U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNIFER BRADY and U.S. POSTAL SERVICE,
MAIL PROCESSING CENTER, Cincinnati, OH

Docket No. 00-2158; Submitted on the Record;
Issued June 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained depression in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On December 8, 1999 appellant, then a 38-year-old mail processor, filed a claim for depression, which she initially attributed to her father's death in 1997 and then to work factors. Appellant was off work from April 23 to June 19, 1998.

In an associated statement, appellant noted that she was depressed, nervous and unable to sleep. She alleged that in May 1998 she became "suicidal because the [employing establishment] refused to accept [her] medical instructions, for light duty on Tour 3. [She] went to all types of agencies for assistance and was turned down for any type of help." She was denied unemployment benefits but later "won an August 1998 arbitration." When appellant was absent from work from April 23 to June 19, 1998, she was instructed not to work in any business that sold stamps, as this would be a "conflict of interest. This is when I became suicidal because I had no way to support my son." Appellant alleged that she was always depressed when at work because the "place almost took my life due to total ignorance on the part of management." Appellant asserted that her "entire body" was affected and that the depression exacerbated her asthma.

In a December 30, 1999 letter, the Office advised appellant of the additional medical and factual evidence needed to establish her claim. In an undated statement, appellant noted nonoccupational stresses of "[f]inancial problems, personal illness, death of a loved one, life or death problems because [she] had no way to support [her] son."

In a May 11, 1998 report, Dr. David B. Berkowitz, a physician specializing in sleep disorders, noted treating appellant "for problems relating to sleep difficulties that began in association with her father's death in November 1997," with asthma, hypertension and

neurologic symptoms. Dr. Berkowitz noted that results of an April 30, 1998 sleep pattern evaluation were "consistent with depression," also showing "positional sleep apnea … with significant oxygen desaturation." Dr. Berkowitz opined that appellant's "work schedule c[ould] impact on her treatment, in that working a third shift c[ould] significantly complicate our ability to pharmacologically manage her depression. As such, we would strongly urge that [appellant's] work schedule be limited to first or second shift."

In a January 11, 2000 letter, Carmen Lawson, appellant's supervisor, stated that she had no "first hand knowledge of any problems of depression or anxiety" other than appellant's formal claim. Ms. Lawson noted that appellant appeared to be "in good humor and good spirits" at work and that her work performance "indicate[d] a healthy overall attitude." She also noted that appellant did not work overtime and was only rarely required to work on holidays.

In a January 26, 2000 report, Dr. George Lester, an attending psychologist, treated appellant from April to October 1999. He noted appellant's frustration over the employing establishment's refusal to honor the sleep disorder clinic's recommendation not to assign her to the night shift. Dr. Lester also noted that the "primary focus" of appellant's psychotherapy "was related to grief over the death of her father." Appellant stated that she "hate[d] her job," and that she was frustrated over not prevailing in Equal Employment Opportunity Commission and compensation claims. He diagnosed major depression and "a pathological grief reaction with features of post-traumatic stress disorder."

By decision dated February 3, 2000, the Office denied appellant's claim on the grounds that the evidence did not demonstrate that appellant had sustained any injury or condition in the performance of duty.

Appellant disagreed with this decision and in a letter postmarked March 10, 2000 requested an oral hearing.

By decision dated April 13, 2000, the Office denied appellant's March 10, 2000 request for an oral hearing as untimely. The Office conducted a limited review of appellant's request and further denied it on the grounds that the issue in the case could be addressed equally well by submitting new, relevant evidence in support of a request for reconsideration.

The Board finds that appellant has not established that she sustained an emotional condition while in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to employment. Where disability results from an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the Federal Employees' Compensation Act's coverage.[1] Disabling conditions resulting from an employee's desire for a

[1] 5 U.S.C. §§ 8101-8193*; Lillian Cutler*, 28 ECAB 125 (1976).

different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[2]

As part of its adjudicatory function, the Office 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.[3] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[4]

In this case, appellant attributed her depression to the employing establishment's alleged refusal to honor Dr. Berkowitz's May 11, 1998 restrictions against assigning her to the night shift. The assignment of work schedules is an administrative function not within the performance of duty.[5] 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[6]

There is no evidence of record regarding appellant's work schedule following the employing establishment's receipt of Dr. Berkowitz's May 11, 1998 report. There are no time cards, personnel records or supervisory statements regarding whether appellant was assigned to the night shift (Tour 3). Also, the record does not contain any correspondence, memoranda or other record of communication from the employing establishment to appellant regarding her work limitations, or any formal written refusal to assign her only to Tour 1 and Tour 2. Further, there are no additional medical notes or reports regarding appellant's shift assignments on and after May 11, 1998 and any impact those assignments may have had on her emotional or physical conditions. Because there is no evidence of any error or abuse on the part of the employing establishment, appellant has failed to establish a compensable factor of employment.[7]

Appellant's grief over the death of her father was utterly unrelated to her assigned duties as a mail processor. Similarly, appellant's fear and frustration from April to June 1998 about not being able to provide for her son were not related to employment factors.

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[2] *Raymond S. Cordova*, 32 ECAB 1005 (1981); *Lillian Cutler*, *supra* note 1.

[3] *See Barbara Bush*, 38 ECAB 710 (1987).

[4] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[5] *See Peggy R. Lee*, 46 ECAB 527 (1995).

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

[7] *See Frederick D. Richardson*, 45 ECAB 454 (1994).

The Board notes that, in a December 30, 1999 letter, the Office advised appellant of the additional medical and factual evidence needed to establish her claim, in particular that she needed to submit a detailed statement of the work factors which she believed "caused or contributed" to the claimed condition.

Consequently, appellant has not established that she sustained an emotional condition in the performance of duty, as she submitted insufficient evidence to establish any compensable factors of employment.

The Board finds that the Office properly denied appellant's March 10, 2000 request for an oral hearing as untimely.

The Act[8] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office.[9] Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative states, in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."[10] The Office's procedures require it to exercise its discretionary authority to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a). The Board has held that the Office's exercise of this discretion is a proper interpretation of the Act and Board precedent.[11]

In this case, appellant requested, in a letter postmarked March 10, 2000, that she be granted an oral hearing pursuant to the Office's February 3, 2000 decision. The March 10, 2000 request for an oral hearing was clearly beyond the 30-day time limitation that began to run on February 3, 2000 and was thus untimely. The Board finds that the Office properly exercised its discretion in finding that appellant's claim could be addressed equally well through submitting new, relevant evidence accompanying a valid request for reconsideration. Thus, the Board finds that the Office's denial of appellant's March 10, 2000 request for an oral hearing was proper.

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

[10] 5 U.S.C. § 8124(b)(1).

[11] *Henry Moreno*, 39 ECAB 475 (1988).

The April 13 and February 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member