U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. CADE and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 97-2097; Oral Argument Held July 5, 2000;
Issued August 11, 2000

Appearances: *Frankie Sanders,* for appellant; *Paul J. Klingenberg, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
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 under section 8124 of the Federal Employees' Compensation Act.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[1] 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.[2]

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.[3] This burden includes the submission of a detailed

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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.[5] 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.[6]

On March 28, 1996 appellant, then 39-year-old postal supervisor, filed an occupational disease claim alleging that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated November 6, 1996, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. By decision dated April 15, 1997, the Office denied appellant's hearing request on the grounds that it was untimely. 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 alleged that the employing establishment acted improperly by issuing her a memorandum in February 1996 regarding unscheduled absences and by issuing her a letter of warning in February 1996 for failure to dispatch all available mail. She alleged that she was unfairly issued various disciplinary letters, including a May 1996 notice of removal and a June 1996 demotion letter, for submitting an altered leave slip in January 1996. Appellant claimed that she was unfairly denied leave on several occasions and otherwise was unfairly criticized for her leave usage.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly denied leave, and unreasonably monitored her activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[7] Although the handling of disciplinary actions, the granting of leave requests, and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[8] However, the Board has also found

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

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

[6] *Id.*

[7] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[8] *Id.*

that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[9] Appellant did not submit sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters.[10] Appellant filed grievances and Equal Employment Opportunity (EEO) claims with respect to some of these matters, but it does not appear that any of these grievances or claims were resolved in her favor as to show error or abuse. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant also alleged that the Office acted improperly when it investigated her for submitting an altered leave slip in January 1996. She alleged that the employing establishment improperly prevented her representative from attending an investigative meeting. The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.[11] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12] Although appellant has made allegations that the employing establishment erred and acted abusively in conducting its investigation, she has not provided sufficient evidence to support such a claim. A review of the evidence indicates that appellant has not shown that the employing establishment's actions in connection with its investigation of her were unreasonable. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant claimed that a supervisor, Aubrey Watson, subjected her to sexual harassment, made various untoward remarks about her clothing, and unfairly threatened to remove her from her job. She alleged that Mr. Watson harassed her by falsifying documents which led to her discipline in February 1996 for failure to deliver mail. Appellant alleged that the employing establishment discriminated against her on the basis of sex by promoting four men instead of her and that it retaliated against her for filing complaints. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[13] However, for harassment or discrimination to give rise to a compensable

[9] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[10] Appellant claimed that some of the disciplinary actions were reduced in severity, but she did not further explain this assertion. Moreover, the mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse. *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[11] *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[13] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[14]

In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors.[15] Appellant alleged that supervisors made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided insufficient corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[16] Appellant filed grievances and EEO claims with respect to some of these matters, but it does not appear that any of these grievances or claims were resolved in such a manner as to show harassment or discrimination. The record contains a statement in which a coworker indicated that Mr. Watson stated he would "get" appellant, but the statement is too vague to establish that a harassing threat was made. Mr. Watson noted he did not make a threat but rather had indicated that appellant, and other employees, would be disciplined for any unauthorized use of leave. Moreover, Mr. Watson indicated that he advised appellant that her clothing was not in accordance with postal regulations, but that he did not make any untoward statements. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[17]

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, 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 ... 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."[18] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[19]

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[14] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[15] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[16] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[18] 5 U.S.C. § 8124(b)(1).

[19] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[20] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[21] when the request is made after the 30-day period for requesting a hearing,[22] and when the request is for a second hearing on the same issue.[23]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated November 6, 1996 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in an undated letter received by the Office on February 21, 1997. Hence, the Office was correct in stating in its April 15, 1997 decision that appellant was not entitled to a hearing as a matter of right because her February 21, 1997 hearing request was not made within 30 days of the Office's November 6, 1996 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its April 15, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional evidence and requesting reconsideration. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[24] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

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 April 15, 1997 and November 6, 1996 are affirmed.

Dated, Washington, D.C.
August 11, 2000

[20] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[21] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[22] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[23] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[24] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member