U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNABELLE GRIM-MARIN and DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, San Francisco, CA

Docket No. 97-2244; Oral Argument Held October 18, 2000; Issued November 22, 2000

Appearances: *Jerry K. Cimmet, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

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 a stress-related aggravation of her multiple sclerosis in the performance of duty; and (2) whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

On December 22, 1992 appellant, then a 46-year-old supervisory special agent, filed an occupational disease claim alleging that she sustained an aggravation of multiple sclerosis and emotional stress causally related to factors of her federal employment.

By decision dated January 6, 1994, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she did not establish an injury in the performance of duty. In a letter dated February 3, 1994, appellant, through her representative, requested a hearing before an Office hearing representative. By decision dated March 28, 1997, the hearing representative affirmed the Office's January 6, 1994 decision after finding that appellant had not established any compensable factors of employment.

The Board finds that the case is not in posture for decision on the issues of whether appellant has established that she sustained a stress-related aggravation of multiple sclerosis or 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 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]

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.[5] 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.[6]

In this case, appellant alleged that she experienced stress as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that she experienced stress as a result of the employing establishment's investigation into allegations that she behaved inappropriately during her tenure as office head in Caracus, Venezuela. The Board has held that an employing establishment retains the right to investigate an employee if wrongdoing is suspected or as part of the evaluation process.[7] As an investigation is generally related to the performance of an administrative function of an employer and not to the employee's regular or specially assigned work duties, it is not a compensable factor of employment unless there is affirmative evidence that the employer either

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

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

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *Sandra F. Powell*, 45 ECAB 877 (1994).

erred or acted abusively in the administration of the matter.[8] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[9] In this case, appellant maintained that investigators from the employing establishment and an agent with the Central Intelligence Agency questioned her in a loud and abusive manner on September 23 and 24, 1992. Appellant further alleged that the investigators asked inappropriate questions regarding her relationships with men while working in Caracas, failed to provide her with a warning as to the criminal nature of the investigation, and erroneously neglected to keep written notes of the interview. In an internal memorandum dated June 1993, James E. Kibble, one of the men who interviewed appellant, responded that, while the discussion with her became "heated," the interviewers were not loud or abusive. He further stated that the questions regarding appellant's personal relationships were pertinent to the investigation. In a deposition taken in conjunction with appellant's Equal Employment Opportunity (EEO) complaint, John J. MacReady related that appellant was provided with criminal warnings prior to the interview. While it is not clear whether the investigators retained their notes of the interview, the Board finds that this omission is not sufficient to establish error by the employing establishment in its conduct of the investigation. As appellant has not provided sufficient evidence to show that the investigation by the employing establishment into her conduct in Caracus was erroneous, she has not established a compensable employment factor under the Act in this respect.

Appellant further contended that the employing establishment's investigators sexually harassed her during the September 23 and 24, 1992 interview by questioning her in detail regarding her relationship with men during her time in Caracus. Appellant also alleged that the employing establishment sexually discriminated against her by placing her in a limited-duty status pending the outcome of the investigation. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[10] However, for harassment or discrimination 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.[11] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by officials with the employing establishment.[12] Investigators with the employing establishment indicated that the questioning of appellant regarding her sexual conduct in Caracus was limited and appropriate under the circumstances, and appellant has not submitted sufficient evidence negating this position. Appellant has also alleged that

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[8] *Id.*

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

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

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

[12] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

male employees under investigation were not placed in an extended limited-duty status but she provided insufficient documentary evidence in support of her allegation.[13] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.[14]

Regarding appellant's allegations that the employing establishment issued unfair performance evaluations, wrongly denied leave, failed to provide the proper training, and failed to correct erroneous newspaper accounts, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[15] However, the Board has also found 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.[16] In this case, appellant has submitted no evidence establishing that the employing establishment failed to provide her with adequate training, wrongly decided leave requests or erroneously failed to correct foreign newspapers' account of events. An official with the employing establishment noted that appellant had not requested training and further indicated that the agency was not responsible for providing information to newspapers. Appellant has submitted evidence that the employing establishment upgraded her performance rating for the period ending June 1990 from fully satisfactory to excellent following a grievance. However, the fact that a personnel action was later modified or rescinded, does not in and of itself, establish error or abuse.[17] As appellant has not submitted evidence which would establish error by the employing establishment, she has not established a compensable employment factor under the Act with respect to administrative matters.

Regarding appellant's allegation that she experienced stress due to understaffing and overwork, the Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.[18] In *Joseph A. Antal*,[19] a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*, found that the

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

[14] Subsequent to the hearing representative's decision, appellant submitted evidence relevant to the disposition of her EEO complaint of sexual discrimination. The Board cannot consider this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); however, as the case is being remanded, *see infra*, on remand appellant can resubmit this evidence to the Office.

[15] *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).

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

[17] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[18] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

[19] *Joseph A. Antal, supra* note 18.

claimant was entitled to compensation. In *Georgia F. Kennedy*,[20] the Board, also citing the principles of *Cutler*, listed employment factors which would be covered under the Act, including an unusually heavy workload and imposition of unreasonable deadlines.

In this case, appellant related that she experienced staffing problems beginning in November 1989. Appellant stated that for part of June and July 1990 she was the only agent in the office. Appellant reported that she gained a second agent in August 1990 but that he was of limited function until January 1991 due to his lack of proficiency in Spanish. Evidence from the employing establishment confirms the existence of numerous vacancies in appellant's office between 1989 and 1991. Additionally, appellant's 1991 mid-year progress review indicated problems "attributable to personnel disruptions and delays in the arrival of replacements." Consequently, appellant has established a compensable employment factor with respect to her work duties in Caracas.

Appellant further attributed her stress to acting as liaison with the Venezuelan police, performing the duties of the fiscal clerk after improprieties were discovered in the prior clerks handling of funds, and dealing with coordination problems with other federal agencies regarding ongoing investigations. In *Lillian Cutler*,[21] the Board explained that, where an employee experiences emotional stress in carrying out the employment duties, or has fear and anxiety regarding his or her ability to carry out such duties, and the medical evidence establishes that the disability resulted from his or her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment, and would, therefore, come within the coverage of the Act. The Board stated in *Pauline Phillips*,[22] that this is true where the employee's disability resulted from his or her emotional reaction to the regular day-to-day or specially assigned work duties or to a requirement imposed by the employment.[23] In this case, acting as liaison with the Venezuelan police, coordinating investigations with other federal agencies, and performing the duties of the fiscal clerk constituted regular or specially assigned duties of appellant's position with the employing establishment. Consequently, appellant's performance of these duties would be compensable under the Act.

Appellant also maintained that she experienced stress due to threats of physical harm to herself and an agent whom she supervised. The Board has recognized the compensability of physical threats in certain circumstances.[24] In this case, the evidence establishes that, as a result of threats of harm made in July 1991 by a member of the Venezuelan national guard, the employing establishment assigned appellant and a coworker a bodyguard while in transit and provided them a light armored vehicle in which to travel. Internal correspondence from the employing establishment indicated that the "threats are credible and should be taken seriously." Further, the Board notes that the threat of harm toward appellant did not appear to have been

[20] 35 ECAB 1151 (1984).

[21] *See supra* note 2.

[22] 36 ECAB 377 (1984).

[23] *Larry J. Thomas*, 44 ECAB 291 (1992).

[24] *See Leroy Thomas, III*, 46 ECAB 946 (1995); *Alton L. White*, 42 ECAB 666 (1991).

imported into the workplace but rather arose during the performance of her regularly assigned duties.[25] Therefore, appellant's reaction to learning of threats to her personal safety bears a sufficient relationship with her employment to afford coverage.

In this case, appellant has identified compensable employment factors with respect to stress resulting from overwork, the performance of her day-to-day duties, and security threats. As appellant has implicated compensable employment factors, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[26] After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

The decision of the Office of Workers' Compensation Programs dated March 28, 1997 is hereby set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
November 22, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[25] *See Janet Hudson-Dailey*, 45 ECAB 435 (1994).

[26] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).