

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANE F. BISHOP and DEPARTMENT OF VETERANS AFFAIRS,
E.N. ROGERS MEMORIAL VETERANS HOSPITAL, Bedford, MA

*Docket No. 00-2826; Submitted on the Record;
Issued September 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

On August 31, 1998 appellant, then a 50-year-old registered nurse, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that she suffered from stress, headache, anxiety, panic attacks, nervousness, nightmares and agitation as a result of unsafe working conditions, low staffing, harassment and intimidation. Appellant alleged that her emotional condition was due to the stress from her federal employment. Specifically, appellant stated that downsizing resulted in staffing being below the minimal standards and that the staff was told to cope. She alleged that after a patient choked to death at lunch, she complained to the nursing union about the inadequate staffing. Appellant further alleged that she was harassed and intimidated at the employing establishment and that she had to work nonstop without breaks.

Appellant also submitted medical evidence to support her claim. The record contains progress notes and notes excusing appellant from work by Dr. James P. Casey, an internist, who treated appellant from January 22, 1998 to February 27, 1998 for stress, fatigue and migraines. He advised appellant on numerous occasions to refrain from her work and gradually concluded that stressful situations at work caused her problems. In his August 20, 1998 report, Dr. Casey excused appellant indefinitely from work, due to anxiety and panic attacks. He concluded: "Since her discharge date is in the near future and her work situation appears directly related to her panic attacks, I had advised her not to return to work."

Appellant was also seen by Dr. James E. Kolb, a Board-certified internist, on August 19 and December 23, 1997 for treatment for ocular migraine headaches, which occurred when she was working at her computer terminal. He excused her from work from August 22 through August 25, 1997 and from December 21 to December 29, 1997. The record also contains a doctor's note, by a physician, whose signature is illegible but who works at the Medical Center at Synmes in Arlington, Massachusetts, excusing appellant from working from January 5 to January 8, 1998.

By letter dated October 19, 1998, the Office of Workers' Compensation Programs requested further information from appellant and the employing establishment. By letter dated December 10, 1998, the employing establishment responded. In a letter dated December 4, 1998, the employing establishment's assistant chief of nursing services for the psychiatric department, Margaret Henderson, stated that at no time were there unsafe working conditions or insufficient staffing. She contended, rather, that any stress was caused by a reduction-in-force enacted in February 1998, wherein the staff including appellant was offered job counseling to "help them maintain stress within a coping level." Ms. Henderson noted that the reduction-in-force was rescinded in August 1998. She denied that appellant was the victim of harassment, intimidation, or repercussions. Ms. Henderson noted that appellant was transferred to several different nursing units and issues arose in each area.

In a decision dated April 22, 1999, the Office denied appellant's claim. Although the Office found that appellant had not established a compensable factor with regard to her allegations of harassment or intimidation, or in her allegations of understaffing, her workload and efforts to cope with it constituted a factor of employment. However, the Office denied appellant's claim, finding that she failed to provide rationalized medical evidence showing the existence of cause and effect relationship between appellant's emotional condition and her compensable work factors.

On March 20, 2000 appellant, through her attorney, requested reconsideration.

In support of her request for reconsideration, appellant submitted a medical report by Dr. Gerald S. Fredman, a Board-certified psychiatrist, dated March 9, 2000, which was prepared at the request of appellant's attorney. He conducted a two-hour psychiatric interview of appellant and reviewed her medical records and other documents with regard to her compensation case. Dr. Fredman concluded:

"In my opinion, the Adjustment Disorder with Mixed Anxiety and Depressed Mood was primarily caused by Ms. Bishop's inability to cope with her regularly assigned work duties. If her perceptions of harassment, understaffing and overwork are accurate, these situations also contributed to the Adjustment Disorder. In my view malingering is not present in this matter."

Appellant also submitted an investigative and summary analysis of her Equal Employment Opportunity complaint. In addition, appellant submitted two affidavits from the discovery in that case, one of Margaret McGovern, the evening nursing supervisor, dated April 29, 1998 and one of Mary Louise McCarthy, a staff nurse, also dated April 29, 1998. Ms. McGovern testified:

"Well, one thing I remember, that comes to mind is that when Jane was on, [she] was always alone to handle a unit. And we usually had an LPN or RN on duty to help. You really need t[w]o licensed people to handle medications and admissions. It gets very busy.

"And when Jane was there, [she] was always alone. He would never put another nurse on with her. It was very rare. She was there and she had to handle it all."

Ms. McCarthy testified:

“But then as the staff started to diminish a little bit there, people started leaving. It was almost impossible to take care of the patients and sit in front of a computer writing these elaborate treatment plans and leave the patients out fending for themselves. It’s just impossible to do.”

“And that [i]s what Jane ran into. That was what she ran into. [Jane] did n[o]t neglect the patients. She took care of the patients. [Jane] might have had the little paperwork that she couldn’t get caught up with and she tried, believe me.”

“But when you work days and there’s social workers, medical students, doctors, specialists and everything else going on, you know, family meetings, team meetings and you have to sit in on all of those during the day as Jane did and still give med[ication]s, it was like an impossible job to complete, what was put on her to compete in the time frame. I know.”

In a decision dated July 23, 2000, the Office denied modification of the April 22, 1999 decision.

The Board finds that this case is not in posture for decision.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.¹ To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) Factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.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 illness has some connection with the employment but nevertheless does not come within the coverage of workers’ compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of employment. Disability is not covered where it results from an employee’s frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee’s emotional reaction to her regular or specially assigned work duties or to a

¹ *Edward C. Heinz*, 51 ECAB ____ (Docket No. 99-992, issued September 12, 2000); *Martha L. Street*, 48 ECAB 641, 644 (1997).

² *Ray E. Shotwell, Jr.*, 51 ECAB ____ (Docket No. 99-2032, issued September 12, 2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

requirement imposed by the employment, the disability come under the coverage of the Federal Employees' Compensation Act.³

Appellant attributes her emotional condition, in part, to harassment and intimidation by the employing establishment. For harassment or discrimination to give rise to a compensable disability under the Act there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁴ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.⁵ Appellant cited no specific examples of harassment, nor did she provide any supporting evidence. Accordingly, appellant has not established a compensable factor with her general allegations of harassment.

Appellant also alleged that her emotional condition was caused by overwork due to staff shortages. In the initial decision, April 22, 1999, the Office found that appellant's regular workload and her efforts to cope with it were a factor of employment. Nevertheless, on reconsideration, the Office denied appellant's case without review of the medical evidence due to the fact that it found that she showed no compensable factors.

The Board has held that overwork may be a compensable factor of employment.⁶ In the case at hand, appellant, through her allegation that her efforts to cope with her workload caused her emotional condition, established a compensable factor of employment. Ms. McGovern stated that appellant handled the unit alone without another nurse to help her, and Ms. McCarthy stated: "It was almost impossible to take care of the patients and sit in front of a computer writing these elaborate treatment plans and leave the patients out fending for themselves." Furthermore, in an earlier statement, the employing establishment's assistant chief of nursing services for the psychiatric services contended that stress was caused by a reduction in staffing levels was offered job counseling to help them maintain stress within a coping level. Although a reduction-in-force would not be a compensable factor, appellant's inability to deal with the stress of her job because she was overworked due to the reduction-in-force would be compensable. Accordingly, appellant has identified a compensable factor of employment.

As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office did not analyze or develop the medical evidence, the case will be remanded to the Office for this purpose.⁷

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ See *Michael Ewanichak*, 48 ECAB 354 (1997); *Martha L. Cook*, 47 ECAB 226 (1995).

⁵ *James E. Norris*, 52 ECAB ____ (Docket No. 98-2293, issued October 5, 2000).

⁶ *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *William P. George*, 43 ECAB 1159 (1992); *Georgie A. Kennedy*, 35 ECAB 1151 (1984).

⁷ See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

The decision of the Office of Workers' Compensation Programs dated March 20, 2000 is set aside and the case remanded to the Office for further consideration consistent with this opinion.

Dated, Washington, DC
September 26, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member