

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN H. MINEHAN and DEPARTMENT OF THE ARMY,
WALTER REED ARMY MEDICAL CENTER, Washington, DC

*Docket No. 00-520; Submitted on the Record;
Issued October 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on November 22, 1996.

On March 17, 1994 appellant, then a 46-year-old management analyst, filed an occupational claim, alleging that she sustained stress, anxiety and hypertension from her first line and second line supervisors, Major Denise M. McCollum and Colonel Stephen Clouse, when they harassed her and retaliated against her for reporting that office to the Inspector General. Appellant stopped working on March 1, 1994.

In a memorandum on appellant's grievance and second step discussion dated December 27, 1993, appellant's supervisor, Major McCollum, stated that part of appellant's grievance was that Colonel Clouse used abusive language with appellant on July 21, 1993, specifically stating that he was "pissed off" and tossed a sheet of paper onto the table in appellant's presence. Major McCollum stated that Colonel Clouse discussed the circumstances of the incident and apologized to appellant for any impropriety she committed.

Appellant additionally contended that, in meetings on July 21, 1993 and on February 25, 1994, Colonel Clouse raised his voice in speaking with her which embarrassed and humiliated her. She contended that Colonel Clouse pointed a finger at her while he yelled at her on February 25, 1994. She also contended that her supervisor changed her hours, which made providing transportation for her children to school more difficult. In the 1993 grievance, appellant contended that she was unfairly denied a Special Act Award on November 17, 1993. She contended that reclassification of her job without promotion to GS-12 and the reassignment she received on January 23, 1994 were retaliatory actions by management. Appellant also contended that her supervisor divulged her medical diagnosis to other employees, including her subordinates.

In a report dated March 15, 1994, Dr. Ira Tauber, a Board-certified internist, opined that appellant was suffering a high level of anxiety related to a work-induced situation. He stated that

she felt much stress at work due to retaliation by her supervisors for her initiating a whistle blower action.

By decision dated July 14, 1994, the Office denied benefits, stating that the evidence of record did not establish that the claimed injury occurred in the performance of duty. By letter dated December 21, 1994, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. In a report dated December 1, 1994, Dr. Howard G. Weinstein, a psychologist, considered that appellant's supervisors verbally abused her on July 21 and December 17, 1993 and on February 25, 1994. He diagnosed severe depression and anxiety related to her employment situation. Dr. Weinstein opined that appellant was unable to work. In a report dated November 18, 1995, appellant's treating physician, Dr. Stephen Rojcewicz, a psychiatrist, opined that the February 25, 1994 work incident in which Colonel Clouse verbally abused appellant and "deliberately and publicly humiliated her," aggravated her depression and prevented her from working.

By decision dated April 21, 1995, the Office vacated the Office's July 14, 1994 decision and accepted appellant's claim for anxiety. The Office based its finding that appellant sustained anxiety in the performance of duty on the two incidents of Colonel Clouse raising his voice at appellant in the meetings on July 21, 1993 and February 25, 1994. Appellant received compensation for temporary total disability since May 15, 1994.

In a report dated July 13, 1995, a second opinion physician, Dr. Richard G. Sutton, a Board-certified internist, diagnosed major depression and traumatic neurosis with post-traumatic stress syndrome. He stated that appellant's psychiatric condition was a direct result of her supervisors' treatment of her at work and was aggravated by an additional abusive incident involving the supervisors. Dr. Sutton stated that, although appellant had no further confrontations with the supervisors, her condition was aggravated to the point that the symptoms had not yet resolved. He opined that appellant was unable to work.

In a statement dated August 3, 1995, John Wigton, a labor relations specialist at the employing establishment, stated that the purpose of the December 17, 1993 meeting which he attended with appellant, her supervisors, Colonel Clouse and Major McCollum, was to address appellant's grievance she filed for alleged retaliatory action by them for her visit to the Inspector General's Office. The subject of the grievance was that Colonel Clouse used abusive language in a previous meeting, appellant did not receive a Special Act Award, which her subordinates received, and she was not promoted to the GS-12 level. During the meeting, Mr. Wigton stated that Colonel Clouse raised his voice while talking to appellant, "pointed his right index finger and shook it at her while making his point."

In a report dated August 16, 1995, Dr. Devesh D. Kanjarpane, a Board-certified preventive medicine specialist, opined that the stress appellant experienced was from her unwillingness to perform adequately on the job and from action directly undertaken by her. He stated that internal investigations conducted by the employing establishment supported the notion that no harassment had occurred. Dr. Kanjarpane opined that appellant's claim for job-related stress should be rejected.

In a report dated August 14, 1995, Dr. Mark S. Cotterell, a general practitioner with a specialty in psychiatry, stated that appellant was angry over a narcissistic injury, had nursed the anger over the last two years, and her condition was inconsistent with depression. He stated that there was no attempt to explain or understand why the two negative encounters of Colonel Clouse raising his voice led to such a severe and ongoing disability. Dr. Cotterell opined that appellant's inability to work was not work related.

In a report dated September 15, 1995, Dr. Rojcewicz stated that appellant continued to have symptoms of depressed mood, mental preoccupations, intrusive memories and agitation, and that in the past four months, there had been significant worsening of her symptoms. He diagnosed major depression, single episode, severe, without psychotic features, post-traumatic stress disorder, no personality disorder, mitral valve prolapse, severe work stresses and severe symptoms of global assessment. Dr. Rojcewicz stated that appellant should not return to the same physical location under any circumstances, opined that she was unable to work in her previous employment, and that the worsening of her symptoms was directly caused by her recent experiences with the employing establishment.

In his report dated September 20, 1995, Dr. Cotterell opined that there was no basis for Drs. Rojcewicz and Sutton's diagnoses of major mood disorder and "absolutely" no basis for their assertion of post-traumatic stress syndrome. He opined that appellant could work but could not adequately adapt in stressful situations.

In a report dated April 5, 1996, Dr. Brian M. Schulman, a Board-certified psychiatrist and neurologist, reviewed appellant's history of injury and considered that on July 21, 1993 and February 25, 1994 Colonel Clouse raised his voice when speaking with appellant. He also performed a mental status examination. Dr. Schulman diagnosed occupational, relational and identity problems, probable mixed personality disorder, obsessive-compulsive, paranoid/borderline and history of mitral prolapse. He stated that appellant did not demonstrate a mood disorder and/or post-traumatic stress disorder. Dr. Schulman stated that appellant's presentation was highly emotive, and that there was insufficient evidence to attribute appellant's residual complaints and symptoms to the two job-related incidents. He stated that appellant's reaction to criticism was not the function of a mental illness but represents "a volitional and intentional state of reaction to a perceived injustice." Dr. Schulman concluded that appellant did not suffer any residual psychiatric impairment as a consequence of the July 21, 1993 and February 25, 1994 employment incidents.

In a notice of proposed termination of compensation dated July 3, 1996, the Office found that Colonel Clouse raised his voice in speaking to appellant. The Office found that the following incidents occurred but were not in the performance of duty: (1) appellant's supervisor changed her hours which made it more difficult for appellant to transport her children to school; (2) appellant filed a formal grievance over her 1993 performance appraisal and failed to receive a special award for her performance in 1993; (3) appellant's job was reclassified with a new job description, and the reclassification did not include a grade increase to which appellant felt she was entitled; (4) appellant had disagreements with her supervisor regarding the authorization of leave; and (5) appellant's supervisor requested statement from appellant's coworkers for adjudication of the claim. The Office found that the following incidents did not occur: Colonel Clouse pointed his finger at her in the February 25, 1994 meeting while he yelled at her,

Colonel Clouse said “pissed off” in her presence and her supervisor divulged her medical diagnosis to coworkers.

The Office found that the medical opinions of Drs. Cotterell, Kanjarpane and the second opinion physician, Dr. Schulman, that appellant’s emotional condition was not work related outweighed the opinions of appellant’s treating physicians, Drs. Tauber, Weinstein and Rojcewicz, and the second opinion physician, Dr. Sutton, that appellant’s emotional condition was work related.

Appellant submitted additional evidence. In a report dated July 18, 1996, Dr. Rojcewicz stated that he disagreed with Dr. Schulman’s April 5, 1996 conclusions. He stated that appellant continued to suffer from major depression manifested nearly every day by a depressed mood most of the day, markedly diminished interest in almost all activities most of the day, insomnia, psychomotor agitation, and diminished ability to think and concentrate on matters other than her case. Dr. Rojcewicz stated that appellant’s symptoms were not due to the direct physiological effects of a substance or a general medical condition and her symptoms were not accounted for by bereavement. He stated that if appellant feared for her safety when Colonel Clouse shook his finger at her in close proximity to her face, the diagnoses would be post-traumatic stress disorder. Dr. Rojcewicz stated, however, that he chose to use the diagnosis of anxiety disorder.

In his report dated August 28, 1996, Dr. Schulman disagreed with Dr. Rojcewicz’s opinion regarding his diagnoses of depression and post-traumatic stress disorder. He stated that appellant was unhappy and angry. Dr. Schulman stated that appellant’s diminished interest in her activities reflected “not so much an ability to engage in these activities, but an unwillingness to invest herself in little other than the documentation of her injustices” at the employing establishment. He opined appellant did not have post-traumatic stress disorder because the impact of the stressor was not significant enough. Dr. Schulman opined that if appellant was willing and motivated she would be able to work.

By decision dated November 22, 1996, the Office found that the opinion of the referral physician, Dr. Schulman, that appellant did not have a work-related emotional condition constituted the weight of the evidence, and terminated benefits effective November 22, 1996.

By letter dated November 19, 1997, appellant requested reconsideration of the Office’s decision and submitted additional evidence. In a report dated October 29, 1997, Dr. Rojcewicz reiterated his diagnoses of major depressive disorder and anxiety disorder. He also reiterated that the incidents of Colonel Clouse raising his voice with appellant on July 21 and December 17, 1993, and February 25, 1994 caused appellant to become emotionally disabled.

By decision dated May 28, 1998, the Office denied appellant’s request for modification.

By letter dated May 25, 1999, appellant requested reconsideration of the Office’s decision and submitted additional evidence. A July 24, 1996 report from the Inspector General stated that appellant’s allegation that her supervisor, Major McCollum, failure to inform her of a personnel action intended to cancel, establish and recruit for a GS-12 MEPRD Branch Chief violated AR 690-500 and was substantiated. The report stated that AR 690-500 requires that employees be kept informed of personnel actions that may affect their employment. The report

also stated that appellant's allegation that in November 1993 Major McCollum attempt to improperly initiate a personnel action to cancel, establish, and recruit for a GS-12 MEPRS Branch Chief, which would have placed appellant in a reduction-in-force (RIF) situation, violated AR 690-500 and was substantiated.

In a report dated July 10, 1998, Dr. Rojcewicz reiterated his diagnosis of major depression, single episode, severe, without psychotic features, anxiety disorder and mitral valve prolapse. He stated that appellant was totally disabled and that her disorders were precipitated by work-related stresses. Dr. Rojcewicz stated that the stresses were her supervisor failing to inform her of a personnel action that affected her job, raising his voice and shaking his finger at appellant and violating personnel practice in attempting to promote a person to appellant's position after eliminating her from it. He stated that the original stressors at work may have been removed through appellant's termination but the ongoing stressors continued. Dr. Rojcewicz stated that appellant became disabled from her condition on February 25, 1994 and that she had no history of depression, anxiety or psychiatric disorder prior to June 1993.

In a report dated May 24, 1999, Dr. Rojcewicz reiterated his diagnoses of major depression and anxiety disorder not otherwise specified. He stated that additional evidence documented by the Inspector General that appellant's supervisor failed to inform her of a personnel action to cancel her job, put her in RIF status and recruited another person at a higher grade, at GS-12, showed examples of work stress which precipitated her medical condition. Dr. Rojcewicz stated that these incidents aggravated appellant's medical conditions of major depressive disorder and anxiety disorder not otherwise specified, and aggravated her severe fear and anxiety regarding her ability to carry out her assigned employment duties. He stated that appellant's symptoms of mental preoccupations and intrusive memories "have often focused on these violations of personnel practices," and these violations increased her depression and increased her anxiety symptoms.

In a letter dated July 14, 1999, the Office indicated that it accepted that in November 1993 Major McCollum attempted to improperly initiate a personnel action to cancel, establish, and recruit for a GS-12 MEPRS Branch Chief, which would have placed appellant in a RIF status in violation of AR 690-500. The Office also indicated that it accepted that Major McCollum's initially stating that the GS-12 duties existed and then stating that they did not exist violated AR 690-500. Further, the Office accepted appellant's allegation that Major McCollum failure to inform appellant of the personnel action he was taking concerning her job violated AR 690-500 which required that employees be kept informed of personnel action that may affect their employment.

In a report dated August 16, 1999, Dr. Schulman, stated that he reviewed the update on the statement of accepted facts, Dr. Rojcewicz's May 24, 1999 report, and stated that the "probability of attributing, at this late date, the causative effect of an administrative action that occurred in November 1993 (nearly six years ago), upon [appellant's] current mental status, is, at best, conjectural and, at worst, not possible based on established and accepted principles of medical causation." He stated that if appellant was currently diagnosed with major depressive disorder from a single episode, it was "unlikely that the onset of that single episode began six years ago and is continuous through the present time." Dr. Schulman recommended the assignment of a rehabilitation specialist coordinate appellant's return to work and he suggested a

“flexible, accommodated return to duty with ample opportunity for progressive assimilation into the workplace.”

By decision dated August 20, 1999, the Office denied appellant’s request for modification. The Office noted that appellant established a new compensable factor in that the evidence of the investigation from the Inspector General’s Office established violations of the employing establishment’s personnel regulations in that Major McCollum stated that the GS-12 duties existed but later stated that they did not exist and failed to inform appellant of a personnel action. The Office found that Dr. Schulman’s opinion still constituted the weight of the evidence.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹ The Office’s burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

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.³ 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.⁴

Where an employee alleges harassment and cites to specific incidents and the employer denies that harassment occurred, the Office or some other appropriate fact finder must make a determination as to the truth of the allegations.⁵ The issue is not whether the claimant has established harassment or discrimination under standards applied by the Equal Employment Opportunity Commission. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.⁶ To establish

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Clara T. Norga*, 46 ECAB 473, 480 (1995); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991).

⁵ *Michael Ewanichak*, 48 ECAB 364, 366 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

⁶ *See Martha L. Cook*, 47 ECAB 47 ECAB 226, 231 (1995).

entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.⁷

To the extent that disputes and incidents alleged as constituting harassment by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁸ 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.⁹

In the present case, in its November 22, 1996 decision terminating benefits, the Office found that Colonel Clouse's raising his voice to appellant on December 17, 1993 and February 25, 1994 which embarrassed and humiliated appellant constituted compensable factors of employment. 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.¹⁰ Colonel Clouse raising his voice during the meetings on December 21, 1993 and February 24, 1994 is not evidence of harassment and is not compensable. The November 22, 1996 and August 20, 1999 decisions must therefore be modified to reflect that Colonel Clouse raising his voice on those dates in 1993 and 1994 does not constitute compensable factors of employment. Further, although Mr. Wigton's August 3, 1995 statement corroborated appellant's contention that at the December 17, 1993 meeting, Colonel Clouse pointed his right index finger and shook it at appellant while he addressed her, this also does not constitute harassment and abusive conduct. Appellant did not present any corroborating evidence that Colonel Clouse said he was "pissed off" at appellant. This allegation has not been established as factual and does not constitute harassment and abusive conduct. The Board therefore finds that the Office properly terminated benefits on the grounds that appellant did not establish any compensable factors of employment.

Subsequent to appellant's May 25, 1999 request for reconsideration, based on the July 24, 1996 report appellant submitted from the Inspector General, the Office accepted that in November 1993 Major McCollum improperly attempted to cancel the GS-12 MEPRS Branch Chief which would have placed appellant in a RIF status in violation of AR 690-500. The Office also accepted that Major McCollum's stating that the GS-12 duties existed and then retracting that statement violated AR 690-500. The Office accepted appellant's contention that Major McCollum's failure to inform appellant of the personnel action he was taking concerning her job violated AR 690-500 which required that employees be kept informed of personnel action that may affect their employment. Appellant's reaction to a possible RIF is not a compensable factor. The Board has held that fear of losing one's job is not compensable.¹¹ Similarly, Major McCollum's stating that the GS-12 duties existed and then retracting that

⁷ *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

⁸ *Clara T. Norga*, *supra* note 4 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ *Christophe Jolicoeur*, 49 ECAB 553, 556 (1998); *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹¹ *Donna J. DiBernardo*, 47 ECAB 700, 705 (1996);

statement relates to the fear of appellant's losing her job and thus is not compensable. Major McCollum's failure to inform appellant of the personnel action he planned to take concerning her job, however, was in violation of procedures and constituted error.¹² Appellant has therefore established that Major McCollum's failure to inform her of the proposed job change constitutes a compensable factor of employment.

Appellant's burden of proof is not discharged by the fact that she has identified 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 identified compensable employment factors.¹³

A conflict in the medical evidence exists between the opinion of appellant's treating physician, Dr. Rojcewicz, and the second opinion physician, Dr. Schulman, as to whether appellant is disabled due to factors of her employment. In his July 10, 1998 and May 24, 1999 reports, Dr. Rojcewicz stated that appellant's supervisor failing to inform her of a personnel action to cancel her job was one of the stresses at work which precipitated and aggravated her major depressive disorder and anxiety disorder. In his July 10, 1998 report, Dr. Rojcewicz stated that appellant was disabled due to her medical condition. In his August 16, 1999 report, Dr. Schulman opined that appellant did not have a work-related medical condition arising from employment factors occurring in 1993 and that appellant could return to work with a flexible, "accommodated return."

Due to the conflict in the medical evidence, the case must be remanded for the Office to refer appellant and the case record with a statement of accepted facts to an impartial medical specialist to address whether appellant's medical condition is related to the specific compensable factor. The statement of accepted facts should be revised to reflect that the only compensable factor is Colonel Clouse's failing to inform appellant of the personnel action he planned to take regarding elimination or reclassification of her job. The allegations of verbal abuse are not factually established. After further development as it deems necessary, the Office shall issue a *de novo* decision.

¹² See *Peggy Ann Lightfoot*, 48 ECAB 490, 493 (1997); *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

¹³ *Clara T. Norga*, *supra* note 4 at 482-83; see *William P. George*, 43 ECAB 1159 (1992).

The August 20, 1999 decision of the Office of Workers' Compensation Programs is thereby modified to reflect that the only compensable employment factor was Colonel Clouse's failure to inform appellant of the proposed personnel action regarding her job. The Office's August 20, 1999 decision is set aside and remanded for further action consistent with this decision.

Dated, Washington, DC
October 9, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member