

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA T. GANO and DEFENSE COMMISSARY AGENCY,
AIR FORCE BASE, Little Rock, AR

*Docket No. 02-1327; Submitted on the Record;
Issued August 13, 2002*

DECISION and ORDER

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

The issue is whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of employment.

On December 26, 1999 appellant, then a 42-year-old supply technician, filed an occupational disease claim, alleging that stress from her new job increased her fears and depression. She stopped work on September 30, 1999. In an accompanying statement, appellant related that she had a previously accepted 1995 claim for work-related major depression and dysthymia. Regarding her current claim, appellant contended that she was repeatedly asked to do such tasks as plunge toilets, was told by management that she could have an office by herself, which she decorated on overtime but was then told to move out and that the job, because of its nature, was very demanding and almost everyday she had to handle an emergency. She stated that this caused headaches and other autoimmune diseases which were aggravated by stress. Appellant noted that she had been treated for depression in Virginia from 1995 until she moved to Arkansas in 1996 and had again begun treatment. She further submitted medical evidence.

The employing establishment submitted a statement advising that on only a few occasions was appellant asked to perform additional assignments, such as plunging toilets, which could be considered as "other duties assigned" under her position description. The employing establishment further stated that management had gone out of its way to accommodate appellant, noting that it had initially provided an office which she painted, but that the office space was needed for use by the safety officer and for computer training and testing. Finally, the employing establishment advised that appellant's position, supply technician, required 40 hours of work per week but was not demanding.

In a January 28, 2000 letter, Barbara Maye, an employing establishment personnel management specialist, advised that appellant was hired under the Priority Placement Program on September 28, 1998 after she had resigned from her previous employer. Ms. Maye further indicated that an individual hired under this program was not to be temporarily physically

incapacitated and advised that the plunging toilet incident was isolated and was subsequently corrected.

In a June 23, 2000 letter, appellant advised that a “Ms. Rosier” was retaliating against her.

In a July 18, 2000 statement, appellant’s supervisor Edward Morrison disagreed with appellant’s allegations. Mr. Morrison stated that she was provided with sufficient time to complete all assignments and the employing establishment was lenient in granting her leave due to health problems. He further indicated that no staffing shortages occurred during her tenure and that she performed her duties as required but had a difficult time working a full 40-hour week due to health problems.

By decision dated January 8, 2001 and finalized January 10, 2001, the Office of Workers’ Compensation Programs found that appellant’s emotional condition was not sustained in the performance of duty.

In a letter dated January 19, 2001, appellant requested a review of the written record, noting she was claiming that her 1995 work-related injury was exacerbated by the stress at her present employment and stated that she was “not the right person for that job at that particular time.” She contended that it was not one single incident that caused her condition, but a “multitude of many small ones.” Appellant specifically contended that her supervisor, Mr. Morrison, harassed her by screaming at her and taking pictures of her even though she requested that he not and implied that she was fat. She also contended that Mr. Burke harassed her by quoting scriptures and making sexually suggestive statements and generally embarrassed her by his behavior. Appellant further contended that when she asked for time off to visit her psychologist, Mr. Burke placed her on leave restriction, and that a coworker, Jack Strickland, lied about her to the area manager, Mr. Pilley. Appellant indicated that she had a hard time working a 40-hour week due to her health, which was impacted by the 1995 employment injury. She further stated that since leaving her current employment, she had continued to be harassed, including being placed on absent-without-leave status, failure to quickly determine her disability retirement and delaying filing the instant claim. Finally, appellant stated that because of interference by the employing establishment, she had been unable to concentrate on her therapy which caused her mental health to continue to deteriorate. She also submitted evidence regarding her previous claim.

By decision dated June 18, 2001, an Office hearing representative remanded the case for further development. While the hearing representative agreed with the findings in the January 10, 2001 decision, he found that with her January 19, 2001 request for review of the written record, appellant had listed a number of new alleged employment factors. The hearing representative remanded the case to the Office to determine if appellant had established any compensable factors of employment and, if so, whether these factors caused or contributed to her claimed emotional condition.

Following remand, by letter dated June 29, 2001, the Office submitted appellant’s January 19, 2001 letter to the employing establishment for review. The record does not indicate that the employing establishment responded.

By decision dated July 31, 2001, the Office denied appellant's claim on the grounds that she failed to establish a compensable factor of employment. The instant appeal follows.

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

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹ Workers' compensation law is not applicable to each and every injury or illness that is somehow related to 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.² 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.³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁵ When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out these duties, and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁶

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.⁷ This includes matters

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

² 5 U.S.C. §§ 8101-8193.

³ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ 28 ECAB 125 (1976).

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 3 at 130.

⁷ See *Gregory N. Waite*, 46 ECAB 662 (1995).

involving the training or discipline of employees. In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.⁸

Furthermore, 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.⁹ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. The issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁰

Regarding appellant's allegations that the employing establishment wrongly placed her on leave without pay, the Board finds that this relates to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and does not fall within the coverage of the Act.¹¹ Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties, and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹² There is no evidence in the instant case to indicate that the employing establishment erred or acted abusively. Thus, appellant has not established a compensable employment factor under the Act with respect to this administrative matter.

Similarly, regarding appellant's complaint that she was initially assigned an office which she personally decorated, the employing establishment explained that the space became needed for other uses. The Board therefore finds that this was a proper exercise of administrative function on the part of the employing establishment and there was no error or abuse in this regard.¹³

Regarding appellant's contention that she was subjected to harassment and humiliation by Mr. Morrison, Mr. Burke and Mr. Strickland, 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.¹⁴ Unsubstantiated allegations

⁸ *Ruth S. Johnson*, 46 ECAB 237 (1994).

⁹ *See Michael Ewanichak*, 48 ECAB 354 (1997).

¹⁰ *Id.*

¹¹ *See Janet I. Jones*, 47 ECAB 345 (1996).

¹² *Id.*

¹³ *See Gregory N. Waite*, *supra* note 7.

¹⁴ *See Michael Ewanichak*, *supra* note 9.

of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. The issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁵ In the instant case, while appellant submitted a number of personal statements regarding the perceived harassment by Mr. Morrison, Mr. Burke and Mr. Strickland, she provided no evidence in support of these contentions. The employing establishment, however, submitted a number of statements countering appellant's contentions.

The Board, though, finds that appellant's allegation that she had to plunge a toilet would be considered a factor of employment as part of her assigned job duties. The employing establishment confirmed that this in fact did occur. Nonetheless, as appellant submitted no rationalized medical evidence to substantiate that this one incident caused her condition, she did not establish that she sustained an emotional condition due to this factor.¹⁶

The Board, however, finds that appellant also alleged that her current medical condition was causally related to her previously accepted condition. The medical evidence in the instant case includes a December 22, 1999 report in which Alan Kauffman, a clinical psychologist, who diagnosed major depressive disorder, dysthymic disorder, pain disorder associated with both psychological factors and migraine headache, breathing-related sleep disorder and post-traumatic stress features. He advised that her condition was due, in part, to the traumatic to which she was exposed in 1995, concluding that her condition appeared to be chronic and had been "significantly exacerbated by the work trauma" and noted that her symptoms intensified after her return to work. In a report dated January 12, 2000, Dr. Kauffman advised that appellant had been recently hospitalized for depression.

Dr. George Konis, a resident physician in family practice, provided a duty status report dated March 17, 2000 in which he diagnosed depression and advised that appellant needed psychiatric evaluation. In an April 27, 2000 duty status report, Dr. Irving Kuo, who is Board-certified in psychiatry and neurology, noted clinical findings of severe depression with decreased sleep, decreased energy, psychomotor slowing and suicidal thoughts and diagnosed major depressive episode, recurrent, severe, without psychosis. He advised that appellant could not work. Dr. Jody Peebles, a resident physician in psychiatry, provided duty status reports dated May 1, 15, 23, June 7 and 19, 2000 in which she repeated Dr. Kuo's findings and conclusions. In a report dated June 7, 2000, Dr. Peebles noted a previous suicide attempt and diagnosed major depression, recurrent, severe, without psychotic features and dysthymic disorder. The report was countersigned by Dr. Kuo.

In a report dated September 20, 2000, Dr. Charles Schultz¹⁷ noted appellant's complaints of medically intractable headaches that were occurring on a daily basis. He noted her history of depression and diagnosed headaches, secondary to greater and lesser occipital neuralgia with a

¹⁵ *Id.*

¹⁶ See discussion of medical evidence *infra*.

¹⁷ Dr. Schultz' credentials are not known.

tension headache component, neck pain, history of a connective tissue disorder and depression and advised that she could not work.

The case record before the Board contains scant evidence regarding the prior claim.¹⁸ The Board has held that “when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant’s own intentional conduct.” Dr. Kauffman attributed appellant’s condition, in part, to her 1995 employment injury and residual symptoms. As the Office did not associate appellant’s present and prior claims, the Board will remand the case to the Office for consolidation of the two case records, to be followed by an appropriate *de novo* decision on the merits of the claim.¹⁹

The decision of the Office of Workers’ Compensation Programs dated July 31, 2001 is hereby vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
August 13, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ The Board notes that the instant case was adjudicated by the Office under file number 162000760 whereas her prior claim was adjudicated under file number 250469333.

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- File Maintenance and Management, *Doubling Case Files*, Chapter 2.40000.8(c)(2-00) (February 2000).