U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA BELL and U.S. POSTAL SERVICE,
POST OFFICE, East Hartford, CT

Docket No. 99-2512; Submitted on the Record;
Issued August 21, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty on June 12, 1996; 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.

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty on June 12, 1996.

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

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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).

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 the present case, appellant alleged that she sustained an emotional condition due to an encounter with a supervisor on June 12, 1996.[7] By decision dated September 11, 1996, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. By decision dated and finalized March 24, 1998, an Office hearing representative affirmed the Office's September 11, 1996 decision. By decision dated August 17, 1998, the Office denied appellant's request for merit review. 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 claimed that on June 12, 1996 a supervisor, Mike Dadonna, harassed and verbally abused her. She claimed that after she told him to not "get in my face" he placed his face against hers and shouted "this is in your face." In an undated statement, Mr. Dadonna stated that on June 12, 1996 he was having a discussion with appellant and that appellant accused him of "getting in her face" during the discussion. Mr. Dadonna noted that there was a tub of mail between them and that he moved closer to appellant and stated "this is in your face." In a statement dated June 12, 1996, a coworker stated that on June 12, 1996 appellant and Mr. Dadonna had a brief discussion[8] and that as Mr. Dadonna was walking away appellant loudly stated, "I can't talk to him he's ignorant, he's ignorant." The coworker indicated that the discussion continued and that when the two were three feet apart appellant accused Mr. Dadonna of being in her face. The coworker stated that Mr. Dadonna then moved forward to demonstrate "what in your face actually was."

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

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

[6] *Id.*

[7] Appellant filed another emotional condition claim regarding an incident on February 4, 1997. The claim was accepted for post-traumatic stress syndrome. This claim does not relate to the current appeal before the Board.

[8] Appellant had indicated that the conversion concerned her request for time off to discuss union matters.

To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[9] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[10] Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[11]

The record establishes that during a discussion on June 12, 1996 appellant accused Mr. Dadonna of being "in my face" and that Mr. Dadonna then moved closer and stated, "this is in your face." While Mr. Dadonna's actions were not entirely appropriate, appellant has not shown that they rise to the level of harassment within the meaning of the Act. There is no evidence to support appellant's claim that Mr. Dadonna pressed his face against appellant's face or otherwise assaulted her.[12] The evidence reveals that just prior to the incident appellant had loudly insulted Mr. Dadonna by calling him "ignorant." Under these circumstances, appellant has not shown how such an isolated action by Mr. Dadonna would rise to the level of harassment or otherwise fall within the coverage of the Act.[13]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[14]

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[15] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered

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

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

[11] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

[12] The evidence reveals that Mr. Dadonna had been three feet away at the beginning of the discussion and then moved closer.

[13] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993). Appellant filed grievances regarding the events of June 12, 1996, but the record does not contain any decision in her favor.

[14] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[15] 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).

by the Office.[16] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file her application for review within one year of the date of that decision.[17] 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.[18]

In support of her reconsideration request, appellant submitted a May 1997 report of an attending psychiatrist. However, this medical report would not be relevant to appellant's claim as she has not established any compensable employment factors. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[19] Appellant also submitted a portion of the Office procedure manual and a statement from her union representative which discussed her time off work after June 1996. However, she did not adequately explain how these documents would be relevant to her claim regarding the events of June 12, 1996.

In the present case, appellant has not established that the Office abused its discretion in its August 17, 1998 decision by denying her request for a review on the merits of its March 24, 1998 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The August 17 and March 24, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 21, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[16] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[17] 20 C.F.R. § 10.138(b)(2).

[18] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[19] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).