

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY E. HOLLAND and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 01-2094; Submitted on the Record;
Issued December 10, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

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

On November 26, 1997 a 52-year-old Internal Revenue Service (IRS) agent, filed an occupational disease claim alleging that she sustained an emotional condition as a result of a number of employment incidents and conditions. Appellant stopped work in October 1997.¹

In an accompanying statement, appellant indicated that the factors that led to her emotional condition included: problems with her new branch chief, who found fault with everything she did; working long hours to meet production demands; being involuntarily moved from management to field work; loss of job satisfaction and reputation, which led to loss of self-esteem; feeling trapped; being asked to retaliate against an employee who had filed a grievance; being discriminated against because she was a woman; being frustrated with disparate treatment of employees; being left out of management parties due to an "old boys network"; being attacked by Dan Miller during management training meeting by being screamed at; improperly being reviewed; the death of a coworker, Val Cunningham; being harassed by management; anxiety attacks about reviewing a case with eight bankers' boxes; and difficulty carrying field agent equipment.

In a November 7, 1997 report, Dr. Margaret November, a Board-certified psychiatrist, checked a box "yes" that inquired as to whether or not she believed the condition was caused or aggravated by an employment activity and stated "see attached." In an attached report, Dr. November indicated that appellant's stress at work contributed to her depression. Dr. November indicated that appellant felt discriminated against by her branch chief and her coworker, Mr. Miller, as he started finding fault with everything she did. She indicated that,

¹ Appellant asserts that she worked through October 1997 and returned on July 20, 1998 until she retired on disability.

since 1995, appellant has had increasing depression from that stress which included being removed from her position, without a hearing in a publicly humiliating manner and being intimidated during meetings where she had to leave because she was to blame for her group's performance. Dr. November indicated that appellant felt betrayed and "sacrificed" by an agency to which she devoted most of her working life and that appellant was affected when she was transferred to another office, many miles from her house and demoted to a field agent position, losing her work group, all of her colleagues and support. She indicated that appellant felt disoriented with the long drives, had panic symptoms and was too depressed to absorb any of the new training. Dr. November indicated further that appellant was terrified that she was being "set-up" to be fired, and simultaneously felt unable to do the work because of depression, eye problems, and lack of control of her work environment. She opined that appellant's symptoms would become extremely exacerbated when she would have any interactions or thoughts about work.

In a December 29, 1997 statement, the employing establishment controverted appellant's allegations.

By letters dated February 3, 1998, the Office of Workers' Compensation Programs advised appellant and the employing establishment that additional factual and medical evidence was needed to establish her claim.

The employing establishment responded on February 26, 1998, noting that appellant was not entitled to sit in as branch chief, as acting assignments were handled on an as needed basis; appellant's Equal Employment Opportunity (EEO) claim was dropped and no sex discrimination was found to exist; operational reviews were needed to address managerial positions and were consistently applied to all managers; disagreement with appellant's description of a termination involving a trainee; denied that data bases changed every month and that they expected trainee's statistics to be \$1,000.00 per hour; denied a manager's evaluations were based on statistics; denied allegations concerning Stanley, Kokka, Sawicki, Lauer and Allen; denied that promotions were made unfairly; confirmed that all employees were treated fairly; denied a hostile environment for women; denied an agency sponsored party occurred to which appellant was not invited; denied that appellant worked long hours with the exception of 15 hours over 2 weekends; and denied demoting appellant due to her EEO complaint.

In a report dated March 24, 1998, Dr. Diane C. Narhi, a Board-certified internist, indicated that appellant had active rheumatoid arthritis with joint inflammation in multiple joints. She stated that, due to her active arthritis, appellant would have difficulty with strength and mobility, difficulty lifting heavy objects, difficulty walking up stairs or walking for long periods of time, and would have considerable challenges with carrying around heavy computers and doing a great deal of computer work secondary to her deforming rheumatoid arthritis. She opined that this would be a permanent aggravation of her underlying disease if she continued to work in the field noting that she would have difficulty with sitting for long periods of time as well and may have difficulty with a great deal of travel.

In a May 28, 1998 report, Dr. F. Ray Nickel, a Board-certified orthopedic surgeon, indicated that appellant's medical condition was aggravated temporarily by the walking and climbing activities which were required in the course of her employment as a field agent, starting

on June 10, 1997. He opined that the temporary aggravation therefore would have, terminated on or about September 1, 1997.

In an undated statement under oath, Rosemary Lippert, a certified public accountant, attested to circumstances concerning an audit that included appellant and her supervisors. She stated that it appeared to her that the supervisors were gathering information to substantiate problems with appellant's managerial abilities.

By decision dated June 4, 1998, the Office denied appellant's claim, finding that the evidence failed to demonstrate that the claimed emotional condition arose in and out of the performance of appellant's federal duties. The Office identified three factual allegations that included: the death of appellant's coworker; an incident wherein Mr. Stanley observed appellant teaching prevention of sexual harassment (POSH) in Oxnard, and the training in July 1997. However, the Office found that the medical evidence was insufficient to establish a causal relationship.

Appellant requested a hearing, which was held on January 25, 1999.

By letter dated March 15, 1999, appellant provided additional information.

By decision dated March 29, 1999, the Office hearing representative affirmed the Office's June 4, 1998 decision, in part, and remanded the case regarding whether appellant sustained a physical injury caused by employment factors.

By letter dated May 19, 1999, the Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion.

In a report dated June 17, 1999, Dr. Bleecker noted appellant's history of injury and treatment. He concluded that appellant suffered from preexisting rheumatoid arthritis of the hands, wrists and feet. However, Dr. Bleecker indicated that appellant's temporary fieldwork assignments, which involved driving, carrying equipment and walking, might have contributed to a temporary aggravation of this condition.

In a supplemental report dated July 18, 1999, Dr. Bleecker clarified that the precise period of temporary and work-related aggravation occurred from June 10 until August 1997, which was the period of time appellant was in the field.

By decision dated August 6, 1999, the Office accepted that appellant suffered a temporary aggravation of her rheumatoid arthritis of her feet which had ceased.² The Office denied modification of the mental health component of the claim.

By letter dated February 22, 2000, appellant requested reconsideration of the March 29 and August 6, 1999 decisions. Appellant provided additional information in support of her claim.

² The described conditions were, however, accepted for a temporary aggravation for the approximate period, May 10, 1995 to October 1997.

In a February 23, 2000 statement, appellant asserted: that the factual evidence provided by the employer was hearsay and the employer withheld or fabricated evidence critical to her claim; that the Office hearing representative erred as to her gender in his decision and failed to consider EEO evidence; that he erred as to the specialty of one of the medical providers involved in the case; that the Office failed to consider a volume of evidence establishing error and abuse on the part of the employer (including “collusion,” “retaliation” through forced reassignment, removal without due process, threats and other forms of verbal abuse, among other factors); that the Office hearing representative issued a decision that was both “prejudicial and adversarial”; that the Office hearing representative erred in directing the Office to arrange a second opinion examination with an orthopedic surgeon rather than a rheumatologist; that the assigned claims examiner erred in her statement of accepted facts, writing that [appellant] abandoned her position in October 1997 when, in fact, she worked until January 15, 1999 and retired on disability” because the employer failed to make adequate accommodation for her as a qualified injured worker so that she was forced into retirement in spite of her remaining work capacity; and the Office failed to pay billing associated with her claim.³

In a March 22, 1998 report, Dr. November noted appellant’s history of injury and treatment. She noted several employment incidents as causing appellant’s condition, including an incident in June 1995 wherein Mr. Stanley had a major disagreement with her during a meeting, gave her minimal ratings, and tried to get her to evaluate employees on the basis of statistics. Dr. November noted that appellant was depressed about her demotion, and had other physical problems including rheumatoid arthritis. She diagnosed major depression, severe without psychotic features and post-traumatic stress disorder and indicated that the following factors of employment caused appellant’s condition: verbal abuse; overwork; hostile environment; lack of support and out right harassment by superiors; scapegoating; demotion from a managerial position to a field agent position which she was “out of training for”; transfer to a location far from her home to which her severe rheumatoid arthritis made it difficult to commute; disregarding her plea to transfer to a closer location for medical reasons; and finally humiliation before coworkers; and people in the field. Dr. November recommended a six-month absence from work and no interaction with anyone from her work for six months and psychotherapy.

³ Appellant provided statements from Maureen Glynn-Shirley and Lilith Imbrogno, revenue agent, a February 27, 1998 employing establishment/EEO Commission decision finding that appellant had established a *prima facie* case of retaliation; portions of the EEO investigative file with several annotations and an undated declaration from Rosemary Lippert; reference materials pertaining to a performance management appraisal.

By decision dated September 8, 2000, the Office denied modification of the August 6 and March 29, 1999 decisions.⁴

By letter dated December 2, 2000, appellant requested reconsideration.

In support of her request, she submitted additional evidence.⁵

By decision dated May 31, 2000, the Office denied appellant's request for a merit review of her claim on the grounds that the evidence submitted was repetitious, and/or irrelevant and thus, insufficient to warrant a review of its prior decision.

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

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 his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.

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.⁶ Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.⁷

⁴ The Office accepted two factors of employment based on the April 24, 2000 decision of the EEO Commission. The Office determined that the employing establishment abused its discretion in issuing appellant a negative performance appraisal, due, in part, to her EEO activities on June 26, 1996 and that the employing establishment abused its discretion in reassigning appellant in partial retaliation for her instigation of "union distrust of branch management policies.

⁵ The additional evidence was comprised of: a four-page letter dated December 2, 2000 requesting reconsideration; a November 24, 2000 report from Dr. November; copies of the June 4, 1998 decision; a June 5, 1998 letter from the Office, pages 35, 50 and 54 of the June 4, 1998 Memorandum to the Director; an "Investigative File of Equal Employment Opportunity Complaint" dated August 27, 1997; a copy of the September 8, 2000 letter from the Office and a copy of page four of the September 8, 2000 Memorandum to the Director; a copy Dr. Nickel's May 28, 1998 report; an undated four-page "Investigative File Equal Employment Opportunity Complaint"; an Internal Revenue Service Memorandum dated September 22, 1998; a copy of the front-page of "Federal Employment Law Practitioner's Handbook 1998-1999" and copies of pages 271 through 274 of a book containing 29 C.F.R. CH. XIV §§ 1614.201-3 (Age discrimination in Employment Act, Equal Pay Act, and Rehabilitation Act); a copy of a four-page typed declaration of John H. Kokka dated April 5, 1999; and a copy of a two-page National Treasury Employees Union memorandum from James Minton to David Dean dated November 10, 1998.

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Michael Thomas Plante*, 44 ECAB 510 (1993).

In the instant case, appellant alleged that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly denied leave, improperly assigned work duties, and unreasonably monitored her activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.⁸ 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.⁹ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁰ The record shows no evidence of error or abuse with respect to these allegations. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.¹¹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹² In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors or coworkers.¹³ Appellant alleged that supervisors and coworkers made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹⁴ The record does contain witness statements from Ms. Lippert, Ms. Glynn-Shirley, and Ms. Imbrogno, however, these witnesses made general statements and did not refer to specific allegations to establish that the employing establishment

⁸ See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁹ *Id.*

¹⁰ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹¹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹² *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹³ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹⁴ See *William P. George*, 43 ECAB 1159, 1167 (1992).

subjected appellant to harassment or discrimination. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant also alleged that she worked long hours to meet production demands, however, the employing establishment denied this with the exception of 15 hours over 2 weekends. The Board has held that emotional reactions to situations in which an employee is trying to meet his position requirements are compensable.¹⁵ With the exception for the two weeks noted by the employing establishment, appellant has not submitted sufficient evidence to support her general allegations of overwork or that she was given unreasonable deadlines.

Regarding appellant's allegation that she was involuntarily transferred from management to a field agent position, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.¹⁶

Regarding appellant's allegation that she developed stress due to insecurity about maintaining her position, the Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Act.¹⁷

Regarding appellant's allegations that her Branch Chief found fault with everything she did, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.¹⁸

Appellant alleged that she felt trapped, and frustrated with disparate treatment of employees, and was left out of management due to the "old boys network," and even left out of parties. The Board has held that an employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.¹⁹

The Office found that appellant substantiated several compensable factors of employment. In November 1996, Mr. Stanley came down and watched appellant present training on POSH at the Oxnard, California facility. The Office found that appellant's reaction

¹⁵ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

¹⁶ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

¹⁷ See *Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

¹⁸ See *Michael Thomas Plante*, *supra* note 7.

¹⁹ See *David M. Furey*, 44 ECAB 302, 305-06 (1992).

to Mr. Stanley being present while she taught the class would be in the performance of duty. It was determined that the Branch Chief's were required to attend POSH training sessions with employees in the branch in order to demonstrate management commitment to POSH policy. It was determined that Mr. Stanley was not present for the purpose of observing appellant teaching the class. The Office also found that, on July 27, 1997, the class material was very difficult and appellant did not feel that she could apply it. Appellant passed the class. It was determined that reactions arising out of performance of the training was compensable. Further, it was noted that the employing establishment abused its discretion in issuing appellant a negative performance appraisal, due in part, to her EEO activities and reassigning appellant in partial retaliation for her instigation of "union distrust of branch management policies" on June 26, 1996.²⁰

Because appellant substantiated four compensable factors of employment, the Board will examine the medical evidence to determine whether it establishes that these factors contributed to her emotional condition.²¹

In a report dated November 7, 1997, Dr. November noted that appellant's condition was caused or aggravated by her employment activity. She elaborated by indicating that that appellant's stress at work contributed to her depression. Dr. November described the stress appellant experienced with her Branch Chief, as he found fault with everything she did, that the stress also came from being removed from her position; without a hearing in a publicly humiliating manner, and being intimidated during meetings where she had to leave because she was to blame for her group's performance. She also cited as factors affecting appellant's condition that she felt betrayed and "sacrificed" by an agency to which she devoted most of her working life and that appellant was affected when she was transferred to another office, many miles from her house and demoted to a field agent position, losing her work group, all of her colleagues and support. Dr. November indicated that appellant felt disoriented with the long drives, had panic symptoms and was too depressed to absorb any of the new training. Dr. November indicated further that appellant was terrified that she was being "set-up" to be fired, and simultaneously felt unable to do the work because of depression, eye problems and lack of control of her work environment. She opined that appellant's symptoms would become extremely exacerbated when she would have any interactions or thoughts about work. In her March 22, 1998 report, she added that the following factors of employment caused appellant's condition: verbal abuse; overwork; hostile environment; lack of support and out right harassment by superiors; scapegoating; demotion from a managerial position to a field agent position which she was "out of training for"; transfer to a location far from her home which her severe

²⁰ In the original decision, it was noted that the appellant's reaction to her coworker's death was deemed to be in the performance of duty. However, the Office subsequently determined that this conclusion was not consistent with the Board's decisions and found that her reaction to her coworker's death was outside the scope of her federal employment.

²¹ Appellant's burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factors. *William P. George, supra* note 14.

rheumatoid arthritis made it difficult to commute; disregarding her plea to transfer to a closer location for medical reasons; and finally humiliation before coworkers; and people in the field.

In the instant case, the medical evidence is insufficient to meet appellant's burden of proof. However, this does not mean the Office may disregard the evidence. The existence of causal relationship regarding appellant's emotional condition is supported by appellant's physician. Dr. November provided a history and some type of rationale for her opinion. Further she cited as part of the causes for appellant's condition, the demotion from a managerial to field agent position and the transfer, as well as treatment by the employing establishment. Although, her report was not fully rationalized with explanations, no Office medical adviser commented on the case regarding appellant's emotional condition. Under such circumstances, while the reports of Dr. November are insufficient to establish causal relationship between appellant's condition and the employment factors, they are sufficient to require further development of the record.²² When an uncontroverted inference of causal relationship is raised, the Office is obligated to request further information from an employee's attending physician.²³

On remand the Office should prepare a detailed statement of accepted facts based on a thorough review of the case record and further development as necessary. Appellant should then be referred, together with that statement, and the entire case record to a Board-certified psychiatrist, for evaluation and a rationalized opinion on causal relationship between the employment factors to be considered and the emotional condition.

²² *Lois J. Kilbourne*, 27 ECAB 97 (1975).

²³ *John J. Carlone*, 41 ECAB 354 (1989).

The May 31, 2001 and September 8, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further development as outlined above and for a *de novo* decision.

Dated, Washington, DC
December 10, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member