U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELBA PAGAN and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

Docket No. 99-843; Oral Argument Held January 11, 2000;
Issued May 5, 2000

Appearances: *Gilbert Cabanas, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained a recurrence of disability causally related to her employment injury of April 27, 1996; and (2) whether appellant established that she sustained an emotional condition in the performance of duty.

On March 3, 1998 appellant, then a 45-year-old letter carrier filed a claim alleging that she sustained a recurrence of disability on February 27, 1998 causally related to an April 27, 1996 employment injury.[1] She stated on the claim, Form CA-2, that she suffered from depression and anxiety. In supplemental statements, appellant alleged that her supervisor, Tim Dose, improperly contacted her treating physician, Dr. Conrad P. Weller, a Board-certified physiatrist, by telephone on February 12, 1998 in an attempt to coerce him to change medical restrictions he prescribed on a CA-17 duty status form.[2] It is appellant's contention that the call on February 12, 1998 constituted harassment since Mr. Dose told Dr. Weller that the language used at item 14 of the CA-17 duty status form would have to be changed or appellant would be placed "off work." She became aware of the phone call on February 24, 1998 and alleged that her anxiety levels increased until February 27, 1998 when she stopped working.

[1] The Office of Workers' Compensation Programs accepted a claim filed by appellant who alleged that she was harassed and verbally abused by her supervisor and thereby sustained an anxiety attack on April 27, 1996. She received compensation for wage loss based on temporary total disability. From July 1996 to February 1998 appellant was under restricted limited duties necessitated by her anxiety disorder. The record also suggests that she has filed a concurrent claim for a right shoulder injury, but a decision from the Office with respect to that claim is not before the Board.

[2] Appellant filed an Equal Employment Opportunity (EEO) complaint and a union grievance against her supervisor, but the record does not include a final decision in resolution of these matters.

The record contains a CA-17 duty status form completed by Dr. Weller on February 10, 1998 which stated in item 14 that appellant was "emotionally and behaviorally unstable under stress."

In a letter dated February 27, 1998, Dr. Weller verified that he was contacted by Mr. Dose and informed that his physician's statement under item 14 of the CA-17 form created a situation whereby appellant would have to be placed off work as the statement suggested that appellant posed a threat to herself and others at work. According to him, he informed Mr. Dose that appellant was fit for duty within her prescribed medical restrictions and agreed to rewrite the duty status report to clarify the matter.

In a CA-17 duty status report dated February 24, 1998, Dr. Weller restated under item 14 that "inattention to injury-related restrictions will result in stress and instability."

In conjunction with appellant's claim, the employing establishment submitted a statement from Mr. Dose, which stated as follows:

> "On February 12, 1998 I reviewed a Form CA-17 completed by [Dr.] Weller concerning [appellant]. Item 14 of the CA-17 stated that [she] was 'emotionally and behaviorally unstable under stress.' This statement concerned me. After consulting with the injury compensation office, I contacted Dr. Weller's office to ask for clarification of Item 14. I explained to Dr. Weller's nurse the purpose of my call. I then spoke with Dr. Weller. [He] seemed very pleased that I had called. [Dr. Weller] said he believed that it was completely correct to talk to me in principle. I explained that I was apprehensive about allowing a carrier that was 'emotionally and behaviorally unstable under stress' to continue to work. He then said that there are issues of repetitive motions that hinder [appellant] from performing up to her expectations [and that appellant preferred to work outside, but could not due to her physical problems]. [Dr. Weller] stated that appellant [could work indoors on a well defined task so long as she did not display apprehension about using her arm [as physical tasks not compatible with her limitations caused her anxiety.] [He] assured me that [appellant] would have no anxiety or stress as long as her assignments were within her limitations. [Dr. Weller] agreed to reword the CA-17 to be more specific in defining areas that would lead to anxiety and stress. He also asked if it would be all right to talk to me on a regular basis. [Dr. Weller] also [requested permission to tell appellant about the phone call]. The phone conversation lasted approximately 20 minutes."

In a route slip dated March 31, 1998, Dale Harris of the employing establishment's injury compensation office advised that "it is the position of the [i]njury [c]ompensation [o]ffice that the employing agency does have the right to contact an employee's physician, either in writing or by

telephone, in order to get clarification of the employee's work restrictions, if the restrictions are not fully understood. I conveyed this to Mr. Dose (after the phone call incident)."[3]

In support of her claim, appellant has also submitted copies of EEO investigative reports and complaints filed by appellant with respect to the February 12, 1998 phone call.

In a report dated April 24, 1998, Dr. Weller indicated that appellant felt threatened and harassed when she learned of Mr. Dose's February 12, 1998 phone call and told him that she had not authorized her supervisor to make such a communication.

By letter dated May 19, 1998, the Office provided Dr. Weller with a copy of the definition of a recurrence of disability under the Federal Employees' Compensation Act and inquired whether appellant's emotional condition constituted a recurrence of disability or a new injury.

In a July 3, 1998 report, Dr. Weller stated: "The [February 12, 1998] incident does not constitute 'a recurrence' as defined under [Office] criteria … a recurrence means a disability occurring after an employee has returned to work, caused by a spontaneous change in the employee's medical condition without an intervening injury or new exposure to the work environment that caused the illness. It is abundantly clear that the [February 12, 1998] incident was not 'spontaneous' in nature and that it represented, in the employee's perception, a new exposure to the work environment that caused the original illness."

In a report dated July 28, 1998, Dr. Weller stated that appellant's emotional condition related to the February 12, 1998 incident represents an aggravation of a preexisting stress condition causally related to the work injury of April 27, 1996.

On July 29, 1998 appellant filed a (Form CA-2) notice of occupational disease and claim for compensation alleging that she sustained an emotional condition caused by harassment from her supervisor with the intent to terminate her employment.

In a decision dated September 8, 1998, the Office determined that appellant failed to establish a recurrence of disability causally related to her work injury of April 27, 1996 and therefore denied her compensation benefits.

In a decision dated November 9, 1998, the Office further denied appellant's claim for compensation on the grounds that she failed to establish that she sustained an emotional condition in the performance of duty.

The Board finds that appellant failed to establish a recurrence of disability causally related to her April 27, 1996 employment injury.

[3] Appellant alleged in a series of letters that Mr. Dose had lied about getting permission from the injury compensation office to contact her doctor. The Board notes, however, that regardless of whether permission was given prior to the call, the employing establishment apparently considered Mr. Dose's actions to be appropriate given the policy cited by Mr. Harris.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[4] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[5] An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.[6]

When an employee, who is disabled from the job he or she had when injured on account of employment-related residuals returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to proof by the weight of the reliable, probative and substantial evidence a recurrence of disability and show that the light duty cannot be performed. As part of the burden of proof, the employee must show either a change in the nature and extent of the injury related condition or a change in the nature and extent of the light-duty requirements.[7]

In the instant case, there is no medical evidence to support that appellant sustained a recurrence of disability. Her treating physician, Dr. Weller, was provided with the Office's definition of a recurrence of disability and specifically opined that appellant sustained a new injury or an emotional condition stemming from a new exposure to her work environment. Consequently, the Office properly found that the February 12, 1998 phone call did not cause appellant to sustain a recurrence of disability.

The Board also finds that appellant failed to establish that he sustained an emotional condition in the performance of duty.

Workers' compensation law is not applicable 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 coverage 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 comes within coverage of the Act.[8] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of

[4] *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

[5] *See Nicolea Bruso*, 33 ECAB 1138 (1982).

[6] *Ausberto Guzman*, 25 ECAB 362 (1974).

[7] *Gary L. Whitmore*, 43 ECAB 441 (1992); *Cloteal Thomas*, 43 ECAB 1093 (1992).

[8] 5 U.S.C. §§ 8101-8193.

workers' compensation because it is not considered to have arisen in the course of the employment.[9]

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.[10] If a claimant does implicate a factor of employment, then the Office should determine whether the evidence of record substantiates the 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.[11]

Generally, actions of the employing establishment in administrative or personnel matters such as use of leave are not considered to be compensable employment factors.[12] While the assignment of work duties and the assessment of work performance or conduct are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[13] But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of an administrative matter, may afford coverage.[14]

The Board has reviewed the record and finds that actions of appellant's supervisor did not constitute harassment and that there is insufficient evidence of record from which to conclude that the employing establishment committed error or acted abusively in the administration of a personnel matter. Mere perceptions of harassment or discrimination are not compensable under the Act.[15] It was reasonable that Mr. Dose was concerned about the language used by appellant's physician in classifying her as "emotionally and behaviorally unstable under stress" such that he sought to clarify from the doctor what specific circumstances in the workplace would cause appellant stress so that those circumstances could be avoided in the interest and safety of all employees under his supervision. Moreover, although appellant contends that her supervisor violated policy by directly contacting her physician, the employing establishment has indicated that it was not improper for a supervisor to contact a physician in order to clarify whether an employee is fit for duty.

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[9] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

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

[11] *Id.*

[12] *Frank A. Catapano*, 46 ECAB 297 (1994).

[13] *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

[14] *Catapano, supra* note 12.

[15] *Elizabeth Pinero*, 46 ECAB 123 (1994); *Mary A. Sisneros*, 46 ECAB 155 (1994).

Furthermore, there is insufficient evidence of record from which to conclude that Mr. Dose acted in a retaliatory manner in making the February 12, 1998 phone call. Although appellant previously established a harassment claim against her supervisor in April 1996, her current allegations of harassment are unsubstantiated by the record before the Board. In the absence of any documented proof of error on behalf of the employing establishment, the Board concludes that appellant has failed to allege a compensable factor of employment. Given that there is no compensable factor of employment alleged, it is not necessary to discuss the medical evidence of record. Thus, the Board finds that the Office properly denied appellant's claim for compensation based on an emotional condition in the performance of duty.

The decisions of the Office of Workers' Compensation dated November 9 and September 8, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 5, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member