

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FAWN A. PLATTEN and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

*Docket No. 99-1643; Submitted on the Record;
Issued October 18, 2000*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of her case on its merits under 5 U.S.C. § 8128(a).

On August 7, 1996 appellant, then a 41-year-old postal clerk, filed a claim alleging that she developed agoraphobia, panic attacks and a severe psychiatric problems beginning in 1981 due to intimidation, harassment and a hostile environment at her job. She did not stop work.

In support of her claim appellant submitted a statement noting that her favorite aunt died and her father was hospitalized, which affected her attendance; that she was called over the public address system; that she had gastritis; that when she was pregnant she was pushing cages, hampers and postcons full of packages possibly jeopardizing her pregnancy; that her supervisor trivialized her pain when she had labor contractions; that when coworkers spoke spanish she felt left out and that when she returned from maternity leave she was once again "on the bottom of the heap." Appellant alleged that her coworkers were biased against her when she returned to work; that she sustained a spinal subluxation from lifting; that she was given letters of warning for taking sick leave; that she was not allowed to work the window even though she was trained to do so; that she did not get the tour she wanted; and that coworkers' joking made the environment very unpleasant and that her psychologist swore at her. Appellant alleged that she experienced sexual bullying; that she sustained lumbosacral strain; that she had a miscarriage in 1991, that she was not given the employment opportunities others were; that she had her third child in May 1993 but that her marriage was rocky; that her supervisor was angry at her due to her lateness because of her children; that she was not given the leeway she thought she deserved; that two female coworkers appellant's age had died; that she was isolated and that she had chronic pain from fibromyalgia.

Appellant also submitted a copy of a 1988 EEO (Equal Employment Opportunity) affidavit about a reassignment to a different tour and a statement alleging incidents such as not being aware of operational “clock-ins,” being asked about her new “bid” when on the way to the ladies room and being called on the public address system when she was on break. A coworker alleged that some rules seemed only to apply to appellant and that problems existed on the entire tour.¹ Several coworkers’ statements attested to activities involving them. Appellant also alleged that she received letters of warning about being late.²

Appellant’s supervisor, Fred Salazar, denied appellant’s allegations of harassment.

By letter dated September 10, 1996, the Office requested further information, including identification of specific work incidents implicated in causing appellant’s condition.

In response appellant alleged that on July 10, 1996 she experienced an out-of-body experience, dissociation and pain from fibromyalgia, that she received Zoloft, Mellaril and Elavil and that the women at the employing establishment experienced sexual innuendos, sexist jokes, vulgar language, sexual teasing and being called “girls.” Appellant submitted a letter from coworker Ann Oliver, who stated that she retired for her peace of mind as the employing establishment was the “worst working experience I have had.” Ms. Oliver stated that the men at work provided a “barrage of filth,” stories of sexual fantasies, obscenities and profanities and course joking. Ms. Oliver stated that when the women workers complained, the men grew worse. She stated that women coworkers were not accorded any respect.

By letter dated September 17, 1996, Mr. Salazar controverted appellant’s allegations of harassment and he denied any knowledge of appellant’s July 10, 1996 out-of-body experience.

By decision dated December 19, 1996, the Office rejected appellant’s claim finding that she failed to implicate any compensable factors of her federal employment in the causation of her emotional conditions.

By letter dated January 15, 1997, appellant requested reconsideration of the December 19, 1996 decision. Appellant alleged that all the evidence was not reviewed, that there was a direct correlation between her work and her mental state and that her claim was about unacceptable treatment. On July 21, 1997 appellant also requested review by the Branch of Hearings and Review. In support she submitted further medical evidence.

By decision dated September 12, 1997, the Office Branch of Hearings and Review denied appellant’s request, noting that it was untimely made and finding that she could equally well

¹ No specifics were given.

² Medical reports of record support that appellant had experienced intermittent anxiety attacks, subjective depression, shortness of breath and decreased appetite since suffering a miscarriage in April 1991, that she had marked family difficulties and that she was divorced in April 1996. A major depressive disorder with mild psychotic features was diagnosed; a bipolar disorder, borderline personality with schizotypal traits was also diagnosed.

address the issue in question by requesting reconsideration from the Office and by submitting additional relevant evidence.

By decision dated December 18, 1997, the Office denied modification of the December 19, 1996 decision, finding that the evidence submitted in support was insufficient to warrant modification.

On March 17, 1998 appellant requested reconsideration. In support, she submitted an undated statement that the accumulated effect of insensitivity and blatant disregard of fellow workers caused her psychotic break in July 1996. She submitted an EEO complaint of discrimination on November 13, 1987. The grievance was denied. Another grievance about a letter of warning was resolved by the removal of the letter from appellant's personnel file. Appellant also submitted paperwork regarding her job being changed. Appellant alleged that she was placed on restricted sick leave.

By decision dated April 27, 1998, the Office denied modification of the prior decisions, finding that the evidence submitted in support was insufficient to warrant modification.³

In a letter dated July 22, 1998, appellant requested reconsideration, detailing her difficulties in filing her claim. Appellant alleged that Mr. Salazar kept her working on the ORD belt when he knew of her back injuries and emotional distress. Enclosed were multiple submissions regarding regulations and schedules.

By decision dated October 26, 1998, the Office denied modification of the April 27, 1998 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that appellant had failed to establish any compensable factor of her federal employment in the causation of her emotional conditions.

By letter dated November 25, 1998, appellant again requested reconsideration. Appellant discussed her EEO claims and argued that the regulations and statements submitted should demonstrate discrimination.

By decision dated January 14, 1999, the Office denied appellant's request for reconsideration. It found that appellant's letter neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that appellant has failed to establish that she developed an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

To establish her claim that she has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally

³ The Office found that appellant's claim for events, which occurred prior to August 7, 1993 was not timely filed.

related to her emotional condition.⁴ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.⁵

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. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁶ Conversely, if the employee's emotional reaction stems from employment matters, which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁷ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁸

When working conditions are alleged as factors in causing 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.⁹ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by

⁴ See *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Id.*

⁶ See *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Id.*

⁸ See *Joseph Dedonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

⁹ See *Barbara Bush*, 38 ECAB 710 (1987).

supporting the allegations with probative and reliable evidence.¹⁰ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹¹ If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

Appellant alleged that she was subjected to sexual and other harassment and discrimination on the basis of her sex. With regard to her allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.¹² An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹³ Words and actions that appellant implicated as being harassment include her perception that coworkers were gossiping about her and/or other female coworkers, that male coworkers referred to appellant and other female coworkers as "girls," that they made sexual jokes and comments in the workplace and that they discussed sexual fantasies. These incidents and allegations could possibly rise to the level of compensable harassment if they were indeed proven, but the Board finds that appellant has failed to submit evidence sufficient to establish the alleged occurrences, including time, place and circumstance of these events and comments, to the case record. Consequently, they are not established as occurring and are not compensable under the Act.¹⁴

Several of appellant's other allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,¹⁵ 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 relation 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

¹⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹¹ *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹² *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

¹³ *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

¹⁴ No EEO sexual discrimination grievance findings in appellant's favor were submitted to the record to establish that such alleged sexual harassment occurred and the sexual harassment was denied by the employing establishment.

¹⁵ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

claimant.¹⁶ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant, which fall into this category of administrative or personnel actions include: appellant being paged over the public address system, leave usage and denial,¹⁷ transfer to another assignment¹⁸ and letters of warning being issued to appellant.¹⁹ Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions and, therefore, they are not compensable now under the Act.

Appellant additionally alleged that she was assigned to work a tour she did not want and was not allowed to work the position she desired. The Board has held that the assignment of a work schedule is an administrative function and, absent evidence of error or abuse, it is not considered a work factor for purposes of compensation.²⁰ Further, the Board has explained that disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position.²¹

Appellant also alleged that Mr. Salazar disregarded, or failed to give her leeway for her back injuries, her emotional problems, her marital and family problems and her pregnancy problems and problems with her children in his treatment of her at work. The Board notes that these problems either, have their genesis outside the employing establishment and, therefore, are not compensable under the Act. Appellant has failed to establish administrative error or abuse by Mr. Salazar with regard to his actions taken on these administrative matters. Consequently, any emotional distress related to them is not compensable under the Act.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a further review on its merits under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,²² the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.²³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a

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

¹⁷ *Helen Casillas*, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

²⁰ See *Alice M. Washington*, 46 ECAB 382 (1994).

²¹ *Clara T. Norga*, 46 ECAB 473 (1995).

²² 5 U.S.C. §§ 8101-8193.

²³ 20 C.F.R. § 10.606 (b)(1),(2)

claimant also must file his or her application for review within one year of the date of that decision.²⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.²⁵ When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.²⁶ However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.²⁷ Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.²⁸

Section 10.608(a) states that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in § 10.606(b)(2). If reconsideration is granted, the case is reopened and the case is reviewed on its merits.²⁹ This section however, continues to state in paragraph (b) that where the request is timely but fails to meet at least one of the standards described in § 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits. A decision denying an application for reconsideration cannot be the subject of another application for reconsideration. The only review for this type of nonmerit decision is an appeal to the ECAB,³⁰ and the Office will not entertain a request for reconsideration or a hearing on this decision denying reconsideration.

With appellant's request for reconsideration she submitted only argument that the previously submitted regulations and statements, which had already been reviewed by the Office on their merits should have been enough to demonstrate discrimination. As evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case, these arguments regarding the evidentiary value of prior submissions are insufficient to warrant reopening appellant's case for further review on its merits.

²⁴ 20 C.F.R. § 10.607(a)

²⁵ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²⁶ *See Mohamed Yunis*, *supra* note 13; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

²⁷ *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

²⁸ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

²⁹ 20 C.F.R. § 10.608(a); *see also* § 10.609(a-c).

³⁰ *See* 20 C.F.R. § 10.625.

As these arguments failed to meet at least one of the standards described in section 10.606(b)(2), the Office properly denied appellant's application for reconsideration without reopening the case for a review on the merits

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.³¹ Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 14, 1999 and October 26 and April 27, 1998 are hereby affirmed.

Dated, Washington, DC
October 18, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³¹ *Daniel J. Perea*, 42 ECAB 214 (1990).