

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANNE M. MORROW and DEPARTMENT OF THE NAVY,
NAVAL UNDERSEA WARFARE CENTER, Keyport, WA

*Docket No. 98-2557; Submitted on the Record;
Issued September 1, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant has established that she sustained a recurrence of disability after April 8, 1996; and (2) whether appellant established that she sustained an emotional condition that was causally related to factors of her federal employment or her accepted employment injury.

On February 17, 1995 appellant, then a 37-year-old traffic management specialist, filed a notice of traumatic injury and claim, alleging that she sustained possible occupational asthma beginning January 24, 1995. Appellant stopped work on January 25, 1995. On May 22, 1995 the Office of Workers' Compensation Programs accepted appellant's claim for allergic rhinitis and bronchitis and began payment of compensation for temporary total disability. On April 1, 1996 appellant returned to limited work after the employing establishment offered her a position in an environment free of carbonless (NCR) paper. On April 8, 1996 appellant began filing claims for continuing compensation, alleging that she had the same symptoms after her return to work as she had the prior year. In a decision dated October 4, 1996, the Office denied appellant's claim for recurrence of disability on the grounds that she was not exposed to NCR paper while in the performance of duty and medical evidence had not established any work-related sensitivity other than to NCR paper. The Office further determined that appellant was not allergic to regular paper which she was exposed to during her return to work. By decision dated August 26, 1997, an Office hearing representative affirmed the prior decision denying recurrence of disability and further found that appellant did not establish that she had an emotional condition causally related to her accepted injury on the grounds that the medical evidence did not establish any residuals of that condition.

The Board has duly reviewed the entire case record on appeal and finds that this case is not posture for decision.¹

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position, or medical evidence of record establishes that she can perform the work of a light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of the burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

In the present case, the Office denied appellant's claim for recurrence of disability beginning April 8, 1997 on the grounds that the medical evidence did not establish that she had any disability or condition that was causally related to factors of her current employment or to her accepted employment injury. This determination was based on a review of the reports of Drs. George Pappas, a Board-certified internist, and Jeffrey Burgess, as well as the second opinion examination and report by Dr. Teresa E. Jacobs, a Board-certified internist. Dr. Jacobs indicated that appellant had allergy to NCR paper after allergy testing was conducted in August 1995 by Drs. Burgess and Pappas. When appellant again claimed symptoms in April 1996 that she alleged were related to her exposure at work to NCR paper and regular paper, Dr. Jacobs recommended that additional testing be performed. This testing was performed by Drs. Burgess and Pappas on July 31, 1996. They noted appellant's history of lung function decline following exposure to NCR paper in earlier testing. On July 31, 1996 appellant was tested in a controlled environmental exposure chamber for allergies. This test was to expose appellant to filtered air and paper products to determine the nature of her reaction in a controlled environment. However, in conducting the trials of blind exposure, appellant was not actually exposed to any paper products. She was only exposed to filtered air and on the last blind exposure test, appellant sustained an anxiety attack. Drs. Pappas and Burgess reported that appellant appeared to have a typical reaction to this blinded test and apparently hyperventilated. They noted that one possibility was that appellant had had valid recurrent episodes of respiratory disability related to the NCR paper while at work and therefore was having a generalized response to odors in situations which she associated with work. After reviewing this test in a report dated September 3, 1996, Dr. Jacobs indicated that she concurred with the impression of Drs. Pappas and Burgess. She noted that if appellant truly had an asthma attack, the spirometry test would have changed and that appellant's blood gases revealed she had hyperventilated. Dr. Jacobs indicated that there was no decline in lung function upon exposure to any paper other than NCR paper. She also reported that appellant does seem to have a real asthmatic reaction to NCR paper and that she would continue to recommend that appellant not work with NCR paper but that this was the only restriction to appellant's employment. Thus, contrary to the Office's finding that appellant did not demonstrate an allergy related to regular paper exposure, the test performed by

¹ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on August 28, 1998, the only decision before the Board is the Office's August 26, 1997 decision. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

Drs. Burgess and Pappas was not complete inasmuch as such testing did not test appellant for her claimed sensitivities. Accordingly, the opinion by Dr. Jacobs that appellant's only work restriction was related to carbonless paper is not based on accurate medical testing and therefore is of no probative value. The Board also notes that the factual evidence is not clear regarding whether appellant had possible exposure to NCR paper upon her return to work April 1, 1996. Contrary to appellant's limited-duty work restriction that she not be exposed to NCR paper, a review of memoranda sent by the employing establishment to the Office indicates that such NCR paper may have been in appellant's work area albeit not at her desk. Specifically, in a memorandum dated June 17, 1997, the employing establishment reported that any possible exposure to NCR paper was remote to appellant's physical location as it was contained in closed work files. In a prior memorandum, the employing establishment reported that the only time a purchaser would come in contact with NCR paper would be if they had to open the purchase file for administrative action. Although they also indicated that appellant never had to do such work it appears that NCR paper was in the files in appellant's working environment despite the provision in her limited-duty work proposal that there would be no exposure.

The Office may undertake to develop either factual or medical evidence for determination of the claim.³ It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature,⁴ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.⁵ The Office has the obligation to see that justice is done.⁶

As the physicians of record agree that appellant should not be exposed to NCR paper, the Office must ascertain whether this restriction is an absolute restriction meaning that appellant cannot even be in an area in which NCR paper is stored or whether they are talking about actual physical contact with NCR paper. Consequently this case must be remanded for further development of medical evidence to develop specific information concerning appellant's restriction to NCR paper and to have the necessary test performed to determine whether appellant has any allergy to regular paper as well as NCR paper. After such further development as the Office deems necessary, as *de novo* decision should be issued on the merits of this issue.

The Board further finds that the issue of whether appellant sustained an emotional condition is also not in posture for decision.

The initial question presented in an emotional condition claim is whether appellant has alleged and substantiated compensable factors of employment contributing to her condition. 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'

³ 20 C.F.R. § 10.11(b); *see also John J. Carlone*, 41 ECAB 354 (1989).

⁴ *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

⁵ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

⁶ *William J. Cantrell*, 34 ECAB 1233 (1983).

Compensation Act. Where 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 factors such as an employees 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 desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.⁷ 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.⁸ 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.⁹

The Office determined that appellant did not sustain an emotional condition causally related to factors of her federal employment based on its finding that appellant had no residuals of her accepted employment injury and that no other work-related physical condition or disability was established based on medical evidence. As this case must be remanded for further development of the issue of whether appellant did have a recurrent disability or residuals of her accepted employment-related condition, the Office's determination concerning an emotional condition cannot be upheld. After the evidence is fully developed with respect to appellant's original accepted injury and any other employment-related condition, the Office should reexamine the issue of whether appellant sustained an emotional condition within the performance of duty.

⁷ *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985).

⁹ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

The decision of the Office of Workers' Compensation Programs dated August 26, 1997 is hereby set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
September 1, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member