U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CELIA VITO and U.S. POSTAL SERVICE,
EVANS AVENUE POST OFFICE, San Francisco, CA

Docket No. 01-333; Submitted on the Record;
Issued January 4, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's August 8, 2000 request for a merit review.

On July 2, 1999 appellant, then a 48-year-old distribution clerk, filed a claim for an emotional condition sustained in the performance of duty on June 24, 1999 when acting supervisor Mary Chan allegedly yelled at her.[1] Appellant stated that at 12:30 a.m. on June 24, 1999, when she was returning from her scheduled break, Ms. Chan walked up to her and "[w]ithout warning, she yelled at me 'You're taking a long break. You have gone from 12[:00 a.m.] to 12:30 a.m. You're missing for 30 minutes.'" Appellant then explained that she had only been gone for 15 minutes, whereupon Ms. Chan "said in a loud voice again, accusing, 'I didn't see you from 12[:00 a.m.] to 12:30 a.m.'" Appellant again stated that she was casing mail until 12:15 a.m., helping another supervisor "clear the mail for dispatch," then took her break until 12[:30 a.m.] Appellant then told Ms. Chan, "'You're lying. I was casing mail. How can I be missing for 30 minutes when I am casing mail here.' [Ms. Chan] said again in a loud and unfriendly voice … 'No. You're lying! You've been missing from 12[:00 a.m.] to 12:30 a.m.'" Ms. Chan then followed appellant to her seat, "shouted at [appellant] loudly and pointed her finger to the number one front seat next to the main aisle, 'SIT DOWN number one.'" (Emphasis in the original.) Appellant refused to sit at the front seat as she was on limited duty for an occupational back injury and she usually sat "by the end of the casing alley to avoid equipment traffic … to protect [her] back." Following the incident, appellant spoke to Ms. Chan's supervisor, Noreen Gee. "Ms. Gee later told [a]cting [s]up[er]v[isor] [Ms.]Chan that [appellant]

[1] In an August 4, 1999 letter, the Office advised appellant of type of additional factual and medical evidence needed to establish her claim.

was right … that [she] was working and not missing." Appellant was off work from June 24 through September 22, 1999.

Appellant submitted a June 24, 1999 report from Dr. Karl Lee, an attending physician, holding her off work June 24 through July 1, 1999 "due to anxiety and headaches and back pain."

In a July 13, 1999 statement, Ms. Chan admitted that on June 24, 1999, she "confronted [appellant] about taking a long break which she denied taking." Ms. Chan asserted that appellant "made a scene," and refused to take the seat Ms. Chan assigned to her. Ms. Chan also denied yelling at appellant, stating that she was "a Chinese-Burmese female, standing five foot tall, weighing 105 pounds and [could not] speak that loudly," as her voice was "small" and did "not carry."

By decision dated September 3, 1999, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant had accepted as factual that on June 24, 1999, Ms. Chan inquired as to appellant's whereabouts, but that this was a normal administrative or supervisory function and that no error or abuse was shown. The Office noted that appellant submitted insufficient corroborating evidence to substantiate that Ms. Chan yelled at her in front of her coworkers.

Appellant disagreed with this decision and in a September 9, 1999 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held February 29, 2000. Prior to the hearing, appellant submitted additional evidence.

In a May 5, 1998 report, Dr. Aubrey Swartz, an attending orthopedist, prescribed limited duty and work restrictions due to an occupationally-related back injury.[2]

In an August 27, 1999 letter, Annie Marcelo, one of appellant's coworkers, recalled that on June 24, 1999 at approximately 12:00 a.m., she "heard Mary Chan raise her voice at [appellant] that she took a 30 minute break. Then [appellant] replied in a low tone, so [Ms. Marcelo] wasn't able to hear [her] response to Ms. Chan. However, Ms. Chan repeated speaking loudly 'You're taking a 30 minute break.'" Ms. Chan "followed [appellant] and went beside her and commanded her while pointing her finger in front of [appellant's] face. 'I want you to sit down at seat number 1' in a very loud commanding voice that caught everyone's attention." Ms. Marcelo approached appellant and told her that Ms. Chan wanted to "swallow" appellant.

In a September 1, 1999 report, Dr. Howard L. Hoffman, an attending psychiatrist, noted treating appellant beginning on July 8, 1999 for anxiety, diagnosed as "acute adjustment disorder with mixed anxiety and depressed mood … secondary to problems with her supervisor …. She describes being yelled at and humiliated by the supervisor. … Being publicly criticized and embarrassed is hard to cope with. She has suffered increased level[s] of anxiety." Dr. Hoffman

[2] The record indicates that the Office accepted disc protrusion at L2-3 and L4-5 beginning in April 1993, under Claim No. 13-1013350. The Office also accepted an emotional condition in 1998 due to harassment by supervisor Rita Farr, under Claim No. 13-1153346. These claims are not before the Board on the present appeal.

held appellant off work until September 22, 1999 and recommended that appellant "not be under the management of her current supervisor, Mary Chan."

A December 9, 1999 Equal Employment Opportunity (EEO) settlement specified that appellant was to be given a light-duty assignment for six months in the box section and would not be supervised by Ms. Chan during that time. Appellant and Ms. Chan agreed to treat one another "with dignity and respect." The employing establishment also agreed that Manny Valenton, a supervisor, would "reiterate to [Ms.] Chan … treating subordinates with dignity and respect in the workplace." The agreement notes that it "should not be construed as an admission of discrimination or wrongdoing."

At the February 29, 2000 hearing, appellant asserted that she was disabled for work from July 25 to September 21, 1999 due to her emotional reaction to the June 24, 1999 confrontation with Ms. Chan. She alleged that Ms. Chan continued to harass her.

In a March 21, 2000 response to the hearing transcript, Ms. Chan asserted that appellant did not have an assigned mail case and that, therefore, she was within her discretion to assign appellant to seat one on June 24, 1999. Ms. Chan stated that seat one would no more expose appellant to equipment traffic than any other seat. She opined that if appellant was not worried about reinjuring her back, she would not be depressed. Ms. Chan did not address her own remarks to appellant on June 24, 1999.

In an April 6, 2000 letter, appellant submitted employing establishment safety documents and a work floor diagram showing that seat one was the closest to ongoing equipment traffic.

By decision dated April 28 and finalized May 1, 2000, the Office hearing representative affirmed the Office's September 3, 1999 decision denying appellant's claim. The hearing representative found "that the incident between [appellant] and Ms. Chan occurred on June 24, 1999," and that "Ms. Chan confronted [appellant] when she returned from her break regarding the amount of time she was away from her workstation." While there was some disagreement as to whether Ms. Chan raised her voice to appellant, the hearing representative found that Ms. Chan may "have raised her voice to some degree when speaking to [appellant]. This would not constitute harassment or improper conduct on her part and there is no evidence to show that she was screaming or ranting at [appellant]." The hearing representative further found that the June 24, 1999 incident regarding Ms. Chan's questioning appellant regarding her break and assigning appellant to seat one, was an administrative matter not within the performance of appellant's duties and that no error or abuse was shown.

Appellant disagreed with this decision and in an August 8, 2000 letter, requested reconsideration. She submitted additional evidence.

Appellant submitted a June 24, 1999 petition to the plant manager regarding Ms. Chan, alleging that she yelled at her subordinates, used threats of discipline and conducted herself in an unprofessional manner. The petition was signed by 44 employees.[3]

[3] Appellant submitted statements from coworkers Joy Rameses and Louis Ante alleging that Ms. Chan yelled at

In a June 1, 2000 letter, Ms. Marcelo noted that she wished to provide new information in addition to her August 27, 1999 statement regarding the June 24, 1999 incident between appellant and Ms. Chan. Ms. Marcelo stated that "[d]uring the entire incident on June 24, 1999, [s]upervisor [Ms.] Chan was SCREAMING repeatedly at [appellant]. She was screaming at [appellant] that 'You … took 30 minutes break' repeatedly. … [Ms. Chan] was also SHOUTING to [appellant] repeatedly 'YOU ARE A LIAR' when [appellant] was trying to explain to her that she was actually helping another supervisor." (Emphasis in the original.) Ms. Marcelo recalled that the incident occurred in front of her and other employees and that appellant "was obviously upset and embarrassed."

By decision dated September 12, 2000, the Office denied appellant's request for a merit review, findings that the new evidence submitted was irrelevant and that Ms. Marcelo's statement had "been previously considered."

Regarding the first issue, the Board finds that appellant has not established that she sustained an emotional condition in the performance of duty as alleged.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to employment. Where disability results from an employee's emotional reaction to matters unrelated to the employee's duties or job requirements, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the Act's coverage.[4] As part of its adjudicatory function, the Office must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[6]

Appellant attributed her claimed emotional condition to a June 24, 1999 discussion with Ms. Chan, her supervisor. An employee's complaints about the manner in which supervisors perform supervisory duties or the manner in which a supervisor exercise supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor must be allowed to perform his or her duties and that employees will at times dislike actions taken. For example, the Board has held that discussions of job performance do not fall

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employees and was disrespectful in her conduct with subordinates. Neither statement addresses the June 24, 1999 incident. Appellant also submitted January 26, 1982, October 8 and 12, 1999 letters of recommendation, which do not address the June 24, 1999 incident.

[4] *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *See Barbara Bush*, 38 ECAB 710 (1987).

[6] *Ruthie M. Evans*, 41 ECAB 416 (1990).

under coverage of the Act absent a showing of error or abuse.[7] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[8] To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.[9]

Although appellant substantiated that Ms. Chan engaged her in a job discussion on June 24, 1999, she provided insufficient factual evidence prior to the issuance of the hearing representative's decision dated April 21, 2000 and finalized May 1, 2000[10] to establish that this confrontation was anything more than a normal administrative matter.

Appellant submitted an August 27, 1999 letter from Ms. Marcelo, one of her coworkers, who recalled that on June 24, 1999 Ms.Chan spoke to appellant in a "very loud commanding voice" regarding a seat assignment. The Board finds that this statement is insufficient to establish error or abuse.

The record also contains a December 9, 1999 EEO settlement agreement directing that Ms. Chan be given a job discussion regarding "treating subordinates with dignity and respect in the workplace." However, this settlement states on its face that it is not "an admission of discrimination or wrongdoing."

Thus, appellant submitted insufficient evidence prior to the decision dated April 28, 2000 and finalized May 1, 2000, to establish the June 24, 1999 job discussion as a compensable factor of employment.

Regarding the second issue, the Board finds that the Office abused its discretion in denying appellant's August 8, 2000 request for a merit review.

The Board finds that the Office in its September 12, 2000 decision, improperly denied appellant's August 8, 2000 request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.[11]

Under section 8128(a) of the Act,[12] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines

[7] *Donald E. Ewals*, 45 ECAB 111 (1993); *see also David W. Shirey*, 42 ECAB 783 (1991).

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

[9] *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

[10] In adjudicating the first issue, the Board is considering only the evidence submitted prior to the hearing representative's decision dated April 28, 2000 and finalized May 1, 2000. The Office has not yet conducted a merit review of the additional evidence appellant submitted accompanying her August 8, 2000 request for reconsideration, the June 24, 1999 petitioner and Ms. Marcelo's June 1, 2000 statement.

[11] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[12] 5 U.S.C. § 8128(a).

set forth in section 10.606(b)(2) of the implementing federal regulations,[13] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[14]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[15]

The Board finds that the Office erred in its September 12, 2000 decision, by finding that Ms. Marcelo's June 1, 2000 statement was previously considered by the Office. While the Office had considered her August 27, 1999 statement, the June 1, 2000 letter contains many new details that are highly relevant to the critical issue of administrative error or abuse.

In her August 27, 1999 letter, Ms. Marcelo recalled that Ms. Chan "raise[d] her voice" at appellant about the length of her break and spoke "in a very loud commanding voice that caught everyone's attention" regarding assigning her to a different seat. In her June 1, 2000 letter, Ms. Marcelo clarified that Ms. Chan has "scream[ed]" and "shout[ed]" at appellant, calling her a liar in front of other employees. Ms. Marcelo's description is critical in determining whether the June 24, 1999 incident was merely a job discussion and, therefore, a normal administrative action, or a confrontation constituting administrative error or abuse. While a job discussion is considered an administrative action not within the performance of duty, the supervisor's demeanor and tone of voice may constitute abusive behavior, thus rendering such confrontation compensable. Thus, Ms. Marcelo's June 1, 2000 letter constitutes relevant, pertinent new evidence not previously considered by the Office.

In the September 12, 2000 decision, the Office further found that the June 24, 1999 petition stating that Ms. Chan yelled at her employees was irrelevant. However, the Board finds that this petition is relevant to assessing the probative value of Ms. Chan's account of events. In her June 13, 1999 statement, Ms. Chan asserted that as she is a female, "Chinese-Burmese," only five feet tall, has a "small voice," and that these characteristics made it impossible for her to yell. Ms. Chan, therefore, asserted that appellant lied by asserting that Ms. Chan had yelled at her. However, the Board finds that the petition is sufficient to rebut Ms. Chan's assertion that she is

[13] 20 C.F.R. § 10.606(b) (1999).

[14] 20 C.F.R. § 10.606(b).

[15] 20 C.F.R. § 10.608(b).

physiologically incapable of yelling and tends to cast doubt on the veracity of Ms. Chan's denial of appellant's account of events.

The case must be returned to the Office for further development, including a merit review of Ms. Marcelo's June 1, 2000 letter. Following this and any other development the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decisions of the Office of Workers' Compensation Programs dated September 12, 2000 and dated April 28, 2000 and finalized May 1, 2000 are hereby set aside and the case remanded for further development consistent with this decision.

Dated, Washington, DC
January 4, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member