U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of D'ANDREA L. HARRIS and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, IL

Docket No. 98-782; Submitted on the Record;
Issued September 21, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty on December 21, 1996; (2) whether the Office of Workers' Compensation Programs properly determined that appellant had abandoned her request for hearing.

On December 21, 1996 appellant filed a claim alleging that on that day she sustained job-related stress because management refused to accept medical documentation, which added stress to a preexisting condition. Appellant submitted two reports from Dr. Catalino Ferald. In the first report dated December 24, 1996, Dr. Ferald stated that due to appellant's medical condition it was necessary that she work Monday through Friday. In a second report received by the employing establishment on January 14, 1997, Dr. Ferald stated that appellant's medical condition had worsened due to harassment, physical assault and job-related stress. He stated that appellant had been unable to work from December 21, 1996 to January 19, 1997 and could return to work Monday through Friday. On February 7, 1997 the Office wrote to appellant and requested that she describe her claim in further detail and provide a comprehensive medical report in support of her claim. Appellant did not respond to the Office's request. The Office denied appellant's claim by decision dated March 11, 1997.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of her federal employment.

Workers' compensation is not applicable to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[1] the Board discussed at length the principles applicable to alleged employment-related emotional conditions and the distinctions as to the type of employment situation giving rise to an emotional condition

[1] 28 ECAB 125 (1976).

which will be covered by the Federal Employees' Compensation Act.[2] When an employee experiences an emotional reaction to his or her regular or specially assigned employment duties or to a requirement imposed by the employment or has fear and anxiety regarding his or her ability to carry out his or her duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within coverage of the Act. On the other hand, where the disability results from an employee's emotional reaction to employment matters but such matters are not related to the employee's regular or specially assigned work duties or to requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within coverage of the Act.

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 factors of employment and may not be considered.[3] In the present case, the Board, must thus initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

In this case, although appellant was requested to fully outline her claim in detail, she has only stated that she sustained stress because her supervisor would not accept her physician's recommendation that she work "Monday through Friday." Appellant has not sufficiently explained her claim, but it appears from this allegation that appellant had been requested to work a different schedule.

The Board has previously explained in *Allen*,[4] that changes in workdays and hours, positions or locations may constitute a compensable factor of employment arising in the performance of duty. However, a change in duty shift does not arise as a compensable factor *per se*. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in the duty shift, *i.e.*, a compensable factor arising out of and in the course of employment, or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position. In this regard, the assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and absent any error or abuse, does not constitute a compensable factor of employment.[5]

[2] 5 U.S.C. § 8101 *et. seq.*

[3] *Helen P. Allen*, 47 ECAB 141 (1995).

[4] *Id.*

[5] *Peggy R. Lee*, 46 ECAB 527 (1995).

In the present case, although requested to do so, appellant did not provide sufficient factual detail for the Office to evaluate whether the alleged shift change interfered with her ability to perform her regular work or specially assigned duties or whether in fact the employing establishment acted with error or abuse in assigning appellant's work schedule. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Similarly, while Dr. Ferald's second report noted that appellant had been subjected to harassment and physical abuse, appellant did not specify the factual basis for these allegations. Actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. However, for harassment to give rise to a compensable factor of employment, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment are not compensable.[6] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement, the claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[7] The Board finds that appellant has failed to factually establish this allegation as a compensable factor of employment.

The Board also finds that the Office properly determined that appellant abandoned her request for hearing.

Appellant requested a hearing before an Office hearing representative on March 18, 1997. On November 8, 1997 the Office wrote to appellant at the address of record that a hearing had been scheduled for 3:30 p.m. on December 17, 1997. Appellant did not appear at the hearing and did not request that the hearing be rescheduled. By decision dated December 22, 1997, the Office found that appellant had abandoned her request for hearing.

The Board finds that the Office did not abuse its discretion in finding that appellant abandoned her request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act[8] provides claimants under the Act a right to a hearing if they request one within 30 days of the Office's decision. Pursuant to the applicable regulations,[9] a scheduled hearing may be postponed upon written request of a claimant or his representative if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. If a claimant fails to appear for a scheduled hearing, he or she has 10 days after the date of the scheduled hearing to request in writing that another hearing be scheduled. Where good cause for the failure to appear is shown, a second hearing will be scheduled.

[6] *See Joel Parker, Sr.*, 43 ECAB 220 (1991).

[7] *Garry M. Carlo*, 47 ECAB 299 (1996).

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

In this case, the record contains no evidence that appellant requested postponement of the hearing. Nor did she request within 10 days after the date of the hearing that another one be scheduled. Appellant's failure to make such requests together with her failure to appear at the scheduled hearing, constitutes abandonment of her request for a hearing and the Board finds that the Office properly so determined.

The Board notes that the Office issued its abandonment decision on December 22, 1997, while it should have waited until December 27, 1997. Appellant did not, however, present any evidence to the Office at any time prior to this appeal that she had good cause for not appearing at the scheduled hearing. The Office's issuance of the decision on December 22, 1997 was therefore harmless error.

On appeal, for the first time, appellant alleges that she did not receive notice of the hearing. After the issuance of the Office's decision, appellant alleged on appeal that she did not receive a copy of the notification of the date and time of the hearing scheduled for December 17, 1997. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision and the Board may, therefore, not consider whether appellant's allegation is sufficient to rebut the presumption of receipt raised by the "mailbox rule."[10]

Absent evidence to the contrary, a notice mailed to an individual in the ordinary course of business is presumed to have been received by that individual.[11] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. The Office's finding of abandonment in this case rests on the strength of this presumption.

[10] *See* 20 C.F.R. § 501.2(c).

[11] *A.C. Clyburn*, 47 ECAB 153 (1995).

The decisions of the Office of Workers' Compensation Programs dated December 22 and March 11, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 21, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member