "I may have raised my voice when I instructed her to report to my office but not in a demeaning fashion." Mr. Foster further noted in his statement that employees were not permitted to handle mail in the fashion displayed by appellant since the contents of the mail could be damaged. According to the postmaster, after his meeting with appellant he was contacted by Ken Buchanan, the Union area representative, for appellant's phone number. Mr. Foster related that, according to Mr. Buchanan, appellant had called to report her meeting with the postmaster and was so upset that he did not know whether she had passed out or hung up the phone. The postmaster stated that he provided Mr. Buchanan with appellant's home phone number.

The record also contains several witness statements. In a February 2, 1996 statement, Melanie Walton stated that she heard the postmaster first call appellant's name and then, after a few moments, yell at appellant to come to his office. Ms. Walton advised that she did not know what was said or done to make the postmaster angry. She related that once appellant was in the postmaster's office, she heard him angrily tell her not to throw mail or he would have her escorted out by the postal inspector. She also heard the postmaster comment angrily that appellant did not come to work enough to ever throw mail down.

In an undated statement, Wanda Robinson essentially related the same story as Ms. Walton, noting that she did not hear appellant say anything to the postmaster before they went into his office. She described the postmaster as having yelled at appellant for throwing mail and noted that appellant had tried to explain to the postmaster that she always dropped the flats in the manner he witnessed because they were so heavy. Ms Robinson related that the postmaster warned appellant that with her kind of attendance she needed to change her attitude. She confirmed appellant's assertion that she never raised her voice or spoke to the Postmaster in a disrespectful manner.

In a January 23, 1996 statement, Margaret DeFazio stated that on January 18, 1996 she heard the postmaster call appellant to the office and that she witnessed appellant throw the flats down and ask, "What does he want now?" in an agitated tone of voice. Ms DeFazio further described appellant as stating "Like What! Like What!" in a very loud voice as she walked with

[1] Appellant also described an incident on January 16, 1996, where the postmaster had her sit on a stool in the middle of the work floor, while he questioned her about a six month leave of absence she took from work. She alleged that the January 16, 1996 incident was another example of the postmaster trying to humiliate her in front of her coworkers. The record, however, is devoid of any corroborating evidence to support appellant's allegation.

the postmaster to the office. She noted, however, that she was too far away to hear what happened inside the office.

In a statement dated January 23, 1996, Mr. John Lure noted that he was in the Office when the postmaster brought appellant in to give her some mail. Mr. Lure reported that appellant was yelling at the postmaster in a high-pitched tone and that "the postmaster told her a few times to lower her voice before he raised his ... and told her not to talk to him that way." He also commented that it seemed to him that the postmaster's initial intention was to give appellant an envelope but that she "compounded the entire situation which was of her doing."

In an undated statement, Gary Pritchard stated that he heard appellant reply in a loud voice "What did I do?" to the postmaster when he called for her and that the postmaster replied "Do n[o]t play with me, I want to see you in my office."

In an undated statement, Ken Buchman related that appellant contacted him around 1:00 p.m. in the afternoon of January 18, 1996 and became hysterical trying to tell him about an incident at work in which she was chastised by the postmaster in front of her coworkers and yelled at by the postmaster in his office. Mr. Buchman stated that appellant complained of chest pains and he told her to lay down and call him back. When she did not call by 3:00 p.m., he called the postmaster and got appellant's phone number. When she did not answer the phone he called the police. He stated that shortly thereafter appellant returned his call and advised him that she was on her way to a doctor.

In a decision dated May 8, 1996, the Office denied compensation on the grounds that the evidence was insufficient to establish that appellant sustained an emotional condition in the performance of duty.

By letter postmarked June 12, 1996, appellant requested a hearing.

On July 17, 1996 the Office denied appellant's hearing request as untimely filed, noting that the issue of the case could be equally well addressed if appellant filed a request for reconsideration with the Office.

By letter dated April 2, 1997, appellant requested reconsideration.

In a decision dated July 3, 1997, the Office performed a merit review and found the evidence to be insufficient to establish fact of injury. The Office specifically found that, "based on the different accounts of what happened as provided in the witness statements," there was insufficient evidence to establish that appellant sustained a nervous breakdown on January 18, 1996 as a result of harassment and stress in her federal employment.

The Board finds that appellant has failed to discharge her burden of proof to establish that she sustained an emotional condition 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 a claim that an emotional

condition was sustained in the performance of duty, a claimant must submit: (1) factual evidence identifying and establishing employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that he or she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[2] 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. Such an opinion of the physician 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.[3]

Workers' compensation law is not applicable 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 concept of workers' compensation. These injuries occur in the course of employment and have some kind of connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations 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 to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not compensable where it results from such factors as an employee's fear of a reduction-in-force, his frustration from not being permitted to work in a particular environment or to hold a particular position, or his failure 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 personal injury sustained while in the performance of duty within the meaning of the Act.[4] 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 sustained in the performance of duty within the meaning of the Act.[5] In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his 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.[6]

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] *See Martha L. Watson*, 46 ECAB 407 (1995); *Donna Faye Cardwell, supra note* 2.

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

[5] *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

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

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.[7] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence[8] When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.[9]

In the instant case, appellant has failed to establish compensable factors of her employment as causing an aggravation of her preexisting emotional condition. Appellant alleged that she was harassed by her supervisor with regard to poor attendance at work and was humiliated in front of coworkers on January 18, 1996. The Board notes, however, that actions such as instructing subordinates how and where and when to work, reminding subordinates of the rules and regulations and conducting other administrative, personnel and personal activities within their scope of employment and discretion, relate to the supervisor's duties and do not arise out of appellant's regular or specially-assigned duties, such that they do not constitute incidents of his specific employment. Consequently, they are not compensable incidents under the Act.

Furthermore, appellant has failed to establish that abuse or error on behalf of the employing establishment or the postmaster which could bring the supervisory administrative actions of the postmaster into the scope of appellant's employment. Although appellant has alleged abusive behavior and harassment by the postmaster, her allegations are not substantiated by the record evidence. It is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[10] An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[11] In this case, the Office correctly noted that the witness statements provide different accounts of what transpired between the postmaster and appellant on January 18, 1996. The Board further finds that there is insufficient factual evidence to establish that the postmaster harassed appellant, intentionally embarrassed her, or otherwise failed to act in a manner reasonable and appropriate to his role as a supervisor. Consequently,

[7] *See Barbara Bush*, 38 ECAB 710 (1987).

[8] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[9] *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

[10] *Helen Castillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

[11] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

appellant's allegations of harassment do not constitute compensable factors of her federal employment.

As appellant has failed to implicate any compensable factors of her federal employment, the Board finds that it is not necessary to consider the medical evidence.

The decision of the Office of Worker's Compensation Programs dated July 3, 1997 is hereby affirmed.

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

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member