

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA McDADE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Wilkes-Barre, PA

*Docket No. 99-290; Submitted on the Record;
Issued June 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty causally related to the factors of her federal employment; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b); and (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits constituted an abuse of discretion.

On June 4, 1997 appellant, then a 42-year-old registered nurse, filed a notice of traumatic injury, Form CA-1, alleging that she sustained an emotional condition due to her employment. She attributed the emotional condition to a June 4, 1997 meeting with Maureen Harris and Kathy Balish, her supervisors, regarding her work performance. During the meeting, appellant was informed that she was being temporarily reassigned from the evening tour of duty to the day shift. She further asserted that she was coerced into attending the meeting. As a result of learning about the proposed changes in her work schedule, appellant claimed that during the meeting she developed stress and heart pain, heart palpitations, severe headaches, shortness of breath and nausea. Appellant stopped work on June 4, 1997.¹

Appellant presented on June 4, 1997 in the employing establishment's emergency room with complaints of chest pressure and shortness of breath. Dr. Heredia, an emergency room physician, reported that appellant got unexpected news from her superiors, which triggered her symptomology. Appellant was admitted to the hospital and released the next day. On June 6, 1997 Dr. John Kish, a general practitioner, examined appellant. He reported that, as a result of appellant having been notified of a work reassignment, she got upset, anxious and started having palpitations and chest pain. Dr. Kish indicated that, although the palpitations and chest pain were brought on by the stressful work situation, he opined that she might have an underlying cardiac arrhythmia, which was exacerbated by stress problems at work. He also reported a

¹ From the record, it is unclear when appellant went back to work. Dr. Lauren Argenio, a family practitioner, determined that appellant was unable to work through August 29, 1997.

history of substance and alcohol abuse and noted that appellant declined a prescription for anxiety medication. In an attending physician's report, Form CA-20, Dr. Kish indicated with a checkmark "yes" that appellant's condition was work related. He further concluded that appellant was unable to work from June 6 through July 6, 1997.

By letter dated June 27, 1997, the Office requested additional information from appellant concerning her allegations. In response, she submitted a July 19, 1997 statement, medical evidence and other documents. In the July 19, 1997 letter, appellant stated that she had been coerced into attending the June 4, 1997 meeting even though her designated union representative could not attend. Since the union president could not make the meeting, appellant believed that the meeting would have to be postponed and was shocked to find out that another union representative was waiting for her. She claimed she did not know what would be discussed at the meeting and became dismayed and upset when she learned that it would be a verbal counseling. Appellant stated that, once Ms. Balish started discussing the allegations against her, she became extremely upset and felt intense chest pain, as well as physical symptoms of palpitations, headache and nausea. She argued that she was given no chance to defend herself against the allegations and noted that none of the accusers were present at the meeting. Appellant further claimed that Ms. Harris, in a raised voice, accused her of writing up reports of contact and taking them home. She claimed the atmosphere of the meeting was hostile, tense, heated and unprofessional. Appellant asserted that she was not capable of working a day shift due to a court-ordered child custody schedule. When she walked out of the meeting, she realized she could not continue her shift due to chest pain, nausea, headache and heart palpitation.

Other evidence appellant provided was a June 3, 1997 e-mail message from a union official informing her that "Yolanda was the only available union representative for tomorrow and that, if she were unable to make the meeting, it would have to be rescheduled." She also submitted a February 3, 1997 court order mandating she pay child support.

The employing establishment submitted a July 31, 1997 statement from Ms. Balish, acting nurse manager, who disagreed with appellant's allegations. Ms. Balish stated that she had informed appellant both verbally and in writing of the need for a meeting to discuss performance issues. She noted that appellant had requested union representation and agreed she would attend the meeting on June 4, 1997. On the day of the meeting Ms. Balish indicated that appellant had thought that the meeting was cancelled due to her inability to find union representation. She informed her that a union representative was waiting in the office. Ms. Balish stated: "[Appellant] calmly walked with me to the designated office. [Appellant] did not voice any objections to accompanying me to the meeting." Ms. Balish stated that Ms. Harris, Associate Director, Surgical Services, appellant, a union representative and she were present at the meeting. She stated that neither she nor Ms. Harris raised their voices although she noted that the union representative was vocal about his objection to the verbal counseling. Appellant was prepared for the meeting with notes and did not raise her voice "but was upset." Ms. Balish further stated that at no time during the meeting, did appellant complain of chest pain, palpitations or shortness of breath. She explained that it was employing establishment policy to temporarily reassign staff to day shift for closer supervision to facilitate improvement in performance. Ms. Balish noted that "this reassignment was temporary and not meant to be threatening, intimidating or cause distress for the employee."

Accompanying Ms. Balish's statement was a copy of a May 30, 1997 e-mail message from her to appellant, which stated in pertinent part: "I need to set up a meeting to discuss some performance issues with you. You are entitled to union representation. The meeting can be either Tuesday or Wednesday which should allow you enough time to obtain an AFGE representative." In a note dated June 2, 1997, appellant replied that she would appear at the 4:00 p.m. June 4, 1997 meeting. The record also contains a copy of a June 3, 1997 memorandum from Ms. Balish listing the performance issues to be addressed at the verbal counseling on June 4, 1997. Performance issues included: not demonstrating the ability to work effectively with other staff and not completing assigned tasks. The verbal counseling memorandum further noted that appellant was being temporarily removed from her regular evening shift until improvement was noted.

Appellant provided additional medical evidence. On July 2, 1997 Dr. Kish examined appellant and diagnosed stress-related disorder and cardiac palpitation from work. He indicated with a checkmark "yes" that the diagnosed condition was due to or aggravated by an employment activity. Dr. Kish also reported that appellant was unable to work from June 6, through July 19, 1997. Appellant also provided attending physician's reports, Form CA-20, from Dr. Lauren Argenio, a family practitioner. Dr. Argenio first examined appellant on July 15, 1997 and diagnosed chest pain, palpitations, anxiety and indicated with a checkmark "yes" that appellant's condition was due to an employment activity. In a return to work certificate also of the same date, Dr. Argenio opined that appellant was unable to work from July 19 through August 15, 1997 due to anxiety, palpitations, chest pain and stress-related syndrome which is work related. In an August 6, 1997 return to work certificate, Dr. Argenio concluded that appellant would be totally disabled until August 29, 1997. He reiterated her findings in the August 18, 1997 attending physician's reports.

By decision dated October 20, 1997, the Office denied appellant's claim on the grounds that the injury did not occur within the performance of duty. The Office found that appellant had failed to establish a compensable employment factor.

By letter dated November 19, 1997 and postmarked on November 21, 1997, appellant requested a hearing before an Office hearing representative.

By decision dated February 3, 1998, the Office denied appellant's request for a hearing as it was untimely.

On March 9, 1998 appellant, through counsel, requested reconsideration.

By decision dated March 24, 1998, the Office denied merit review of its October 20, 1997 decision on the grounds that the evidence submitted was insufficient to warrant review.

The Board finds that appellant has not met her burden of proof in establishing 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.² 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 frustration from not being permitted to work in a particular environment or to hold a particular position.³

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.⁴ 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.⁵

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. These working conditions should be considered by a physician when providing an opinion on causal relationship. Working conditions not deemed factors of employment, may not be considered.⁶ 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.⁷

The initial question presented is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁸ Appellant has alleged that she sustained stress-related conditions as a result of a June 4, 1997 meeting with her supervisors. Specifically, appellant asserted that she was coerced into attending the meeting, that she had no idea what was going to be discussed at the meeting, that she was not given a chance to defend herself, and that the allegations concerning her performance were untrue. The Board notes that disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertaining to actions taken in an administrative capacity are not compensable under the Act

² 5 U.S.C. §§ 8101-8193.

³ *Lillian Cutler*, 28 ECAB 125 (1976); *see also Thomas McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁷ *Id.*

⁸ The Board notes that if a claimant has not established a compensable employment factor it is not necessary to address the medical evidence of record; *see Margaret S. Krzycki*, *supra* note 6.

unless it is demonstrated that the employing establishment has erred or acted abusively in its administrative capacity.⁹

Despite appellant's assertions to the contrary, there is no evidence that she was coerced into attending the June 4, 1997 meeting or that she was unaware that performance issues would be discussed. To the contrary, the record contains a May 30, 1997 e-mail message from Ms. Balish notifying appellant that she wanted to set up a meeting to discuss "some performance issues" and informing appellant of her right to have a union representative present. Moreover, the record contains both an e-mail message and written note from appellant agreeing to the meeting. Ms. Balish further indicated that appellant seemed prepared for the meeting since she came with notes. Appellant's argument that the failure to have her designated union representative at the meeting constitutes a compensable employment factor is also without merit. While appellant may have been unable to have the union representative of her choice at the meeting, she was represented by a union official at the June 4, 1997 meeting.¹⁰ Finally, appellant presented no corroborating evidence that her supervisors' concerns about her work performance were not meritorious. Absent evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In the absence of probative evidence to support her contentions, the Board finds no error or abuse by the employing establishment in the administration of these personnel matters.

Appellant has also alleged that she was subject to verbal abuse at the June 4, 1997 meeting. She argued that there was hollering and yelling in the meeting and that the atmosphere of the meeting was hostile, tense and heated. To support a claim based on harassment, there must be some evidence that the harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹¹ Appellant presented no corroborating evidence, such as witness statements, to establish that the June 4, 1997 discussion was "heated, hostile" or that her supervisors spoke in a loud voice.¹²

Appellant finally asserts that her medical conditions arose after learning of the proposed change in work shift. Changes in workdays and hours, positions, and locations, and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty. However, a change in duty shift does not arise as a compensable factor *per se*. The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in the duty shift, *i.e.*, a compensable factor arising out of and in the course of employment, or whether it is based on a claim which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.¹³ In this regard, the assignment of a work schedule or tour of duty is

⁹ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

¹⁰ *Wanda G. Bailey*, 45 ECAB 835 (1994).

¹¹ *William P. George*, 43 ECAB 1159 (1992).

¹² *Carolyn S. Philpott*, 51 ECAB __ (Docket No. 98-760, issued November 18, 1999).

¹³ *Helen Allen*, 47 ECAB 141 (1995); *Peggy R. Lee*, 46 ECAB 527 (1995).

recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.¹⁴ The record contains no evidence of error or abuse in the reassignment. To the contrary, the employing establishment asserted that the proposed reassignment was only temporary in nature and would enable appellant to receive more guidance from her supervisors. As appellant has not established that she sustained her emotional condition as a result of a compensable factor of employment, appellant has not met her burden of proof to establish that her emotional condition was sustained in the performance of duty.

The Board finds that the Office did not abuse its discretion by denying appellant's request for a hearing before an Office hearing representative.

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of the issuance of the decision before a representative of the Secretary.¹⁵ 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.¹⁶ As appellant's request for a hearing was postmarked on November 21, 1997 more than 30 days after the Office's October 20, 1997 decision, appellant was not entitled to a hearing 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 its discretion.¹⁷ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing under section 8124 of the Act.¹⁸

The Board further finds that the refusal of the Office to reopen appellant's claim for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Section 8128(a) of the Act¹⁹ does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision

¹⁴ *Id.*

¹⁵ See 5 U.S.C. § 8124(b).

¹⁶ *James D. Zurcher*, 48 ECAB 274, 281 (1997); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); see also 20 C.F.R. § 10.131.

¹⁷ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁸ See *Lawrence C. Parr*, 48 ECAB 445, 451 (1997)

¹⁹ 5 U.S.C. § 8128(a).

by the Office.²⁰ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.²¹ By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or fact not previously considered by the Office; or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”²²

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.²³

Evidence which does not address the particular issue involved or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.²⁴ However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.²⁵

In support of her request for reconsideration, appellant submitted neither new legal argument nor medical evidence. Appellant has therefore not established that the Office abused its discretion in its March 24, 1998 decision by denying appellant's review on the merits of its October 24, 1997 decision under section 8128(a) of the Act, because she has failed to show that

²⁰ *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

²¹ *Id.*

²² 20 C.F.R. § 10.138(b)(1).

²³ 20 C.F.R. § 10.138(b)(2).

²⁴ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

²⁵ *Id.*

the Office erroneously applied or interpreted a point of law, that she advanced a point of law or fact not previously considered by the Office, or that she submitted relevant and pertinent evidence not previously considered by the Office.²⁶ Consequently, the Office properly found that modification of the October 27, 1997 decision was not warranted.

The decisions of the Office of Workers' Compensation Programs dated March 24 and February 3, 1998 and October 20, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 20, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁶ 20 C.F.R. § 10.138(b)(1).