

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA E. SUAREZ and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, San Francisco, CA

*Docket No. 00-2351; Submitted on the Record;
Issued December 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained an emotional condition in the performance causally related to factors of her federal employment.

The Board has reviewed the entire case record in this appeal and finds that appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her employment.

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 his or 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 his 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

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 See *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

On November 15, 1996 appellant, then a 43-year-old equal employment specialist, filed an occupational disease claim alleging that she sustained an emotional condition causally related to factors of her employment including: performing additional duties during an period of extended sick leave by the lead equal opportunity counselor, acting as the equal opportunity manager when her supervisor worked in the field on two occasions in February 1993, performing some of the duties of the special emphasis program manager and lead counselor on a short-term basis when the positions were vacated, performing some of the duties of an equal opportunity assistant in October 1993 while this individual was on extended sick leave, being asked to rewrite her position description to accurately reflect her duties in October 1994, being asked to participate in training in March 1994, providing training to an Office volunteer in November and December 1994, serving as lead counselor after a major office reorganization in 1995, not being selected for two positions for which she applied, being told her position could be rewritten and might then be classified as a higher (GS-9) position, receiving a letter on July 16, 1993 from her supervisor Ms. Mills stating the reasons she was not selected for a new position, being harassed by co-workers who gave her copies of job vacancy announcements after she did not get a promotion, being released from a small portion of her workload due to her extended absence, having her position description processing delayed, having upgrading of her position to a GS-9 level denied, requesting that she be detailed to another location for one month in 1994 when her position reclassification was denied, not being assigned as an acting EEO manager when she worked alone in the office, receiving feedback and instructions regarding her job duties and performance, being asked to provide additional information regarding leave requests, not having her detail at another location extended due to budget and personnel reasons, having requests to attend training sessions denied, being told to report directly to a particular person, having requests for transfers denied, disagreeing with the handling of various administrative and personnel matters, being dissatisfied with performance evaluations, being discriminated against in promotional decisions due to her national origin and ability to speak English, being harassed and subject to disparate treatment, telling a complainant of a proposed resolution and then being told by Ms. Mills that she should not have done this as the proposed resolution was not management's final decision, being told by Ms. Mills that she was considering upgrading her position to a GS-9, being more qualified than candidates for positions she had to review, believing that Ms. Mills pre-selected the individuals she hired for positions, not receiving quarterly performance evaluations prior to April 8, 1994, being given performance appraisals as reprisal for filing EEO complaints, being denied achievement and cash awards after she filed EEO complaints, receiving less training than other employees, receiving harassing e-mails, being excluded from meetings, not receiving mail meant for her, and having some of her job duties improperly reassigned.⁵

By decision dated March 22, 1999, the Office denied appellant's claim on the grounds that medical evidence of record failed to establish that her emotional condition was causally related to any compensable factors of employment. The Office stated that the following factors

⁴ See *Effie O. Morris*, 44 ECAB 470, 473 (1993).

⁵ The Board notes that this case record was reconstructed after appellant's original file was lost.

were accepted as factual and occurred in the performance of duty but the medical evidence did not establish that these compensable factors caused or aggravated her emotional condition: performing additional duties during an period of extended sick leave by the lead equal opportunity counselor, acting as the equal opportunity manager when her supervisor worked in the field on two occasions in February 1993, performing some of the duties of the special emphasis program manager and lead counselor on a short-term basis when the positions were vacated, performing some of the duties of an equal opportunity assistant in October 1993 while this individual was on extended sick leave, being asked to rewrite her position description to accurately reflect her duties in October 1994, being asked to participate in training in March 1994, providing training to an Office volunteer in November and December 1994, and serving as lead counselor after a major office reorganization in 1995.

By letter dated January 8, 1997, the employing establishment, denied discriminating against appellant in any way.

In an affidavit submitted in response to an EEO complaint filed by appellant, Ms. Mills explained in detail why she did not select appellant for the two positions for which she applied and denied that she discriminated against appellant in making the job selections.

In a statement dated March 14, 2000, co-worker Karen Washington stated that appellant told her that two co-workers provided her with job vacancy announcements which offended her, that Ms. Mills did not prepare a new job description of appellant's job to classify her at the GS-9 level after appellant asked her to do this, and that appellant believed that Ms. Mills was reluctant to prepare the position description and upgrade appellant's position to a GS-9 position because she had filed an EEO complaint. She stated that when appellant submitted the new position description, she was not promoted to the GS-9 level, filed a reprisal complaint, and was subsequently promoted to the GS-9 level. She stated that appellant filed an EEO reprisal complaint because she did not receive any special achievement or special act awards after she filed her EEO complaint, although she had received such awards prior to filing the complaint. Ms. Washington stated that appellant received e-mail messages in 1996 which she felt were critical of her work and informed Ms. Washington that she was excluded from EEO meetings and denied training opportunities.

In a statement dated March 16, 2000, co-worker Patricia Navas stated that she had processed appellant's EEO complaint. She related that two employees harassed appellant by giving her unsolicited job vacancy announcements, that appellant asked Ms. Mills several times to prepare her position description to upgrade her to the GS-9 level and appellant was bothered by the fact that Ms. Mill was reluctant to prepare the position description and asked appellant to do it. Ms. Navas indicated that appellant told her that a former deputy regional director told her that she could not perform the job duties of an EEO specialist because communication in English was not acceptable. She related that appellant received e-mail messages criticizing her work and was excluded from meetings and not kept informed regarding activities at the employing establishment.

Appellant also submitted a copy of a settlement agreement dated July 29, 1996, in which the employing establishment agreed to give appellant \$67,000.00 and she agreed to resign her position on September 30, 1996 and withdraw her EEO complaints. The agreement stated that

the employing establishment would cooperate with appellant regarding her compensation claim and disability retirement application without admitting any wrongdoing. The agreement stated, "The parties agree that the terms of this agreement shall not constitute an admission of liability or fault on the part of the agency, or its agents, representatives, or employees, and is entered into by the parties for the purpose of compromising disputed claims."

By decision dated November 3, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.

By decision dated April 11, 2000, the Office denied modification of its March 22, 1999 decision. The Office stated, however, that employment factor 5 described in the statement of accepted facts dated December 30, 1997 should be divided into two parts with only the first part being a compensable factor of employment, that appellant was required to prepare her own revised position description. The Office stated that any reaction to the actual preparation of the revised position description would be in the performance of duty but a reaction to being assigned the task was not in the performance of duty.

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.⁶ 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.⁷

In the present case, appellant alleged that she sustained an emotional condition 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.

Regarding appellant's allegations that the employing establishment told her that her position might be rewritten to classify as a GS-9 position, having her position description processing delayed, having some of her duties reassigned, not being designated as acting EEO manager when she worked alone in the office, receiving some feedback and instructions regarding her job duties, being dissatisfied with her performance evaluations, being asked to provide additional information regarding leave requests, not having a detail extended, having requests to attend training sessions denied, being told to report to a particular person, and disagreeing with various personnel and administrative matters, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or

⁶ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁷ *Id.*

specially assigned work duties and do not fall within the coverage of the Act.⁸ Although such matters are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.⁹ 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. Appellant has provided insufficient evidence to establish that the employing establishment erred or acted in the handling of these administrative and personnel matters. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's allegation of denial of promotions, the Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.¹⁰ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and co-workers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and co-workers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.¹¹ 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.¹² 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 her supervisors or coworkers.¹³ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant provided statements from two witnesses in support of her emotional condition claim but these statements essentially repeat appellant's allegations without providing additional details or explanation and are of limited probative value in this case. Appellant also provided a copy of a settlement agreement dated July 29, 1996 between herself and the employing establishment. In this agreement, the employing establishment agreed to give appellant \$67,000.00 and she agreed to resign her position on September 30, 1996 and withdraw her EEO complaints. However, the agreement stated, "The parties agree that the terms of this agreement

⁸ See *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

⁹ *Id.*

¹⁰ See *Michael Thomas Plante*, *supra* note 8 at 515-16.

¹¹ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹³ 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).

shall not constitute an admission of liability or fault on the part of the agency, or its agents, representatives, or employees, and is entered into by the parties for the purpose of compromising disputed claims.” Therefore, this agreement does not establish any error or abuse by the employing establishment regarding appellant’s allegations.

A number of employment factors alleged by appellant are not supported by the evidence of record as having occurred. There is insufficient evidence to establish these allegations as factual and therefore they cannot be deemed compensable factors of employment: telling a complainant of a proposed resolution and then being told by Ms. Mills that she should not have done this as the proposed resolution was not management’s final decision, being told by Ms. Mills that she was considering upgrading her position to a GS-9, being more qualified than candidates for positions she had to review, believing that Ms. Mills pre-selected the individuals she hired for positions, not receiving quarterly performance evaluations prior to April 8, 1994, being given performance appraisals as reprisal for filing EEO complaints, being denied achievement and cash awards after she filed EEO complaints, receiving less training than other employees, receiving harassing e-mails, being excluded from meetings, not receiving mail meant for her, and having some of her job duties improperly reassigned.

In the present case, the Office has accepted as compensable factors of employment that appellant performed additional duties during an period of extended sick leave by the lead equal opportunity counselor, acted as the equal opportunity manager when her supervisor worked in the field on two occasions in February 1993, performed some of the duties of the special emphasis program manager and lead counselor on a short-term basis when the positions were vacated, performed some of the duties of an equal opportunity assistant in October 1993 while this individual was on extended sick leave, was asked to rewrite her position description to accurately reflect her duties in October 1994, was asked to participate in training in March 1994, provided training to an Office volunteer in November and December 1994, and served as lead counselor after a major office reorganization in 1995. However, appellant’s burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁴

In a report dated February 23, 1995, Dr. Robert A. Kaplan, appellant’s attending licensed psychologist, stated that appellant had been under his care for the past several years for treatment of depression and anxiety and that her current job assignment seemed to exacerbate her condition.

In a report dated November 27, 1996, Dr. Kaplan related that appellant applied for two positions in early 1993 which would have been promotions for her and that her supervisor, Rebecca Mills, did not treat her fairly in the application process and selected less qualified individuals for the positions. Appellant felt that a letter from her supervisor stating why she had not been selected for the positions contained racially discriminating comments. After filing an

¹⁴ See *William P. George*, 43 ECAB 1159, 1168 (1992).

EEO complaint, appellant began receiving harassing e-mail messages, was not informed of staff meetings and training sessions, was denied requests for additional training, and had job vacancy announcements placed on her desk which she felt was an attempt to get her to leave her job. Dr. Kaplan stated his opinion that appellant's depression was directly related to the manner in which she was treated at work.

In a report dated March 14, 1998, Dr. Edward J. Fiorella, a Board-certified psychiatrist and an Office referral physician, stated that appellant's depression had resolved and that her condition was not caused or aggravated by work factors.

Due to the conflict in the medical opinion evidence between Drs. Kaplan and Fiorella as to whether appellant's emotional condition was causally related to factors of her employment, the Office properly referred appellant to an impartial medical specialist for a resolution of the conflict as to whether appellant had an emotional condition causally related to factors of her employment.¹⁵

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁶

In a report dated March 5, 1999, Dr. George D. Trahms, a Board-certified psychiatrist and neurologist and impartial medical specialist, provided a history of appellant's condition, a personal history, the results of a mental status evaluation, and a summary of the factual and medical evidence and stated that appellant's depression had resolved. He stated that he had thoroughly reviewed the factors accepted by the Office as compensable factors of employment, as set forth in the statement of accepted facts, in his examination of appellant and in his case analysis and review of the medical records and concluded that none of these compensable factors caused or aggravated appellant's emotional condition.

The Board finds that the March 5, 1999 report of Dr. Trahms is thorough, well rationalized, and based upon a complete and accurate factual background and is therefore entitled to be accorded special weight. His report establishes that appellant's emotional condition is not causally related to any compensable factors of employment.¹⁷

¹⁵ Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a); see *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁶ See *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

¹⁷ Subsequent to the Office's November 3, 1999 decision appellant submitted a report dated March 11, 2000 from Dr. Kaplan. However, as Dr. Kaplan was on one side of the conflict of medical opinion which was referred to Dr. Trahms as the impartial medical specialist, his subsequent report is insufficient to outweigh or create a new conflict with Dr. Trahm's opinion; see *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The April 11, 2000 and November 3, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member