U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERTRUDE A. CANDERA and DEPARTMENT OF AGRICULTURE, Moorestown, NJ

Docket No. 00-2099; Submitted on the Record;
Issued June 21, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

On July 19, 1998 appellant, then a 58-year-old secretary, filed a traumatic injury claim alleging that on July 16, 1998 she sustained a severe headache, dizziness, shaking and vomiting in the performance of duty.[1] She stopped work on July 17, 1998 and did not return.

By decision dated March 17, 1999, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she had an emotional condition causally related to the compensable factor of employment. The Office found that the failure of appellant's supervisor to provide her with a six-month performance review constituted the sole compensable employment factor.

In a decision dated March 2, 2000 and finalized March 6, 2000, a hearing representative affirmed the Office's March 17, 1999 decision as modified to reflect that appellant had not established any compensable employment factors. The hearing representative found that appellant had not submitted any evidence, as requested at the hearing, in support of her allegation that her supervisor was required to give her a mid-year evaluation.

The Board finds that appellant has not established that she sustained 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

[1] The Office adjudicated appellant's claim as an occupational disease claim because appellant attributed her condition to events occurring from 1994 onward.

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.[2] 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.[3]

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.[4] 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.[5]

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 this case, appellant has alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered factors under the terms of the Act.

Many of appellant's allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[8] the Board held that an employee's emotional reaction to administrative actions or personnel matter 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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

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

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

[7] *Id.*

[8] *See Thomas D. McEuen*, *supra* note 3.

if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[9] 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: the denial of a promotion;[10] matters involving the writing of her position description;[11] receiving an official use letter indicating her performance on a critical element was marginal;[12] and failing to receive a mid-year performance appraisal.[13] Appellant has not submitted evidence of administrative error or abuse in the performance of these actions; therefore, they are not compensable under the Act.

Appellant primarily attributed her stress-related condition to alleged harassment and discrimination by her supervisors, Jean Hummel, Maria Gallagher and Beverly Cassidy. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[14] 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.[15]

In this case, appellant alleged that Ms. Cassidy told her not to enter her office when the door was closed; complained about her work product; accused her of a purposeful typographical error and using an incorrect format; belittled her; turned her back to her while appellant spoke with a coworker, Rae Toffel;[16] failed to answer a note appellant left in her inbox; and questioned appellant's confusion with "a nasty look on her face." In response to appellant's allegations, Ms. Cassidy, in a statement dated January 5, 1999, denied harassing appellant. Ms. Cassidy related that she interrupted appellant and Ms. Toffel's conversation because she heard appellant giving inaccurate information to Ms. Toffel. She stated, "While explaining to Ms. Toffel the correct process, I also wanted to provide her with the reference cite for future use, which is why I turned my back to walk to my office. Ms. Cassidy also related that she had not banned appellant

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

[10] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[11] *See Jose L. Gonzales-Garced*, 46 ECAB 559 (1995).

[12] *See Effie O. Morris*, 44 ECAB 470 (1993).

[13] While the Office initially accepted appellant's supervisor's failure to provide her with a six-month review as compensable, the hearing representative properly found that appellant had not submitted any evidence to support her allegation that a mid-year review was required. Her supervisor related that, on September 22, 1998, she told appellant that she was marginal on a critical element without providing her with a six-month review. Appellant's supervisor explained, however, that she not conducted six-month reviews on any employees in years and that she had extended appellant's rating period to give her an opportunity to improve her performance.

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

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

[16] Appellant has a hearing impairment.

from her office but did request that she leave correspondence in a mail slot on the door. She stated that she did not remember saying that appellant used an incorrect format and that she wrote notes to appellant to avoid misunderstandings.

In support of her allegations of harassment by Ms. Cassidy, appellant submitted a statement from her daughter and coworker, Nancy Candera, who related that Ms. Cassidy had "banned" appellant from her office. However, Ms. Candera did not provide any information regarding the circumstances surrounding this action. Further, it does not appear unreasonable for a supervisor to request that an employee not enter an office when the door is closed. In a statement dated November 6, 1998, Ms. Candera related that she remembered Ms. Cassidy speaking to appellant in "impatient, condescending tones." Ms. Candera, however, did not specify any statements made to appellant by Ms. Cassidy which could be considered abusive. Appellant also submitted an October 26, 1998 statement from Ms. Toffel, who related that she was speaking with appellant when Ms. Cassidy "deliberately turned her back on [appellant] and faced me." However, Ms. Cassidy has explained the circumstances surrounding this instance and appellant has not shown how this isolated event was of such a nature as to rise to the level of harassment. Therefore, the Board finds that appellant has not established a compensable factor under the Act with respect to the claimed harassment by Ms. Cassidy.

Appellant also alleged that Ms. Gallagher harassed her by the manner in which she spoke to her, which included asking her why she had sick or blank looks on her face and telling her she had to perform new duties whether she liked it or not. She also maintained that Mr. Gallagher informed Ms. Hummel that she had copied files incorrectly. In a January 4, 1999 statement, Ms. Gallagher denied accusing appellant of having a sick or blank look and denied saying that she had to perform new duties whether she liked it or not. She further noted that appellant made an increasing number of mistakes over the years which were repeatedly brought to her attention. Appellant provided no corroborating evidence in support of her allegations of harassment by Ms. Gallagher and thus has not met her burden to proof to establish harassment.[17]

Regarding Ms. Hummel, appellant contended that she harassed and discriminated against her by the following: stating that she could not communicate; yelling at her for dragging mail; refusing to provide her with a Form CA-1 when she hurt her back in May 1996; yelling at her for asking questions in January 1997; refusing to accommodate appellant's hearing impairment by moving the paper shredder away from appellant's desk; telling her a report which she did was "atrocious" telling her she had time to learn computer skills because she had time for lunch and smoke breaks; and getting angry at appellant for giving her incorrect telephone numbers.

In response to appellant's contentions, Ms. Hummel submitted a statement dated December 9, 1998 in which she denied harassing or discriminating against appellant. Regarding appellant's accusation that she told her that she could not communicate, Ms. Hummel related that at the time she was working with appellant to upgrade her position description. After personnel denied an upgrade following multiple rewritings of the position, Ms. Hummel stated that she told appellant that she did not "know what else I could put into her job since she did [not] use the [tele]phone." Ms. Hummel related that appellant filed an Equal Employment Opportunity

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

complaint which was settled and that appellant was refitted with hearing aids which allowed her to use the telephone. In a statement dated January 5, 1999, Ms. Hummel stated that she told appellant not to drag mail due to her history of back problems. She also related that she challenged appellant's CA-1 form but had not challenged any of her prior claims.[18] Ms. Hummel denied yelling at appellant.[19]

Although appellant submitted witness statements pertaining to her allegations of harassment and discrimination by Ms. Hummel, they are not sufficient to establish either harassment or verbal abuse on the part of appellant's supervisor. In a statement dated October 29, 1998, Carmela Korenicki, a coworker, related that appellant told her that Ms. Hummel had criticized the format she used in typing. Ms. Korenicki related that she told Ms. Hummel that appellant used the Government Style Manual. Ms. Korenicki's statement, however, does not establish that Ms. Hummel's instruction to appellant to use a different format in typing constituted harassment.

Ms. Candera, in a November 6, 1998 statement, related that appellant was upset after receiving a letter from Ms. Hummel characterizing her job performance as poor. However, Ms. Candera did not describe any actions by Ms. Hummel in giving appellant the letter which would constitute harassment under the Act.

In a statement dated October 26, 1998, Ms. Toffel related that in January 1997 Ms. Hummel "raised her voice at [appellant] and questioned [her] as to just what she was so confused about." 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.[20] Appellant has not shown how such an isolated comment would rise to the level of verbal abuse or otherwise fall within the coverage of the Act.[21]

In an April 23, 1999 statement, Marilyn A. Zemble related that in January 1996 she heard Ms. Hummel tell appellant that she could not communicate. Ms. Zemble also stated that in 1996 she saw Ms. Hummel shake her finger at appellant close to her face and speak with her about dragging mail in a voice much louder than usual. However, Ms. Hummel has explained the

[18] The record indicates that, on May 31, 1996, Ms. Hummel refused to file a Form CA-1 for appellant. After examining her duties as a supervisor, Ms. Hummel completed the Form CA-1 on June 18, 1996. Appellant contended that Ms. Hummel's failure to initially complete the form and her controversion of the claim constituted "another form of harassment and reprisal." Thus, appellant has not alleged that the initial failure by her supervisor to file the claim form itself caused her emotional condition but that it demonstrated harassment towards her by Ms. Hummel. Appellant, however, has submitted no evidence that would establish that Ms. Hummel's delay in filing her claim or controversion of the claim constituted harassment or discrimination.

[19] Ms. Hummel noted that the entire office was being transferred to North Carolina from New Jersey. She related that appellant did not plan to move and was not eligible to retire.

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

[21] *See, e.g., Alfred Arts*, 45 ECAB 530, 543-44 (1994) and cases cited therein (finding that the employee's reaction to coworkers' comments such as "you might be able to do something useful" and "here he comes" was self-generated and stemmed from general job dissatisfaction). *Compare Abe E. Scott*, 45 ECAB 164, 173 (1993) and cases cited therein (finding that a supervisor's calling an employee by the epithet "ape" was a compensable employment factor).

circumstances under which she made these comments and appellant has not shown how either comment was of such a nature as to rise to the level of harassment or verbal abuse.[22] Appellant, therefore, has not established a compensable factor under the Act with respect to the claimed harassment and discrimination.

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.[23]

The decision of the Office of Workers' Compensation Programs dated March 6, 2000 and finalized March 2, 2000 is hereby affirmed.

Dated, Washington, DC
June 21, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[22] *Id*.

[23] 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).