U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA J. AXTELL-PALMER and DEPARTMENT OF THE ARMY, ROCK ISLAND ARSENAL, Rock Island, IL

Docket No. 00-795; Submitted on the Record;
Issued September 11, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim for post-traumatic stress, acute adjustment disorder and brief depressive reaction.

In a traumatic injury claim dated October 30, 1995, appellant, then a 42-year-old cost/price analyst, alleged that she sustained a "systemic flare-up of fibromyalgia, headache, nausea and emotional breakdown." She stated that "her supervisor with full knowledge of [her] deteriorating health condition [and the fact she] returned to work 2 days before from a flare-up, verbally harassed [her] while she was in the performance of [her] work duties." She stated that her supervisor's management style "was inappropriate, threatening and imposed undue stress" on her resulting in her emotional and physical conditions. Appellant referred the Office to her Equal Employment Opportunity Commission complaint (EEOC), which she stated contained 14 allegations against her upline supervisors, Janice D. Wards and the Acting Chief of the Environmental Contracting Division, James G. Loehrl.

In her EEOC complaint dated February 29, 1996, appellant alleged that, on October 25, 1996, she called Ms. Wards to determine if they could submit a signed voucher before the usual 14-day waiting period expired. Ms. Wards told her that she would not sign the voucher unless appellant verified it. Appellant interpreted that to mean that she should verify the cost but appellant reminded Ms. Wards that her usual custom was just to verify the information in the voucher. Appellant stated that the different method would require "a team of people to do the work." Appellant stated that they discussed other issues in the telephone conversation as well in that Ms. Wards told appellant she should also verify labor rates. Appellant stated by the end of the conversation she had been yelled at three times, told that she would be fired if she did not verify the voucher as discussed and Ms. Wards hung up on her. Appellant stated that at that time she became physically ill and took medication "in the hopes of warding off a flare-up," but when she talked to her coworker, "Becky," she emotionally broke down. Appellant stated that she had just returned to work on October 23, 1995 from a flare-up which occurred as a result of a fall at work on September 25, 1995. She stated that around September 27, 1995 she told Ms. Wards

that she was concerned that "anything" could set off a flare-up which would prevent her from being able to work. Appellant stated that she believed Ms. Wards acted the way she did on October 25 "to get rid of" her.

Appellant stated that on November 1, 1995 she met with Ms. Wards and Mr. Loerhl and Ms. Wards and Mr. Loerhl agreed that there was no problem with appellant's work performance. Appellant stated that they also discussed remarks Ms. Wards made to her when she was hired in February 1995 and Ms. Wards admitted that she had said that she "swore she would not hire a handicap[ped] person again because she had one before and they are a pain in the ass." Appellant stated that Ms. Wards said in the meeting that she expected appellant to take that "as a challenge because she knew [appellant] would do a good job."

Appellant further stated that toward the end of the November 1, 1995 meeting, Ms. Wards proposed moving her from the Stark Road Office to the "PBS on site" to resolve the October 25, 1995 issues. Appellant objected because everything she needed was at Stark Road and the staff meetings at that office were beneficial. She also stated that Ms. Wards had particularly set up the analyst position at the Stark office because the majority of the information and contacts were there. Appellant also stated that if she were moved to the other office, she would have to carry her gas mask all the time, she would not be able to use her assist dog and she would have to make frequent trips to the Stark office which would be hard on her physically. Appellant stated that at the November 1, 1995 meeting Ms. Wards apologized to her for any harm she might have caused her and said it was not intentional.

Appellant also requested a flexiplace to accommodate her condition and when she gave information on it to Ms. Wards, she threw it across her desk at appellant, stating that she did not have time to read "this shit," that she did not know if Rock Island supported it and did not have "time to find out." Appellant investigated the matter further and asked the flexiplace specialist to contact Ms. Wards and when she did, Ms. Wards "let her know in no uncertain terms that she did not appreciate [appellant's] calling." Appellant stated that at the November 1, 1995 meeting Mr. Loehrl who told her to submit a written proposal and he stated that he doubted they could work out appellant's needs under flexiplace but he would check it out. Appellant stated that she felt she was "being strung along."

Appellant stated that she was compelled to pursue action while she was at home sick. She stated that on November 14, 1995, Ms. Wards left a message on her answering machine at home telling her that she would be placed on nonpay status due to the furlough. Appellant stated that she had to call Rock Arsenal and Ms. Wards to straighten out that she should not be on nonpay status but on continuation of pay and after making the calls, Ms. Wards said she would tell Mr. Loehrl not to interrupt her continuation of pay. Further, appellant stated that management did not provide her information in a timely fashion as on November 14, 1995 when she asked Ms. Ward if she had a copy of her CA-1 claim form and subsequently learned on November 15, 1995 that management was disputing her claim. Appellant stated that in the November 1, 1995 discussion she "broke down" several times talking about the October 25, 1995 incident. Appellant stated that on November 17, 1995 she called Mr. Loehrl to clarify the basis for their disputing her claim and he stated it was because he did not believe the incident caused her medical condition. Appellant stated that she felt she had "laid [her] guts out on the table for their benefit [at the November 1, 1995 meeting] and they used it against [her]."

Appellant stated that on October 20, 1995 while she was at home recuperating from a fall, she had flowers sent to Ms. Wards for "Bosses Day," Ms. Wards' comment to her was whether appellant was "through milking the COP."

Appellant stated that in May 1995 she, Ms. Wards and some other coworkers were scheduled to attend a training session and Ms. Wards was upset with for wanting to take her training dog with her, stating it was a "burden" on them. When she told Ms. Wards that she did not understand why taking her dog was a burden, Ms. Wards "got more upset." Appellant made calls to the restaurant to make sure she could bring her dog and wheelchair and they said it was not a problem and when she told Ms. Wards, Ms. Wards said she "just should have left things alone." Appellant stated that at the restaurant Ms. Wards would not sit at the table reserved for them and when it was time to leave, Ms. Wards "whisked right past [her] like she didn't exist" even through she was having trouble managing the dog, a cane, her cushion and the books. Appellant felt Ms. Wards was embarrassed to be seen with her.

Appellant stated that on March 14, 1995 she submitted a written request to Ms. Wards to have the ramp at Stark Rode reviewed under "the code" as it did not meet the Uniform Federal Accessibility Standards and was difficult and hazardous. Appellant stated that Ms. Wards told her that she turned the issue over to the Corporation of Engineers and appellant was later informed that the request was being reviewed but then she did not hear anything more about it.

Appellant stated that in February 1995, Ms. Wards would not issue her a job offer based on her statement she believed she could perform the job but appellant must obtain a physician's certification that she could not work. Appellant complied but felt the certification was unnecessary because she was already employed by Tooele Army Depot in the chemical area, had a mask issued to her and had access to the chemical storage areas.

Appellant stated that in January 1995, when she called to verify her faxed application would be received, Robert Siegfreid at the Rock Island Civilian Personnel Office told her he had not received it and she should not bother refaxing it as management was not interested in her. She then spoke to Ms. Wards who said he was not "getting that from her" and told appellant to resubmit her application which she did.

In an undated statement received by the Office on November 17, 1995 Mr. Loehrl explained that appellant was a contract price analyst who was hired in February 1995 to work in the Tooele Chemical Demilitarization Facility (TOCDF). He stated that it was understood when she was hired that she had "an MS type of illness" that sometimes caused her mobility problems and it was known that at times she required the use of a guide dog or the use of a wheel chair and at other times she had no mobility restrictions. Mr. Loehrl stated that accommodations were made for appellant to work in a building approximately three miles away from the TOCDF and her supervisor because of the proximity of the building to the chemical storage site and the resulting egress requirements.

Mr. Loehrl stated that, on October 30, 1995, in her second effort to reach him by telephone since October 25, 1995, appellant called him to inform him that she and Ms. Wards had a very intimidating conversation on October 25, 1995 and she was going to file an EEOC complaint against her. Mr. Loehrl said he met with Ms. Wards and appellant on November 1,

1995 and they discussed the procedure for reviewing vouchers and that in the October 25, 1995 conversation Ms. Wards said she did not mean to cut appellant off on the telephone but thought the conversation had ended and turned the speaker telephone off. He said Ms. Wards told appellant she did not intend to intimidate or harass her and her purpose in discussing the voucher verification procedure was to provide an answer to her boss as to how the vouchers were being reviewed. Mr. Loehrl stated that appellant stated that she did not think Ms. Wards was "mean or malicious or had intended to hurt her" but stated that "she was losing her life and by god somebody in the Army was going to pay." He stated that his impression was that the conversations on October 25, 1995 between Ms. Wards and appellant were normal supervisory employee conversations.

In a statement dated November 13, 1995, Ms. Wards stated that she did not find the October 25, 1995 conversation confrontational. She stated that she asked appellant about the method she used for verifying the vouchers because Mr. Loehrl asked her to determine if the voucher was correct for payment and whether appellant was in fact verifying the vouchers. She stated that appellant called her back two or three times to clarify the issue, that she felt the conversation "was going nowhere," and thinking the conversation was over, pushed the cancel button on the speaker telephone. She stated that she was surprised when Mr. Loehrl informed her on October 30, 1995 that appellant intended to file a complaint against her for harassment.

Ms. Wards stated that she did "not agree" with appellant's interpretation of what [her] intent was or her demands upon the Government." She denied that she had full knowledge of appellant's condition as she knew very little about it and was unsure she could repeat the name of it. Ms. Wards also stated that appellant had "renewed [her faith] in handicapped employees." She said she told appellant that she was very satisfied with her and thought that she was doing a good job. Ms. Wards stated that she was frustrated during the October 25, 1995 telephone conversation that she was not getting an answer to her question that she thought would satisfy her supervisor. She stated that she told appellant that she was fired, "knowing full well it was only an expression, as she [could] not fire anyone." Ms. Wards stated that it was not her intent to harass appellant and she believed appellant was a good employee.

In a report received by the Office on December 11, 1995 covering five interviews from October 31 through November 21, 1995, Dr. Dorothea A. Maier, a clinical psychologist, considered appellant's medical history, history of injury and noted that appellant recorded several incidents of harassment in the past year. She stated that that appellant's coping with progressive symptoms of her fibromyalgia, her need to revise future planning and additional stress in the work environment after alleged incidents of abuse resulted in a flare-up of her disease, her inability to return to work and emotional stress. Dr. Maier described appellant's symptoms including being depressed, tearful, crying and having nightmares. She also performed a mental examination. Dr. Maier concluded that the alleged incidents of harassment at work precipitated the emergence of symptoms of post-traumatic stress syndrome.

Appellant also submitted disability notes from Dr. Diana D. Banks dated November 27, 1995 and from Dr. Alan J. Concors dated November 7, 1995, stating that she was unable to work.

On January 19, 1996 the Office accepted appellant's claim for post-traumatic stress for one day.

On March 6, 1996 the Office accepted appellant's claim for an acute adjustment disorder and brief depressive reaction.

On April 22, 1996 the EEOC notified appellant of partial acceptance of her discrimination complaint and that many of her allegations would be investigated.

In a statement dated May 23, 1996, appellant responded to Ms. Wards' statements. Appellant stated that she kept calling Ms. Wards on October 25, 1996 because each time they talked, "the issue changed requiring [her] to answer another question." Appellant also stated that although she was assisted with carrying materials or having the door opened for her when she arrived at work, the assistance was not provided by management but by her coworkers in an informal arrangement. Appellant stated that contrary to Ms. Wards' assertion, she was hooked up with the central computer. She stated that she had her own printer because when other people in the office moved to another building, that printer was left behind but she did not have it as an accommodation. Appellant stated that mail was not delivered to her as she picked up the mail at the mailroom down the hall "like everyone else." Regarding flexiplace, she stated she made her initial request to Ms. Wards in August 1995 and Mr. Loehrl stated he did not receive it until the end of September. Appellant stated that she was told in the interview when she was hired, that her assignment to the office three miles away from the work site had to do with the nature of the work, not her medical condition.

In an undated statement from appellant's coworker, Elizabeth Reed, received by the Office on May 28, 1996, Ms. Reed stated that her office was located across from Ms. Wards and on October 25, 1995 she overheard a conversation between Ms. Wards and appellant, in which Ms. Wards' "voice was intimidating and she seemed to be quite agitated." Ms. Reed stated she heard Ms. Wards repeat emphatically that she would not sign the voucher until it was verified and she heard her say, "You're fired." She said that, soon after that telephone conversation, appellant called her asking her to take her home and when Ms. Reed picked up appellant she was crying and "could not control her emotions."

In a report dated August 28, 1996, Dr. Maier reiterated her diagnosis of post-traumatic syndrome and stated that appellant had been on early retirement due to permanent disability since January 1996. She stated that some symptoms of post-traumatic stress syndrome might persist longer than 12 months and the severity, duration and proximity, person's background, physical condition might influence the course and the healing process of the disorder. Dr. Maier stated that appellant was attending biweekly sessions of individual psychotherapy until April 1996 but felt the need to continue because she was having symptoms of nightmares, hypervigilance and anger.

By decision dated November 20, 1996, the Office rescinded its acceptance, stating that the evidence of record, referring particularly to excerpts from Ms. Wards' November 13, 1995 statement, did not establish that appellant sustained an injury in the performance of duty.

By letter dated December 2, 1996, appellant requested an oral argument before an Office hearing representative which she later changed to a request for a review of the written record.

In a statement dated December 18, 1996, Ms. Wards reiterated that she did not have full knowledge of appellant's medical condition and denied the October 25, 1995 was "harassing in any way." She stated that if the conversation on October 25, 1995 had been harassing, she did not think appellant would have called her back several times. Ms. Ward also stated that appellant's job "could not be perceived as stressful in any way." She stated that appellant had a large office remote from the operating plant where she basically planned and scheduled her workload and took breaks whenever she needed for as long as she determined was necessary, that she was free to come and go as she saw fit and was free to confer on the telephone with other employees "at any time." Ms. Wards stated that she felt the only time they had a conflict was during that telephone conversation on October 25, 1995. Ms. Wards described accommodations they made for appellant, stating that they granted her a flexible schedule, which reduced the number of days she came to work in a pay period, she was not required to attend any meetings at the job site and in case of evacuation she alone was provided the privilege of leaving by means of her private vehicle whereas the other employees had to walk up to two miles to the evacuation point. She stated that when appellant was required to come to the job site, she was met by her or other employees to assist her with her books and papers and when she left, someone walked with her to the car and assisted her as needed. Unlike other employees, at her own request, appellant was allowed software from her prior job, was not connected to the site computer system and was supplied with her own printer so she would not have walk to a central location to retrieve documents. Ms. Wards stated that she also had mail delivered to appellant to eliminate the need for her to walk across the building. Ms. Wards reiterated that generally she had no performance or conduct problems with appellant.

By decision dated May 1, 1997, the Office hearing representative found that the Office's November 20, 1996 rescission was based on a statement by the supervisor, which had been in the record when the original decision was made and merely suggested that the Office's acceptance of appellant's claim was erroneous. The Office hearing representative, therefore, vacated the Office's November 20, 1996 decision and remanded the case for the Office to develop the claim to determine if appellant had any continuing work-related disability causally related to the accepted work injury.

By decision dated May 22, 1997, the Office found that the Office's prior acceptance should have been rescinded because the evidence established that appellant's psychiatric condition did not occur in the performance of duty. The Office stated that new evidence was in the record consisting of Ms. Reed's statement which corroborated appellant's contentions that in a telephone conversation on October 25, 1998, Ms. Wards told appellant that she would not sign the voucher if it was not verified and she told appellant that she was fired. The Office found that appellant's discussions on the telephone with Ms. Wards on October 25, 1995 were administrative matters and no error or abuse by management was shown. The Office stated that no evidence of record established a compensable factor of employment. The Office also stated that since no compensable factor of employment was established, it was not necessary to consider the medical evidence.

In a report dated January 19, 1998, a second opinion physician, Dr. David L. McCann, a Board-certified psychiatrist and neurologist, considered appellant's history of injury and performed a mental status examination and psychological testing. He diagnosed dementia due to or associated with fibromyalgia, chronic fatigue immune dysfunction syndrome, spinocerebellar syndrome, unknown degenerative disease and adjustment disorder with anxiety. Dr. McCann opined that appellant did not have traumatic stress disorder and that the incidents at her work place did not cause an aggravation of her underlying condition of progressive dementia. He stated that her emotional distress at work was part of her deteriorating condition and the events in October 1995 did not cause her to take a permanent disability.

By decision dated January 28, 1998, the Office denied the claim stating that appellant did not establish that her condition was caused by any employment factor. The Office considered Dr. McCann's report at length in its decision and relied on his opinion in finding that appellant's physical and emotional condition were not work related. The Office stated that appellant's medical benefits were terminated.

By letter dated February 10, 1998, appellant requested a written review of the record.

By decision dated July 29, 1998, the Office hearing representative affirmed the Office's May 22, 1997 decision, stating that appellant failed to establish that her emotional condition occurred in the performance of duty. In so finding, the Office hearing representative considered whether factors of employment appellant referenced consisting of her confrontation with Ms. Wards on October 25, 1995, Ms. Wards informing her that she might be moved to another office, Ms. Wards telling her she had fought to hire her because her hiring had been questioned, appellant's being contacted on November, 1995 and informed her that she would be in a nonpay status due to an office furlough and not receiving a final decision on her request to have the ramp modified constituted factors of employment. The Office found that these incidents occurred but appellant did not show either that they constituted harassment or showed error or abuse by management. The Office, therefore, found that appellant did not establish any factors of her employment and failed to establish her emotional claim. It, therefore, found that the Office properly rescinded acceptance of appellant's claim. Further, the Office hearing representative rescinded the Office's January 28, 1998 decision, stating that "it was processed without due application of the appropriate processing guidelines, in accordance with the established Federal Employees' Compensation Act regulations."

By letter dated July 29, 1999, appellant requested reconsideration of the Office's decision. Appellant reiterated some of her earlier arguments such as how the move to another office would burden her physically as she would be unable to use her dog and she would have to do more walking while carrying her mask kit which was heavy. Appellant also stated that her conversations with Ms. Wards on October 25, 1995 "were anything but normal supervisor-employee discussion nor were they related to her performance." She stated that Ms. Wards requested "off the wall" actions related to the reviews and her request were not in compliance with agency policy "nor did they make any sense."

In a statement dated July 19, 1999, appellant's coworker, Tamra T. Peterson, described Ms. Wards' character, that she was vindictive and that she treated appellant harshly and with hostility. She stated that on October 25, 1995 in a telephone conversation, she heard Ms. Wards

tell appellant she was fired and one conversation ended with Ms. Wards saying, "Figure it out yourself. I don't have time for this shit today." Ms. Peterson stated that Ms. Wards "had total disregard" for appellant's condition. She stated that Ms. Wards felt threatened that appellant had an engineering degree, she described her relationship with Ms. Wards and stated that Ms. Wards was "always putting those around her down."

In a negotiated settlement with the EEOC dated April 6, 1996, the employing establishment agreed to pay appellant $5,500.00, Ms. Wards would provide a letter to appellant addressing her concerns raised in the complaint and the employing establishment agreed to cease further controversion of appellant's workers' compensation claim. The settlement stated that by entering into the settlement, the employing establishment did not admit that it, its officials or employees had violated the law.

By decision dated September 7, 1999, the Office denied appellant's request for modification.

The Board finds that the Office properly rescinded acceptance of appellant's claim for an emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[1] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decided that it erroneously accepted a claim.[3] To satisfy its burden, the Office cannot merely second guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.[4]

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 Act.[5] On the other hand, the

[1] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[2] *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993).

[3] *Gareth D. Allen*, 48 ECAB 438 (1997); *Alfonso Martinisi*, 33 ECAB 841 (1982).

[4] *Gareth D. Allen*, *supra* note 3; *Alfonso Walker*, 42 ECAB 129 (1980).

[5] 5 U.S.C. §§ 8101-8193.

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.[6]

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.[7] 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.[8]

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.[9] The issue is not whether the claimant has established harassment or discrimination under standards applied the EEOC. Rather the issue is whether the claimant under the Act has submitted evidence sufficient to establish an injury arising in the performance of duty.[10] To establish entitlement to benefits, the claimant must establish a factual basis for the claim by supporting allegations with probative and reliable evidence.[11]

In this case, contrary to the Office's findings, appellant has established at least one compensable factor of employment. In the October 25, 1996 telephone conversation with Ms. Wards, appellant contended that Ms. Wards told her that she would be fired if she did not verify the voucher as discussed. In her November 13, 1995 statement, Ms. Wards admitted that she told appellant that she was fired stating that "it was only an expression" and she knew she could not fire anyone. Appellant's coworker, Ms. Reed, stated that she overheard Ms. Wards, whose "voice was intimidating and who seemed to be quite agitated," tell appellant she was fired on a telephone conversation on October 25, 1995. Appellant's coworker, Ms. Peterson, also heard Ms. Wards tell appellant she was fired in a telephone conversation on October 25, 1995. Ms. Wards' telling appellant she was fired on the telephone on October 25, 1995 when in fact appellant was not being terminated was abusive toward appellant. Ms. Wards acted unreasonably in treating appellant that way. Since that verbal abuse constitutes a compensable factor of employment, the Office erred in rescinding the acceptance of appellant's claim for emotional distress. The Office therefore did not meet its burden of proof in showing that rescission of its prior acceptance was justified.

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

[7] *Clara T. Noga*, *supra* note 6 at 481; *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

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

[9] *Michael Ewanichak*, 48 ECAB 364 (1997); *Gregory J. Meisenburg*, 44 ECAB 527 (1993).

[10] *See Martha L. Cook*, 47 ECAB 226 (1995).

[11] *Barbara E. Hamm*, 45 ECAB 843, 851 (1994).

The September 7, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 11, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member