

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA C. CARR and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION REGIONAL OFFICE, Lakewood, CA

*Docket No. 01-917; Submitted on the Record;
Issued August 15, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly refused appellant's request for reconsideration.

On June 21, 1999 appellant, then a 32-year-old file clerk, filed a notice of occupational disease alleging that she suffered from post-traumatic stress syndrome as a result of sexual harassment and a hostile work environment.

By letter dated August 10, 1999, the Office advised appellant of the factual and medical evidence required to establish her claim for compensation.

In a decision dated October 21, 1999, the Office denied compensation on the grounds that appellant failed to allege a compensable factor of employment and therefore failed to establish that she sustained an emotional condition in the performance of duty.

Appellant requested a hearing, which was held on August 30, 2000.

In a decision dated November 20, 2000, an Office hearing representative affirmed the Office's October 21, 1999 decision.

Appellant requested reconsideration by hand-delivered letter dated December 11, 2000, arguing that the Office hearing representative did not properly consider her testimony. She did not provide any additional evidence.

In a December 11, 2000 decision, the Office denied appellant's request for reconsideration.

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty.

In order to establish that an employee sustained an emotional condition in the performance of duty, the employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the emotional condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.¹ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.²

Workers' compensation law is not applicable 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. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.³ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁴

As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.⁵ However, the Board has also held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.⁶ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁷

In this case, appellant alleges sexual discrimination and a hostile work environment. Appellant stated that beginning October 1997 her supervisor, Greg Edwards, would approach her

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² *Victor J. Woodhams*, 41 ECAB 345 (1989).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Joel Parker, Sr.*, 43 ECAB 220 (1991).

⁵ See *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

⁶ See *Elizabeth Pinero*, 46 ECAB 123 (1994).

⁷ *Ruth S. Johnson*, 46 ECAB 237 (1994).

on Fridays and force her into a locked file room referred to as the “COVA” room where he kissed and hugged her. She alleged that if she refused to cooperate with his sexual advances then he would threaten to fire her. The last alleged occurrence was on May 8, 1998. Appellant further noted that Mr. Edward’s behavior later progressed to “butt-grabbing” and described her experience as having been molested.

Appellant also alleged that a coworker, Steven Clements, threatened her each day either verbally or by crushing her body up against the filing cabinet. She contends that Mr. Clements talked about shooting her or running her over with his car.

Appellant filed an Equal Employment Opportunity (EEO) Commission complaint alleging sexual harassment and her case was assigned to an investigator, Jack Frost. In a report dated April 30, 1999 prepared for the Office of Resolution Management, Mr. Frost advised that his investigation had resulted in a finding of no discrimination. He noted that the alleged incidents in the COVA room most often occurred between 4:00 p.m. and 4:30 p.m. and that there were no witnesses to corroborate appellant’s statements. Most of the employees who were interviewed by Mr. Frost had not had occasion to work later or be in or around the COVA room. There were no witnesses who testified having ever seen either Mr. Edwards or appellant leave the COVA room separately or together at the times alleged. Mr. Frost noted in his report that he found the supervisor’s statements to be more credible than appellant’s statements, as there were many discrepancies with respect to appellant’s description of the alleged events.

Appellant subsequently filed a second EEO complaint based on discrimination on July 2, 1999. She alleged that Mr. Frost, failed to accommodate her disabilities which included mild mental retardation and speech delays when questioning her with regard to her sexual harassment complaint. It was determined that appellant’s complaint should be forwarded to an administrative law judge for consolidation with the pending sexual harassment complaint filed against the employing establishment. The record contains copies of decisions dated September 21, 1999 and January 28, 2000 by the EEO pertaining to the viability of the complaint filed against Mr. Frost and the failure of the EEO to accommodate appellant’s special needs during the interview process.

Initially, the Board notes that appellant’s complaint that she was denied reasonable accommodation and her difficulties with the EEO investigator, Mr. Frost, are not compensable even if deemed factual. These matters do not involve appellant’s regularly assigned work duties and pertain to appellant’s disappointment with how her EEO complaint was investigated. Thus, the action is against the EEO and not the employing establishment. She would only be entitled to compensation if the administrative actions were undertaken by the employing establishment and there was evidence of error or abuse. The Board does not find any evidence of error or abuse by the employing establishment in the administrative handling of appellant’s sexual harassment complaint. The Board notes that appellant’s concerns were addressed by the EEO and are under consideration with the Office of Administrative Law Judges. Grievances and EEO complaints, by themselves, do not establish workplace harassment or unfair treatment.⁸

⁸ *Constance I. Galbreath*, 49 ECAB 401 (1998).

With respect to the allegations of sexual abuse and threats of violence by a coworker, the Board has held in order for harassment to give rise to a compensable disability under the Act, there must be evidence that the harassment or discrimination did in fact appear. Mere perceptions of harassment are not compensable under the Act.⁹

The Board finds no corroborating evidence to support appellant's allegations of sexual harassment and threats of violence by a coworker. Subsequent to the Office hearing, appellant submitted a witness statement from Valerie R. Steinhoff but the witness did not specifically discuss the incidents as described by appellant. She mainly discussed her experience with the coworker and thought that he "probably threatened" appellant. The witness statements lacks clarity and is speculative at best. It is insufficient to carry appellant's burden of proof in establishing that she was harassed at work by her coworker. While the Board has recognized the compensability of physical threats in the workplace, under the circumstances appellant did not submit sufficient evidence to establish the factual basis of the alleged incidents.¹⁰

Because appellant has failed to allege a compensable factor of employment, the Board finds that she failed to establish that she sustained an emotional condition in the performance of duty. Accordingly, the Office properly denied compensation.¹¹

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹² The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹³ When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁵ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a

⁹ *Bernard Snowden*, 49 ECAB 144 (1997); *Ronald C. Hand*, 49 ECAB 113 (1997).

¹⁰ *Ronald C. Hand*, *supra* note 9.

¹¹ The Board does not have jurisdiction to consider on appeal evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

¹² 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ 20 C.F.R. § 10.606(b) (1999).

¹⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁵ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁶

In this case, appellant's reconsideration request did not show that the Office erred in applying or interpreting a specific point of law. Appellant did not advance a relevant legal argument nor did she submit any new and relevant evidence. Because appellant did not satisfy one of the three requirements of section 8128, the Office properly refused her request for reconsideration on the merits.

The decisions of the Office of Workers' Compensation Program dated December 11 and November 20, 2000 are hereby affirmed.

Dated, Washington, DC
August 15, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).