

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEOTA E. GOLDEN and U.S. POSTAL SERVICE,  
POST OFFICE, Las Cruces, NM

*Docket No. 01-339; Submitted on the Record;  
Issued August 31, 2001*

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DECISION and ORDER

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

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On September 8, 1999 appellant, then a 55-year-old clerk stenographer, submitted a traumatic injury claim, alleging that on that day she received notice that her job was being abolished and that she was being transferred to Tour I. She stopped work that day and submitted medical reports dated September 8, 1999, in which Dr. Wolfgang Haese, a Board-certified pathologist, who practices family medicine, diagnosed severe stress and anxiety reaction with depression present, which he stated was due to "stress at work" and advised that she could not work.

By letter dated September 2, 1999, the Office informed appellant of the type of evidence needed to support her claim, which was to include a detailed statement regarding the implicated employment factor and a comprehensive medical report. In response, appellant submitted a statement dated October 5, 1999, in which she detailed problems with the postmaster, explained that her stress was caused because her duties had changed and noted that she had an employment-related vocal cord condition that precluded her answering the telephone. She advised that having to bid on a new position led to increased stress and stated that she had filed a grievance regarding the abolishment of her job. In an October 18, 1999 letter, she further explained that she became upset because she was placed on the midnight shift. She also submitted additional reports from Dr. Ernest A. Flores regarding her vocal cord condition.<sup>1</sup> The

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<sup>1</sup> Appellant also submitted a report from Nora Toftely-Loken, M.A., LPCC. The Board notes that a report from a counselor is not medical evidence, as it is not the report of a "physician" as defined in section 8101(2) of the Federal Employees' Compensation Act. Such a report has no probative value on the question of appellant's mental competence. *See generally Frederick C. Smith*, 48 ECAB 132 (1996).

employing establishment submitted evidence regarding the abolishment of the clerk stenographer position, appellant's reassignment, her new position and tour and a letter of explanation from the postmaster, Robert M. Dinkel.

In a decision dated November 1, 1999, the Office denied appellant's claim, finding that she failed to establish a compensable factor of employment. On November 30, 1999 appellant requested reconsideration, again contending that abolishing the clerk stenographer position and a change in her shift caused her emotional condition. By decision dated December 8, 1999, the Office denied her request on the grounds that the arguments she advanced had been considered in the initial Office decision and were, therefore, repetitious. The instant appeal follows.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

To establish that she 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 related to her emotional condition.<sup>2</sup> 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.<sup>3</sup>

While, as a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act,<sup>4</sup> error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonable in the administration of a personnel matter, may afford coverage.<sup>5</sup> In the instant case, there is no evidence to substantiate error or abuse. Similarly, for harassment to give rise to a compensation factor of employment, there must be evidence that the implicated acts did, in fact, occur as alleged. Mere perceptions of harassment are not compensation under the Act.

In this case, appellant is alleging that on September 2, 1999 she was informed that her position as clerk stenographer was being abolished and on September 8, 1999 she was informed that she was being reassigned to Tour I,<sup>6</sup> to begin September 11, 1999. In a report dated

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<sup>2</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>3</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>4</sup> 5 U.S.C. §§ 8101-8193; *see Norman A. Harris*, 42 ECAB 923 (1991).

<sup>5</sup> *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>6</sup> The record indicates that Tour I begins at midnight.

October 19, 1999, the postmaster, Mr. Dinkel, explained that the position of clerk stenographer had been abolished due to a reconfiguration of the physical plant and because of the advent of technological advances. He further explained that two new positions were created and that appellant successfully bid for one of these. The Board has held that a supervisor or management in general must be allowed to perform their duties and that in performance of their duties employees will at times dislike actions taken. Mere disagreement or dislike of a supervisory or management action, however, is not actionable, absent evidence of error or abuse.<sup>7</sup> The Board finds no error or abuse in this regard in this case.

Appellant's reaction to the abolishment of her position is not a compensable factor.

The Board further finds that being reassigned to Tour I is not a compensable employment factor. Appellant was to begin work on Tour I on September 11, 1999 but stopped work on September 8, 1999. While the Board has held that a change in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty, this 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.<sup>8</sup>

In this case, appellant did not attempt to perform the reassigned duties on Tour I and then become upset over an inability to satisfactorily perform such duties. Rather, she stopped work on September 8, 1999 and thus did not make any attempt to perform her reassignment duties, which were to begin on September 11, 1999. Her apprehension that she would not be able to perform her new work duties, without any actual attempt to perform these duties, was self-generated and not compensable.<sup>9</sup> Therefore, as appellant failed to establish a compensable factor of employment, she did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>10</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously

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<sup>7</sup> See *Daniel B. Arroyo*, 48 ECAB 204 (1996).

<sup>8</sup> *Helen P. Allen*, 47 ECAB 141 (1995).

<sup>9</sup> *Mary Margaret Grant*, 48 ECAB 696 (1997).

<sup>10</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

considered by the Office.<sup>11</sup> When a claimant fails to meet one of the above 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. To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>12</sup> The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>13</sup>

With her request for reconsideration, appellant merely renewed her argument that the abolishment of the clerk stenographer position and change in duty shift caused her emotional condition. As she had made these contentions previously, she did not meet the standard found in section 8128 of the Act. The Board, therefore, finds that the Office did not abuse its discretion in denying her request for reconsideration.<sup>14</sup>

The December 8 and November 1, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
August 31, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>12</sup> 20 C.F.R. § 10.607 (1999).

<sup>13</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>14</sup> As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496 (1992).