U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BENZENA M. BROWN and DEPARTMENT OF THE ARMY, DEFENSE FINANCE & ACCOUNTING SERVICE, San Bernadino, CA

Docket No. 00-2156; Oral Argument Held September 19, 2001; Issued January 25, 2002

Appearances: *Benzena M. Brown, pro se*; *Thomas G. Giblin, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that her emotional condition is causally related to factors of her employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a merit review.

On May 2, 1997 appellant, then a 48-year-old account technician, filed an occupational disease claim alleging that her stress was due to factors of her employment. Specifically, she related her stress to continuing harassment from Mr. Greiner, demeaning statements made by Mr. Greiner and being forced to work under his supervision. She also noted that she had filed a discrimination complaint.

In an August 6, 1997 equal employment opportunity report, appellant alleged discrimination based upon race, sex religion, mental disability, age and reprisal. Allegations included her supervisor allegedly saying to her that "'its part of your heritage', (sic) when he referred to comments made by a Black associate about the large volume of work he had to perform" and that the supervisor had received counseling for this remark. Appellant also alleged that her supervisor denied her request for overtime while granting it for other individuals. The report found:

> "[T]here were a number of things that happened which caused her to feel that she was discriminated against. During the June/July 1996 time frame, [appellant] took a reassignment to help Delores Pritchett, an associate in customer service who had child care problems caused by having to work mandatory overtime. Brown agreed to switch positions with Pritchett since they were both GS-4's. The supervisor in this department was Henry Greiner. [Appellant] said that after starting in this department several things happened that she ignored. However the incident that she could not ignore was Greiner's accusation of one hour overtime

abuse…. [Appellant] was reassigned from under Greiner's supervision in Vendor pay."

Another incident noted in the report involved her reassignment to Customer Service, Branch Chief Dorr required her to have experience while not requiring Chris Sedback (a white female) to have the same level of experience. The report indicated that appellant was told she could work 40 hours with no overtime in the security position for files in Customer Service, but after her reassignment to Vendor Pay she discovered that Ruby Ervin (white female), her replacement in the Security Room, was allowed to work overtime. Appellant had requested a briefing, was denied, but Mr. Greiner gave an hour and half briefing to Chris Sedback. Another incident occurred when appellant was not notified of a support clerk position vacancy despite the fact that her name was on the referral list and the other candidate was Delores Pritchett. After Pritchett declined the position, appellant learned that her name would be added to a group which would be considered, but this did not happen. The person who was ultimately selected for this position was Michael Porter who was a white male from the Army. In addition appellant "was told by Chief Dorr that the optional part of the form (ethnic identification) had to be filled out. [Brown] objected to this and asked for a meeting with Schelling and Sandy Mercaelel" which did not occur. Appellant also found Mr. Schilling's using statements regarding women and minorities to be offensive. Lastly, it was noted:

"Another incident occurred when she was at a meeting in her current department. Her supervisor, Sandy Mercaelel, made a statement that all should be happy, if they were not, she would be send them to a department where they could be happy. Brown said that she was not happy. Sandy said that she would meet with her after the meeting."

By decision dated March 17, 1998, the Office denied appellant's claim on the basis that she failed to establish fact of injury.

By letter dated March 24, 1998, appellant requested an oral hearing that was held on April 29, 1999. At the hearing appellant testified regarding the incidents she believed contributed to her stress. She testified that Mr. Greiner yelled and screamed at her a lot during the first month she was in her position. Mr. Greiner accused her of abusing overtime and would not explain her job function when she asked him about her duties. After being in her job two days, appellant testified that the work had been back logged for about a month and she "had just about caught the section back up" when Mr. Greiner scolded her for the backlog. During this incident, Mr. Greiner was standing in front of her desk shaking his hands at her and yelling at her, which caused her feel threatened and intimidated. Appellant testified that whether or not she was under Mr. Greiner's supervision, "he went to other supervisors and complained" about her. Appellant also testified regarding Mr. Greiner's racial statement to Lorenzo Mills and Mr. Schilling who informed appellant "that Henry was counseled and told not to use statements like that in front of minorities and women." Appellant did not report this incident because "at that time Mr. Schilling had really scared me." Subsequently, appellant was again reassigned to Mr. Greiner. Appellant stated that due to the high volume of work that her supervisor directed her to discontinue her work-related stress treatment. Another incident involved Nina Brown, a co-worker, who read passages of the bible to appellant because Ms. Brown believed appellant's stress was due to her lack of religious conviction. At this point, appellant was in a trainee

position and Ms. Brown was going to provide her training. Appellant requested another trainer because she felt uncomfortable with Ms. Brown "trying to use her religious beliefs" on her and was told no.

Appellant submitted statements from Mr. Mill, Yvette M. Hill and Desiree Brown who all stated that appellant appeared to be stressed from her job.

The record contains no evidence of the employing establishment responding to appellant's allegations or the Office informing the employing establishment of her allegations.

In a decision dated August 17, 1999, the hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant had established one compensable factor which was that Mr. Greiner and Mr. Schilling had made demeaning racial comments. However, she found the medical evidence insufficient to support a causal relationship between her stress and the one compensable factor.

In a report dated January 29, 1999, Dr. Kalika Chander, an attending Board-certified psychiatrist, diagnosed major depression due to work related stress. She noted that appellant related that she was work in a hostile work environment and was victimized due to this.

By letter dated October 29, 1999, appellant requested reconsideration.

In an October 29, 1999 report, Dr. Harry G. Lewis, an attending Board-certified psychiatrist, diagnosed depression due to work-related stress. He noted that appellant returned to work on February 2, 1999 and appeared to be doing well.

On November 18, 1999 the Office denied appellant's request for a merit review.

In a January 1, 2000 report, Dr. James F. Shalicky, Ph.D., a clinical psychologist, diagnosed adjustment disorder due to stress at her employment. Appellant related the following employment incidents:

> "[A]round November of 1996, after an episode of unfavorable statements reported by her to her director, a series of accusations began. [Appellant] was labeled as being lazy and unable to function. She was also referred to as an unfit employee.… [P]rior to this incident, she was referred to as a good employee and appointed by the director as one of the agency's Equal Employee Counselors. After reporting the incident, [appellant] says she was constantly receiving remarks and yelling episodes from her supervisor."

On November 2, 1999 an OCI investigation Supervisor Jan Iverson stated, "She and other supervisors were aware that [appellant] had suffered work-related stress and that she had also suffered from stress but did not file a claim for it." She also stated that, "The attitude of the staff is that [appellant] was lazy and unproductive." As a result of this [appellant] was not assigned a regular schedule task as other employees were. She did not know her daily schedule from one day to another. In addition to not knowing her schedule, [appellant] received daily counseling where scripts (sic) were read to her from the daily word, because a fellow employee felt she was in need of spiritual help. [Appellant] experienced anxiety and panic attacks and while on the job

in front of fellow employees she was told she needed counseling. The patient reports being yelled and accused by Henry Greiner (sic) and then referred to Sandy M. for something she was unaware of. [Appellant] began to feel shut down mentally. She was scheduled for training class but due to stress was unable to pass the class. [Appellant] had attended classes prior to this incident and passed without distress."

Dr. Shalicky opined that "the stressful events and trauma did occur" and that "[t]he variables and alleged harassment and factors associated with the emotional trauma did bring about a harmful stated to the patient." Lastly, he attributed 75 percent of appellant's emotional condition to be employment related and 25 percent to be nonindustrial.

In a merit decision dated January 31, 2000, the Office denied appellant's request for modification.

On May 30, 2000 the Office denied appellant's request for modification in a merit 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 duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7] Once the Office undertakes development of the record it has the responsibility to do so in a proper manner.[8] In the instant case, the Office failed to properly develop the factual record.

Appellant alleged that her emotional condition was due to harassment. To the extent that disputes and incidents alleged as constituting harassment by coworkers and supervisors are established as occurring and arising from appellant's performance of her regular or specially assigned duties, these could constitute employment factors.[9] For harassment or discrimination to give rise to a compensable disability, there must be evidence 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.[10]

Appellant alleged that Mr. Greiner, her supervisor, said that it was part of heritage when she questioned him about comments he had made to a Black coworker who had expressed concern regarding the large volume of work he had to perform. Mr. Greiner received counseling for this remark. The hearing representative found that this incident was a compensable work factor and the Board finds that the evidence supported that the supervisor used a derogatory epithet in reference to appellant.[11]

Regarding appellant's remaining allegations of harassment, sexual discrimination and religious discrimination, appellant did not submit any corroborating witness statements. However, she did submit an August 6, 1997 equal employment opportunity report which found that a number of incidents causing appellant to feel discriminated against had happened. The record does not contain any evidence that the Office submitted a copy of appellant's allegations to the employing establishment for comment. Thus, none of appellant's allegations of

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[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *Henry G. Flores*, 43 ECAB 901, 905 (1992).

[9] *Marguerite J. Toland*, 52 ECAB ___ (Docket No. 99-1989, issued March 9, 2001).

[10] *Reco Roncaglione*, 52 ECAB ___ (Docket No. 01-144, issued July 24, 2001); *James E. Norris*, 52 ECAB ___ (Docket No. 98-2293, issued October 5, 2000).

[11] *Felix Flecha*, 52 ECAB ___ (Docket No. 00-596, issued February 26, 2001).

harassment, sexual discrimination and religious discrimination have been refuted. Under these circumstances, the absence of corroborating witness statements is not a sufficient basis upon which to conclude that appellant's allegations are unproven. In administering the Act, the Office must obtain any evidence necessary for the adjudication of the case which is not received when the notice or claim is submitted. Thus, the Office is responsible for advising the employing establishment about appellant's allegations and requesting they respond to help adjudicate the claim.[12] Accordingly, the case is remanded to the Office to further develop the record, in conformance with its procedures, with regard to appellant's allegations. Thereafter, the Office should develop whether the medical evidence supports that particular accepted employment factors caused or aggravated appellant's claimed condition. Following this, and after such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.[13]

The decisions dated May 30 and January 31, 2000, November 18 and August 17, 1999 are hereby set aside and the case remanded for further proceeding consistent with the above opinion.

Dated, Washington, DC
January 25, 2002

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c) (April 1993).

[13] In view of the disposition of this case, the Board need not address whether the refusal of the Office, in its May 3, 2000 decision, to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.