U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY LULICK and DEPARTMENT OF THE TREASURY, Washington, D.C.

Docket No. 97-2498; Oral Argument Held April 6, 2000; Issued June 8, 2000

Appearances: *Robert A. Taylor, Esq.*, for appellant; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained an aggravation of her preexisting back condition due to stress or other factors of her federal employment.

On June 23, 1995 appellant, then a 41-year-old computer specialist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging she sustained an aggravation of her preexisting back condition due to factors of her federal employment. Appellant attributed the aggravation of her back condition to stress and to typing on her computer.

By decision dated December 5, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she did not establish that she sustained an injury in the performance of duty. In a letter dated December 5, 1996, appellant, through her representative, requested reconsideration and submitted additional evidence. By decision dated April 15, 1997, the Office denied modification of its prior decision.

The Board has duly reviewed the case record and finds that appellant has not established that she sustained an employment-related aggravation of her preexisting back condition due to stress or other factors of her federal employment.

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 his or 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 employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

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.[3] 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.[4]

Many of appellant's allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[5] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relationship to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[6] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated. The incidents and allegations made by appellant which fall into the category of administrative or personnel actions include: her reaction to receiving a letter in

[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] *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[4] *Id.*

[5] *See Thomas D. McEuen, supra* note 2.

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

September 1994 from her supervisor, Wade Algeo, regarding her use of leave,[7] the disposition by the employing establishment of her leave requests,[8] her allegation that she received inadequate training,[9] the denial of a transfer,[10] and the manner in which a supervisor, Theodora Kunec, performed her supervisory functions.[11] Appellant has presented no evidence of administrative error or abuse in the performance of these actions and, therefore, they are not compensable under the Act.

Appellant further attributed the aggravation of her preexisting back condition to harassment by coworkers and a supervisor, Ms. Kunec. Specifically, appellant maintained that a coworker, Gene Edwards, made unwanted sexual advances, that a coworker avoided her after she filed a grievance and that another coworker disliked her because she had reported her for a security violation. Appellant further described disagreements with Ms. Kunec regarding the processing of requisitions. Actions of an employee's supervisor or coworkers which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act. However, for discrimination to give rise to a compensable disability, there must be some independent evidence that harassment of discrimination did, in fact, occur.[12] Mere perceptions alone of harassment or discrimination are not compensable.[13] In the instant case, appellant has not supported her allegations of harassment by any substantial, reliable or probative factual evidence of record and thus she has not established a compensable factor of employment.

Appellant also maintained that her supervisor and coworkers committed various security violations; however, she has submitted no evidence which would establish a factual basis for her contention and thus it cannot constitute a compensable employment factor.

Regarding appellant's allegation that she experienced stress due to "[p]ressure from tight deadlines" and from workplace understaffing the Board has held that overwork can be a compensable factor of employment if substantiated by the record since it relates to assigned

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[7] *Barbara J. Nicholson*, 45 ECAB 803 (1994) (disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct taken in an administrative capacity are not compensable unless it is demonstrated that the employing establishment erred or acted abusively in such capacity). Appellant filed a grievance over the September 1994 letter, which the employing establishment denied in a decision dated November 22, 1994.

[8] *Joe L. Wilkerson*, 47 ECAB 604 (1996) (matters concerning leave are administrative functions of the employer and are generally not compensable).

[9] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995) (matters involving the training of employees is an administrative function).

[10] *Donna J. DiBernardo*, 47 ECAB 700 (1996).

[11] An employee's complaints concerning the manner in which a supervisor performs her duties as a supervisor or the manner in which a supervisor exercises her supervisory discretion fall, as a rule outside the scope of coverage provided by the Act. *Abe E. Scott*, 45 ECAB 164 (1993).

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

[13] *Id.*

work duties.[14] However, as with all allegations, overwork must be established on a factual basis. In a statement accompanying her claim, appellant related that over the past 10 months the organization had lost a supervisor and a computer specialist and that she and the other 2 remaining employees took over all the work. Appellant principally attributed her stress to working on the Disaster Recovery Project from February to May 1994 in addition to performing her regularly assigned projects. Appellant maintained that the work involved data entry and that she spent all day at her computer terminal. In support of her claim, appellant submitted a statement dated February 5, 1994 from her first-line supervisor, Mr. Algeo, in which he requested that she work exclusively on the Disaster Recovery Project "except for the time necessary for requestition processing and budget." He stated that the project had "very tight deadlines" and informed her that she could work compensatory time. In a memorandum dated February 7, 1994, Mr. Algeo assigned appellant primary leadership responsibility for the Disaster Recovery Project. Appellant submitted time and attendance records dated February through May 1994, which indicate that during this period she earned over a week of compensatory time. She further submitted her performance appraisal for the period April 1, 1993 to March 31, 1994, in which Mr. Algeo related:

> "[Appellant] during this rating period handled [two] projects and act[ed] as backup for [two] others in a professional and competent manner. In March one of her projects was reassigned and she was assigned a high priority project which she is handling in the same efficient manner. [Appellant] has taken over the Financial Management Spreadsheet which is easy to follow and completely understandable to management. [Appellant] has stepped in, in another project leaders absence and managed the Disaster Recover Project, in addition to the large range of duties required by the Financial Management Project and the Classified Site Management Project."

The employing establishment challenged appellant's contention that she was overworked. In a statement dated August 10, 1995, Ms. Kunec, appellant's second-line supervisor, related that appellant's work assignments were suitable for her position and grade. Ms. Kunec stated:

> "Contrary to her assertion, her work load has not increased during the last three years; most of the Operations Branch staff at her grade level carry a heavier work load. While I have had a staff reduction of one employee in that section, he had been in that group for only about a year and had spent most of his time out of the office due to illness associated with injury. [Appellant] was the backup on a project held by that person (Disaster Recovery) and later assumed the prime role on this project … but was relieved of other duties (prime role on security project)…. A contractor and a coworker were also assigned to assist [appellant] in the new project."

Ms. Kunec further related that, in a letter dated March 10, 1995, appellant and a coworker had offered to permanently take over additional duties in exchange for promotions.

[14] *Frank A. McDowell*, 44 ECAB 522 (1993).

She additionally noted that appellant declined an opportunity to accept a transfer in November 1994.

In a statement dated August 1, 1995, Mr. Edwards, a coworker, related that he worked with appellant on "most of the project management activities." He stated:

> "In late 1993 … following the departure of Eric Dalton, Mr. Algeo, who was then the section manager, assigned the Disaster Recovery [P]roject to [appellant] as the primary and Ms. Barnes as her backup; subsequently [appellant's] Security project was reassigned to me as the primary. Following the project reassignment, [appellant] was still only responsible for [two] projects, Disaster Recovery and Operations Branch Budget. Another project, the CDC Handbook, was later assigned to her in February 1995, after the completion of the Disaster Recovery [P]roject in September of 1994."

Ms. Edwards further related that appellant's projects "can be time consuming but she has had the benefit of additional support from contractor personnel, temporary employees and government personnel to assist in her assigned projects."

In a statement dated August 1, 1995, Ms. Barnes, one of appellant's coworkers, described her work with appellant and stated that she "had not observed [appellant] doing any data entry work at her terminal for [an] excessive amount of time."

The Board finds that appellant has not established overwork as a compensable employment factor. Appellant's performance appraisal shows that at least through March 1994 she completed her assigned tasks in a manner above acceptable. While her supervisor assigned her the lead on the Disaster Recovery Project, which had deadlines, the supervisor also removed her from the lead duties of another project. Evidence submitted from appellant's coworkers does not establish that she was overworked. Appellant's second-line supervisor maintained that her duties were appropriate for her grade and position. Further, while appellant put in around a week of compensatory time from February through May 1994, leave records for this period indicate that appellant utilized around three weeks of leave primarily in the form of intermittent days off work. Thus, appellant did not average working more than a 40-hour week during this period.[15] Further, in a letter dated February 7, 1997, appellant informed Mr. Algeo that she would be "happy" to work compensatory time on the Disaster Recovery Project once she finished matters relating to her father's estate. Appellant, therefore, has not established that she was overworked.

The Board further finds that appellant has not established that she sustained an aggravation of her preexisting back condition due to other factors of her federal employment.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.[16] This burden includes the submission of a detailed

[15] For example, appellant earned 20 hours of compensatory time for the pay period March 6 to March 19, 1994 and used 20 hours of annual leave.

[16] *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.[17] This burden also includes the submission of rationalized medical opinion evidence, based on a complete factual and medical background, which shows a causal relationship between the conditions for which compensation is claimed and the implicated employment factors or incidents.[18]

The Board has held that where employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the period of disability related to the aggravation.[19] Where the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.

In the instant case, appellant attributed the aggravation of her preexisting back condition to data entry work on her computer. Appellant, however, has not submitted sufficient rationalized medical evidence in support of her claim.

Appellant submitted office visit notes from physicians dated 1995 and 1996, which indicate that she received treatment for problems with her back, including a herniated cervical and lumbar disc. However, as the physicians did not attribute any diagnosed condition to factors of appellant's federal employment, this evidence is insufficient to meet her burden of proof.

In a report dated November 2, 1995, Dr. Mayo Friedlis, a Board-certified physiatrist, discussed appellant's history of a 1985 motor vehicle accident and her complaints of back pain that "has become more significant over the past one or two years. He further noted that she had neck pain which "does seem to intensify around activities that she associates with work." Dr. Friedlis diagnosed myofascial pain syndrome and fibromyalgia. While Dr. Friedlis' noted appellant's description of increased pain with work activities, he did not relate the diagnosed conditions of myofascial pain syndrome and fibromyalgia to any factors of her federal employment and thus his opinion is of little probative value.

In an office visit note dated January 4, 1996, Dr. Friedlis indicated that he treated appellant for problems with her neck and back. He related, "[Appellant's] problem is aggravated by constant and prolonged positions, particularly seated positions in the workplace or prolonged use of the arms or legs in a static fashion. She would benefit greatly from the ability to work at home." Dr. Friedlis did not render a diagnosis or provide any rationale for his conclusions and thus his opinion is of diminished probative value.[20]

As appellant has not submitted rationalized medical evidence to substantiate that she sustained an occupational disease due to factors of her federal employment, the Office properly denied her claim.

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

[18] *Id*.

[19] *Thomas N. Martinez*, 41 ECAB 1006 (1990).

[20] *Carolyn F. Allen*, 47 ECAB 240 (1995).

The decision of the Office of Workers' Compensation Programs dated April 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member