U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA M. CAMPBELL and DEPARTMENT OF THE ARMY, FORT LEAVENWORTH, Leavenworth, KS

Docket No. 98-557; Submitted on the Record;
Issued January 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition due to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

The Board has duly reviewed the case on appeal and finds that appellant has not established that she sustained an emotional condition due to factors of her federal employment.

On June 16, 1996 appellant, then a 51-year-old instructional systems specialist, filed a claim alleging that she suffered from major depression and anxiety due to job related-stress. The employing establishment submitted a statement from Colonel Gary Bushover responding to appellant's claim. After undertaking medical and factual development the Office denied appellant's claim by decision dated January 31, 1997. Appellant stopped work on June 4, 1996 and has not returned.

By letter postmarked September 9, 1997, appellant requested an oral hearing before an Office representative. In a decision dated November 10, 1997, the Office denied appellant's request as untimely.

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a

particular environment or hold a particular position.[1] An employee's emotional reaction to an administrative or personnel matter is generally not covered. The Board has held, however, that error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in an administrative or personnel matter, may afford coverage.[2]

In this case, appellant attributed her emotional condition in large part and both indirectly and directly, to having been passed over for a promotion. She explained that in December 1992 she was assigned the responsibilities of the Chief, Faculty Development Division of the Directorate of Academic Operations, Command and General Staff College. In January 1993 it was proposed that appellant's position be reclassified and a promotion for appellant was included in the reclassification plans. In December 1993 paperwork was submitted to secure appellant's upgrade but the promotion was delayed because of administrative freezes. In May 1995 paperwork to secure her promotion was again submitted but she was told that the freeze on promotions was still in effect. Later in 1996 she learned that despite the alleged freeze, a man at the college had received a promotion. With respect to appellant's complaint that she was not promoted as promised due to an alleged freeze in promotions, the Board has held that frustration over not being able to secure a promotion involves an administrative or personnel matter and, therefore, is not considered to be in the performance of duty.[3] Furthermore, although appellant felt that she was treated unfairly because another employee had been promoted despite this freeze, the Board has held that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment and that there must be evidence that harassment or discrimination did in fact occur.[4] In his response dated August 13, 1996, Colonel Bushover confirmed that there had been a freeze on promotions and explained that a different set of circumstances to appellant's own allowed for promotion of the other employee in 1996 despite the freeze. As appellant failed to provide reliable, probative and substantial evidence that the discrimination occurred as alleged, she failed to meet her burden of proof in establishing this factor of employment.

Feeling that she had been unfairly denied a promotion, in April 1996 appellant filed a complaint with the Equal Employment Opportunity Commission, but no decision on appellant's claim has been issued. Appellant asserted that after she filed her complaint, the situation deteriorated as she was excluded from a planning and reorganization group, kept uninformed regarding important matters and professionally undermined by her superiors who openly criticized her efforts. In his response, Colonel Bushover disputed appellant's allegations that she was excluded from important decisions and kept uniformed, stating that while appellant was not chosen to be part of the select study group who planned the reorganization, neither were almost all the rest of the members of the college and that very few outside the study group were aware of the specifics of the group's organizational options or recommendations until they were

[1] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

[2] *Margreate Lublin*, 44 ECAB 945, 956 (1993).

[3] *Lillian Cutler*, *supra* note 1.

[4] *Edward J. Meros*, 47 ECAB 609 (1996).

approved. The Board has held that frustration over not being able to work in a particular environment or hold a particular position is not in the performance of duty.[5] In addition, appellant has not provided any documentation to support her allegation that her superiors criticized her in front of others.

Appellant also asserted that while her promotion was pending approval, she was allowed to perform most of the duties of the reclassified position, directing her office and its employees, but because the promotion was not official she was not at first, allowed to evaluate these employees directly. Evaluations were performed by a superior officer. Appellant alleged that the fact that she was acting chief of the branch but had no power to perform employee evaluations and the fact that her employees knew she could not rate their performance, "caused massive confusion and problems for the office." More specifically, a major assigned to her took advantage of her situation by arriving to work late and leaving early without arranging for coverage and generally ignoring the chain of command. She reported the major's conduct to her superiors but no action was taken to correct his work habits. In November 1994 she was again allowed to directly evaluate her employees but the major continued to behave improperly by continually using government resources for his personal consulting business, causing constant conflict and that promises to replace the major went unfulfilled. Appellant's factual assertions are not established by sufficient evidence and, as such is not compensable.[6] However, appellant's specific allegations regarding the uncooperative conduct of the major assigned to her were confirmed by Colonel Bushover, who classified the major's behavior as inappropriate and insubordinate of appellant and thus constitutes a compensable factor of employment.[7]

Appellant further asserted that she worked many hours of unrecorded overtime hours in order to accomplish the goals of her office. In his statement of response, Colonel Bushover confirmed that appellant was dedicated and had an aggressive work ethic, but indicated that the hours of overtime she put in were strictly voluntary and were not a requirement of the position. However, this aspect relates to the performance of appellant's regular and specially assigned duties and constitutes a compensable factor of employment. The fact that appellant voluntarily worked overtime does not take her out of the performance of her regular or specially assigned duties.[8]

Appellant also asserts that when she briefly returned to her office on June 11, 1996 in order to send an e-mail message, she discovered that her computer password had been changed, her phone had been disconnected and her desk had been cleaned out. Appellant expressed a concern that her position would be eliminated. With respect to this allegation, the Board notes that as appellant had stopped work on June 4, 1996, the fact that she discovered that her desk had

[5] *Lillian Cutler, supra* note 1.

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

[7] Altercations between coworkers arising out of appellant's day-to-day regular duties, or out of any specifically assigned duties imposed by the employing establishment, would be considered a factor of the employment; *see Marie Boylan*, 45 ECAB 338 (1994); *Irene Bouldin*, 41 ECAB 506 (1990).

[8] *See Lillian Cutler, supra* note 1.

been cleaned out cannot be said to have contributed to her emotional condition. Moreover, a fear of a reduction-in-force is not compensable under the Federal Employees' Compensation Act and appellant has again not provided any evidence of error or abuse on the part of the employing establishment.[9]

While appellant has raised one possible compensable factor of employment, the insubordination and inappropriate behavior of the major assigned to her, the medical evidence of record does not support a causal relationship between her diagnosed emotional condition and this factor of employment. In support of her claim, appellant submitted medical reports from her treating physicians. In a letter dated June 20, 1996, Dr. Peter J. Cristiano, a Board-certified family practitioner, stated that, based on appellant's job description and on information related by her, appellant's job could be situationally and stressful and that appellant operated in a stressful environment. He added that appellant had to deal with many types of people in a fast paced manner and that all of these factors probably led to her stress and depression. He stated that she was totally disabled from June 4, 1994 to September 4, 1996. In a report dated June 17, 1996, Dr. Bruce Parsa, a psychiatrist, to whom appellant was referred by Dr. Cristiano, diagnosed severe major depression and anxiety disorder and stated that the depressive and anxiety components of her condition were related to stress at her job as a professor in the military. He added that appellant had "verbalized that she has had problems working with some of the other officers and verbalized multiple situations of undermining and conflicting circumstances." In a follow-up letter dated November 6, 1996, Dr. Parsa reiterated that he had been treating appellant since June 17, 1996 and stated "in reference to her previous baseline level of functioning and her situation with the precipitating factor creating her current psychiatric issues, it is quite evident that these are job related-stressors that should be avoided." Both Dr. Cristiano and Dr. Parsa related appellant's diagnosed emotional condition to her job. However, as neither physician specifically relates her condition to her difficult relationship with the major, the only compensable factor of employment established the medical evidence is insufficient to meet appellant's burden of proof to establish that she developed an emotional condition due to compensable factors of her federal employment.[10]

The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office representative.

Following the Office's January 31, 1997 decision denying compensation benefits, by letter postmarked September 9, 1997, appellant requested an oral hearing before an Office representative. In this letter appellant stated that she had requested an oral hearing by letter dated February 18, 1997, but had not received an answer to her request. Appellant submitted a copy of the February 18, 1997 letter.

In a decision dated November 10, 1997, the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office further informed appellant that it had

[9] *Id.*

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

determined that the issue in her claim could be equally well resolved by submitting new evidence on reconsideration.

Section 8124(b) of the Act, concerning entitlement to a hearing before an Office representative states: "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."[11]

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 the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[12]

In this case, the Office issued its decision denying appellant's claim for compensation benefits on January 31, 1997. Appellant's letter requesting a hearing was postmarked September 19, 1996 which was beyond 30 days from the date that the January 31, 1997 decision was issued.[13] While appellant asserted that she had timely requested a hearing by letter dated February 18, 1997 and submitted a copy of this letter, the record does not contain any evidence that this letter was previously received by the Office. Because the record contains no evidence that appellant requested a hearing within 30 days of the Office's January 31, 1997 decision, she was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.[14] In this case, the Office advised appellant that it considered her request in relation to the issue involved and the hearing was denied on the basis that the issues in this claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

[11] 5 U.S.C. § 8124(b)(1).

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

[13] Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; *see* 20 C.F.R. § 10.131(a).

[14] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

probable deductions from established facts.[15] There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

The decisions of the Office of Workers' Compensation Programs dated November 10 and January 31, 1997 are affirmed.

Dated, Washington, D.C.
January 3, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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