U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKY A. HENDERSON and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, San Diego, CA

Docket No. 99-2184; Submitted on the Record;
Issued December 22, 2000

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On October 14, 1997 appellant, then a 43-year-old revenue officer, filed an occupational disease claim (Form CA-2) alleging stress due to a personal attack on her by her supervisor, verbal abuse and by being told to go home on October 3, 1997. In her statement, appellant described the event on October 3, 1997 when she was in her office completing work which had not be done on her office flexi-day when Mickie Motter, acting group manager, questioned why she was at work. Ms. Motter then told appellant to watch the video about the senate hearings and then to go home. Appellant informed Ms. Motter that she thought she was able to come to the office whenever she needed to, otherwise she would not have signed up for the traditional schedule. Lastly, appellant alleged that Ms. Motter made derogatory statements to her about affirmative action.

In a Form CA-16, Margaret R. Elman, Ph.D, an attending psychologist, diagnosed adjustment disorder and indicated that she first examined appellant on October 7, 1997 when appellant reported a confrontation with her supervisor over working in the office.

In a memorandum dated October 14, 1997, Ms. Motter stated that she discussed with appellant that she was on a traditional work schedule and if she needed to be in the office more than one day a week she was to inform Ms. Motter. She denied making any comments about affirmative action or derogatory comments about appellant and her abilities.

In an October 1, 1997 report, Dr. Elman diagnosed adjustment disorder and that appellant informed her that on October 3, 1997 "her supervisor told her to go home and that she should not be in the office" and that there were problems with her work. She stated that appellant was upset by this as she believed she produced good work and that she had been unfairly criticized.

In a statement dated December 4, 1997, Mr. Ducat stated that he had no direct knowledge of the incident alleged by appellant. He stated that Ms. Motter admitted questioning appellant on October 3, 1997 as to her being in the office, but denied making the alleged comments regarding affirmative action.

The Office advised appellant by letter dated January 6, 1998 that the information she had provided was insufficient to support her claim and advised her that additional factual and medical information was needed.

By decision dated September 23, 1998, the Office denied appellant's claim on the basis that appellant had failed to establish a compensable factor of employment. The Office accepted as factual that appellant was told to go home, but that this was an administrative matter and no error or abuse had been established on the part of the employing establishment. Regarding the statements appellant alleged Ms. Motter had made, the Office found that they had not been established.

In a letter dated September 29, 1998, appellant requested a written review of the record by an Office hearing representative and submitted a copy of the flexiplace agreement.

By decision dated February 11, 1999, the Office hearing representative affirmed the September 23, 1998 decision denying appellant's claim. The hearing representative accepted as factual that appellant was told to go home on October 3, 1997, but that this was an administrative action and appellant had not established that there had been any abuse or error on the part of the employing establishment. The hearing representative also concluded that the evidence of record failed to establish that appellant's supervisor had made the verbal statements alleged by appellant.

Appellant, in a February 28, 1999 letter, requested reconsideration of the February 11, 1999 decision and submitted evidence in support of her request including a final decision on her formal grievance by the employing establishment. She also requested that correspondence from Ms. Motter and Mr. Ducat be removed from her workers' compensation file.

On May 26, 1999 the Office denied appellant's request for merit review.

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

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 Federal Employees' Compensation Act.[1] On the other hand, the disability is not covered where it results from such factors as an

[1] 5 U.S.C. §§ 8101-8193.

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

The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment engaged in abuse or improperly told her to go home as she was on traditional flexiplace and she was not scheduled to be in the office on October 3, 1997, the Board finds that this allegation relates to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.[5] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties 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.[6] The Board has held 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.[7] Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters. The evidence of record is not sufficient to establish any error or abusive behavior on the part of Ms. Motter in questioning appellant about her presence in the Office on October 3, 1997.

Appellant has also alleged that her supervisor made derogatory comments about her and affirmative action which contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[8] However, for harassment or discrimination

[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).

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

[5] *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).

[6] *Id.*

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

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

to give rise to a compensable 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.[9] In the present case, appellant alleged that supervisors and coworkers made derogatory statements about her and affirmative action, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[10] Appellant has not established a compensable employment factor under the Act with respect to the claimed derogatory statements about her and affirmative action.

Next, the Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argumentt not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of these requirements enumerated under section 10.606(b)(2), the Office will deny the application for review without reopening the case for a review on the merits.[12]

In her February 28, 1999 letter requesting reconsideration, appellant did not submit any relevant and pertinent evidence not previously considered by the Office and did not argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a point of law or a fact not previously considered by the Office. Appellant merely stated her opinion, therefore, the Office properly denied her request for reconsideration.

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

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

[11] 20 C.F.R. § 10.606.

[12] 20 C.F.R. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated May 26 and February 11, 1999 are hereby affirmed.

Dated, Washington, DC
December 22, 2000

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member