U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY N. HILL and SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS & APPEALS, Chamblee, GA

Docket No. 99-1140; Submitted on the Record;
Issued June 11, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied her request for an oral hearing on her claim by an Office hearing representative.

On October 14, 1997 appellant, a 59-year-old legal assistant, filed a Form CA-2 claim for benefits based on occupational disease, alleging that factors of her employment caused emotional stress and anxiety which resulted in her sustaining a hypertension condition.

By letter dated February 10, 1998, the Office advised appellant that the evidence she submitted was not sufficient to determine whether she was eligible for compensation benefits, and that she needed to submit a detailed description of the specific employment-related conditions or incidents she believed contributed to her illness. The Office also asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether factors or incidents, *i.e.*, specific employment factors, at her employing establishment contributed to her condition.

In a statement dated March 23, 1998, appellant alleged that she had been subjected to continuous harassment and abuse for a period of two years. She stated that the abuse involved: being forced to work at a workstation in which the temperature reached 90 degrees and where coworkers applied excessive amounts of perfume; being charged by management with being absent without official leave on days when she felt compelled to leave the office because the working conditions were making her sick; and being prohibited from transferring to a healthier work environment. Appellant also alleged that management harassed her about the number of cases she was expected to process and gave her unreasonable deadlines, which raised her blood pressure to unhealthy levels. She further stated that she worked for an administrative law judge, Judge Jennings, who engaged in a pattern of abuse by whistling while passing by her desk, engaging in loud and profanity filled arguments with colleagues, slamming his office door and giving her hateful, mean spirited looks on a regular basis. Finally, appellant claimed that

employees and management made derogatory and threatening remarks toward her on a weekly basis. She submitted numerous documents which, she contended, indicated that the employing establishment had abused its authority by forcing her to work in an uncomfortable work environment, which resulted in her high blood pressure condition.

In memoranda dated January 12 and 26, 1998, appellant requested a transfer to another workstation, which was about to become vacant due to a coworker's imminent departure. She indicated she was entitled to this transfer on the basis of seniority. The employing establishment denied this request by letter dated January 15, 1998 and referred appellant to an attached memorandum, dated August 15, 1997, which denied a similar request from appellant on July 17, 1997 on the grounds that such a transfer would violate a national agreement between her union and the employing establishment.[1]

Appellant submitted a statement from a coworker, Dacha Thrasher, who asserted that she observed on January 12, 1998 that appellant "appeared to have been irritable, due to her lack of ventilation at her assigned workstation. I also observed her face, having been very flushed in appearance, along with gasping-like sounds, as if she could n[o]t breath." Another coworker, Maria Teresa Jones, submitted a statement indicating that appellant was in a state of poor health due to the temperature at her workstation. Ms. Jones asserted that the building in which they worked was old and not properly ventilated and that the heat and air were improperly regulated. She also stated that she had observed appellant on January 12, 1998 and noticed that her face was red, at which time appellant informed her that this was because her work area was very hot and had made her sick.

Appellant also submitted a copy of a January 14, 1998 memorandum to her supervisor in which she claimed that she had not been given proper credit for compensatory time on numerous occasions when she worked overtime. On her application for leave dated January 14, 1998, there is a handwritten notation, which states "temperature within acceptable range." Appellant's request for leave was denied. She submitted a copy of a January 15, 1998 memorandum, which stated:

> "The temperature in your area may be acceptable to you, but the temperature in my area is not acceptable. Management refuses to lower the thermostat[s] that regulate my work area, even covering the thermostat with a metal box so that the thermostat is not visible. Only management and [Judge] Jennings can change [the temperature].... My requests to move are ignored and or denied."

The record contains a copy of an application for leave, submitted by appellant on February 11, 1998, in which she stated: "My work area 78 to 79 degrees. Heat causes severe headaches [and] nausea. Management refuses to allow me to sit in a cooler work area. Trying to kill me." An application for leave submitted by appellant on February 13, 1998 states: "Hot

[1] The memorandum stated that the request was denied on the grounds that the employing establishment was responsible for making reasonable efforts to protect employees from potentially abusive and threatening clients and must take reasonable precautions to ensure such protection. Appellant contested this assertion in a January 14, 1998 memorandum, stating that the office was protected from potentially abusive and threatening claimants by security guards, which patrol the halls when hearings are held.

work area[.] Headache, can [no]t breath[.] Management forces me to sit in unhealthy work area." The record contains several other applications for leave and letters of complaint throughout 1997 and 1998 in which appellant essentially makes the same charges, and claims she is becoming ill due to management's insensitivity to her condition. The employing establishment denied all of these requests and repeatedly rebutted appellant's allegations. In a memorandum dated January 21, 1998, appellant states:

> "In addition to the heat in my work area and lack of ventilation, I also am forced to sit in a hostile work environment. [Administrative law judge] ... Kelly Jennings ... continues with his [shrill whistling]. He also slams file cabinet drawers, in addition to slamming his office door. Jeffrey Kohlman will go to [Judge] Jennings' office and talk in a very loud tone, often using profanity, as [does Judge] Jennings. This blatant and [malicious] behavior is a violation of the Social Security Standards of Conduct. I am[,] therefore, requesting my work area to be moved to the Attorney Conference Room."

By memorandum dated February 3, 1998, appellant's supervisor noted appellant's request to transfer to another workstation. She indicated that appellant was not eligible to move into the area being vacated by a coworker, and that with regard to another workstation to which appellant had requested a transfer, she would be permitted reassignment in the event she had sufficient seniority. In a letter to the manager of labor relations dated February 4, 1998, appellant claimed that her requests to transfer had been intentionally ignored or denied in order to inflict harm, and that these denials were motivated by management's hatred of her. She further stated:

> "My health is deteriorating as a result of authoritative abuse. I am being forced to work in an area of extreme heat, no ventilation, strong perfumes, loud whistling, profanity, slamming of office doors and file cabinets, ongoing and consistently.... As of Friday, January 30, 1998, it is believed that someone is spraying their perfume in my work area before I arrive, to make me more sick and management allows it and is part of it by approving derogatory actions against me.… Also, there are at least two staff attorneys ... that have their vents covered, but I am not allowed to [take a similar measure].... This is abuse of authority, a hate crime, and an attempt to harm me.…"

Notwithstanding the employing establishment's official prohibition, the record contains correspondence between the employing establishment and appellant which reflects that, in February 1998, appellant moved into the vacant office space on her own accord, in defiance of the prohibition, and was ordered by the employing establishment to remove herself from the office in question.[2]

The record also includes correspondence between appellant and the employing establishment which indicates that appellant denied a charge by the employing establishment that

[2] Appellant was reprimanded on April 16, 1997 for inappropriate conduct and insubordination and placed on suspension on September 10, 1997 for failure to follow a supervisor's direct instruction.

she had held onto high priority cases, which had been assigned to her, for an excessive amount of time.

Appellant filed an Equal Employment Opportunity complaint on March 23, 1998 in which she summarized the various allegations and complaints listed above.

Appellant submitted a July 13, 1996 treatment note from Dr. Loren J. Carter, Board-certified in internal medicine, who stated that she was being treated for markedly elevated blood pressure and recommended that she avoid stress by staying home and resting.

In a report dated February 3, 1997, Dr. Carter stated:

> "[Appellant] became my patient in November 1992. At that time, her blood pressure was normal. However, by March 1993, her blood pressure had risen to hypertension levels and medication was instituted to control it. While she has a strong family history of hypertension, she related that she was under a great deal of stress arising from her relationship with her office manager. By August 1993, her blood pressure was under excellent control and she came off medication. This was coincident with a change in office personnel. [Appellant's] blood pressure remained normal until the fall of 1995, when medication was again required for control. Again a strong correlation with stress at work and elevation of pressure seemed apparent to me and my patient. On one occasion, September 18, 1996, she entered my office with pressures of 220/112 following [an] 'incident' at the office. Her blood pressure has fluctuated on the high side since that time, in spite of medication and I think at least partly because of an ongoing stress in the work place.
>
> "Additionally, [appellant] feels that her work environment is too hot for her. While I have not had to treat her nose bleeds and can not attest to their occurrence, hot and/or dry air certainly are known etiologies of ... [nose bleed], as is elevated blood pressure. I have treated [appellant] for recurrent upper respiratory illness and sinusitis, both of which are aggravated by a hot and/or dry environment.... If validity exists for my patient's complaints as they relate to her work environment and personnel, and if her job performance is satisfactory or better, then I would hope that the present situation could be worked out to everyone's satisfaction, even if it means transferring [appellant] to another location."

In a report dated August 26, 1997, Dr. Carter stated:

> "It is upon the request of [appellant] that I write this letter giving medical support to her request for transfer to another facility.... Two primary reasons for consideration of this transfer exist. First, [appellant] is heat intolerant; that is she cannot tolerate a hot environment.... It is my understanding that her desk is either right under or extremely close to a heat duct that she feels blows on her nearly constantly. She has requested, on more than one occasion, that she be moved to a different location in her present workplace, but this request has been denied. This

environmentally uncomfortable situation has [affected] her health. It is my understanding that she has on more than one occasion had to leave work because of headache and/or [bleeding nose] both of which can be aggravated by warm or hot dry air in the presence of hypertension. Second, it is my understanding that he work performance is judged to have declined, and this [too] may be attributed to an uncomfortable work environment.

"The second reason for transfer should actually not be coming from me but rather from the personnel division. I judge [appellant] to be a competent and honest person and I know that her work performance was excellent until approximately three years ago. It was at that time that she had a change in her supervisor and her work performance is judged to have declined since that time. She has subsequently been accused of declining work load, performance, insubordination, leaving work without an excuse, not following correct procedures; and perhaps other accusations that I, as her physician, am not privy to.... The strain of working in this environment of conflict clearly impacts in a profoundly negative way both of [appellant's] major disease processes."[3]

By decision dated August 18, 1998, the Office found that fact of injury was not established, as the evidence of record did not establish that she sustained an emotional condition in the performance of duty.

By letter postmarked November 18, 1998, appellant requested an oral hearing.

In a decision dated January 7, 1999, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked November 18, 1998, which was more than 30 days after the issuance of the Office's August 18, 1998 decision, and that she was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

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

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.[4] There must be

[3] Dr. Carter submitted a report dated February 23, 1998 in which he essentially reiterated his previous findings, conclusions and recommendations.

[4] *See Debbie J. Hobbs*, 43 ECAB 135 (1991).

evidence that implicated acts of harassment or discrimination did, in fact, occur supported by specific, substantive, reliable and probative evidence.[5]

The first issue to be addressed is whether appellant has cited factors of employment that contributed to his alleged emotional condition or disability. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.[6] On the other hand, disability is not covered where it results from an employee's fear of a reduction-in-force, frustration from not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute a personal injury sustained while in the performance of duty within the meaning of the Act.[7]

With regard to her allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. It is well established that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. A claimant must establish a basis in fact for the claim by supporting her allegations with probative and reliable evidence.[8] The Board has underscored that, when working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable 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.[9] The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings, alone, are not compensable. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence.[10]

The Board finds that appellant has failed to submit sufficient evidence to establish her allegations that her supervisors or Judge Johnson engaged in a pattern of harassment. These included appellant's allegations that Judge Johnson constantly looked at her with hatred and whistled in an intentionally offensive manner when he passed by her desk, that he and his colleagues constantly shouted and uttered profanities on a weekly basis, and that he habitually slammed his door because he intended to harass her and intimidate her. Appellant has alleged, in

[5] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[6] *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Id.*

[8] *Curtis Hall*, 45 ECAB 316 (1994); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

[9] *Norma L. Blank*, 43 ECAB 384 (1992).

[10] *Id.*

general terms, harassment from various management personnel, but has not provided a description of specific incidents or sufficient supporting evidence to substantiate the allegations.[11] Appellant has not submitted any factual evidence to support her allegations that she was harassed, mistreated, or treated in a discriminatory manner by her supervisors. To that end, the Board finds that the Office properly found that the episodes of harassment cited by appellant; *i.e.*, setting the heat at her workstation at an uncomfortably high level, disparaging remarks, and the use of excessive amounts of perfume, etc, did not factually occur as alleged by appellant, as she failed to provide any corroborating evidence for her allegations. As such, appellant's allegations constitute mere perceptions or generally stated assertions of dissatisfaction with a certain superior at work which do not support her claim for an emotional disability.[12] For this reason, the Office properly determined that these incidents constituted mere perceptions of appellant and were not factually established.

In the present case, the Office found that the allegations made by appellant concerning the implicated work-related incidents were not established as factual by the weight of evidence of record. The Office reviewed all of appellant's specific allegations of harassment, abuse and mistreatment, which allegedly occurred over several years, and found that they were not substantiated. The statements from appellant's coworkers do not establish that her supervisors disparaged appellant or otherwise ridiculed her during the periods and dates she alleged these episodes to have occurred. Nor do the statements of the coworkers substantiate appellant's allegations that her supervisors created a hostile work environment.[13]

The Board further finds that the administrative and personnel actions taken by management in this case contained no evidence of agency error, and are therefore not considered factors of employment. An employee's emotional reaction to an administrative or personnel matter is not covered under the Act, unless there is evidence that the employing establishment acted unreasonably.[14]

In the instant case, appellant has presented no evidence that the employing establishment acted unreasonably or committed error with regard to the incidents of alleged unreasonable actions involving personnel matters on the part of the employing establishment. As to appellant's allegation that management unduly pressured her regarding the number of cases she was expected to process and gave her unreasonable deadlines, appellant did not provide any evidence that the employing establishment acted in an abusive or unreasonable manner in setting performance guidelines for appellant. Thus, these actions on the part of management did not constitute a factor of employment. With regard to appellant's allegation that she was arbitrarily refused reassignment to another workstation, the Board finds that this amounts to frustration at not being permitted to work in a particular environment and is not a compensable factor under the circumstances of this case. Further, the fact that appellant was reprimanded and suspended

[11] *See Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[12] *See Curtis Hall*, *supra* note 8.

[13] *Merriett J. Kauffmann*, 45 ECAB 696 (1994).

[14] *Alfred Arts*, 45 ECAB 530 (1994).

for defiant and insubordinate behavior is also not compensable. Disciplinary matters consisting of counseling sessions, discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable as factors of employment.[15]

The Board notes that matters pertaining to use of leave are generally not covered under the Act as they pertain to administrative actions of the employing establishment and not to the regular or specially assigned duties the employee was hired to perform.[16] However, error or abuse by the employing establishment in an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage.[17] In the present case, there is no evidence of record to substantiate appellant's allegations of error or irregularity when she was charged with being absent without official leave and was denied administrative leave for the periods in question.[18] The employing establishment indicated that appellant left her office without sufficient cause on the dates on which it denied leave. However, appellant has submitted no evidence indicating that the employing establishment committed error or abuse or that its actions in these instances were unreasonable.

Accordingly, a reaction to such factors did not constitute an injury arising within performance of duty. The Office properly concluded that in the absence of agency error such personnel matters were not compensable factors of employment.

The Board finds that the Office properly denied appellant's request for an oral hearing on his claim before an Office hearing representative.

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office's final decision.[19] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[20] The Office has discretion; however, to grant or deny a request that is made after this 30-day period.[21] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[22]

In the present case, because appellant's November 18, 1998 request for a hearing was postmarked more than 30 days after the Office's August 18, 1998 decision, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing

[15] *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

[16] *Elizabeth Pinero*, 46 ECAB 123 (1994).

[17] *Margreate Lublin*, 44 ECAB 945 (1993).

[18] *Drew A. Weismuller*, 43 ECAB 745 (1992); *Kathi A. Scarnato*, 43 ECAB 220 (1991).

[19] 5 U.S.C. § 8124(b)(1).

[20] 20 C.F.R. § 10.131(a)(b).

[21] *William E. Seare*, 47 ECAB 663 (1996).

[22] *Id.*

and correctly advised appellant that she could pursue his claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.[23]

The decisions of the Office of Workers' Compensation Programs dated January 7, 1999 and August 18, 1998 are hereby affirmed.

Dated, Washington, DC
June 11, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[23] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono,* 39 ECAB 617 (1988).