

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. EMLAW and U.S. POSTAL SERVICE,
POST OFFICE, Wilkes-Barre, PA

*Docket No. 01-1105; Submitted on the Record;
Issued January 2, 2002*

DECISION and ORDER

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

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of her employment.

On January 25, 2000 appellant, then a 33-year-old letter carrier, filed an occupational disease claim alleging that she sustained severe mental stress and anxiety on January 21, 2000 when her supervisor, Robert Barbacci, confronted her concerning her limited-duty restrictions from her physician. She stated that she was restricted to two hours a day of carrying mail due to an employment-related left leg injury but Mr. Barbacci told her to deliver her route without assistance and, when she started to document the incident in writing, he became irate, threatened her, tried to grab her paper, shook his finger in her face and told her he would start watching her and documenting incidents when she left her case. He stated that she would not be able to prove he threatened her and no one would believe her. Appellant was upset and went directly to her doctor.

In a disability certificate dated January 21, 2000, Dr. Mauer Biscotti indicated that appellant had an anxiety attack that day and had to leave work.

In a report dated January 24, 2000, a physician related that appellant was verbally abused and threatened by her supervisor because she was restricted to carrying mail for only two hours a day. He diagnosed stress and anxiety.

In a response to appellant's claim, Mr. Barbacci stated that on January 21, 2000 she was assigned to a job which involved two and one-half hours of casing mail, two and one-half hours of inter-city delivery (parcel and large firm delivery) and three hours of street delivery. He asked appellant why she was not covering the inter-city portion of her route and she reminded him that she was on limited duty. Mr. Barbacci then went to the overtime committee and obtained a carrier to complete appellant's route. He denied that he asked appellant to perform the entire route by herself. Mr. Barbacci stated that he had observed that appellant had been voluntarily walking more than two hours a day for the past two weeks and he therefore asked that she

attempt to perform the three-hour street delivery but, if she needed help, he would provide another carrier to assist. However, appellant told him that he did not appreciate her and she was going to document his harassment of her. He stated that he replied in a normal tone of voice, standing two feet from her, that he would begin to document the times that she was away from her case, she responded that he should do it for everyone, he stated that he did but was only concerned with appellant at present and pointed his finger at her. Mr. Barbacci denied that he threatened her or tried to grab her paper and stated that appellant left the office saying her knee was bothering her.

In a statement dated February 14, 2000, an employing establishment human resources specialist stated that appellant had sustained a work-related knee injury on December 8, 1999 and was able to work eight hours a day but was restricted to two hours of walking a day. She stated that for several weeks prior to the January 21, 2000 incident appellant had voluntarily agreed to deliver mail in excess of two hours a day but, for some unexplained reason, on January 21, 2000 she objected to her practice of walking in excess of two hours and became agitated when Mr. Barbacci approached her.

In a statement dated February 18, 2000, employee Dan Jescavey stated that on January 21, 2000 he observed Mr. Barbacci speaking to appellant at her case a number of times and appellant told him the conversations with Mr. Barbacci upset her and she had to leave to see her doctor.

In an undated statement, Irene Zumski stated that on January 21, 2000, appellant and Mr. Barbacci had a "heated" discussion about how much assistance she needed and, the second time Mr. Barbacci approached her case, she told the union steward that she was being threatened.

In an undated statement, Frank Hill, the union steward, stated that on January 21, 2000 Mr. Barbacci visited appellant's case several times and he was called to her case and saw that she was upset.

By decision dated April 11, 2000, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that she failed to establish that her emotional condition was causally related to compensable factors of employment.

By letter dated April 26, 2000, appellant requested an oral hearing.

On September 20, 2000 a hearing was held at which appellant testified. She testified that she did not voluntarily deliver mail for more than two hours a day as alleged by the employing establishment and the times she reported which were in excess of two hours of street time included time for such nondelivery activities as loading mail into her vehicle, traveling to her delivery route, and taking breaks.

In a statement dated October 4, 2000, an employing establishment human resources specialist stated that time and attendance records revealed that appellant walked and delivered mail in excess of two hours on January 18 and 19, 2000 and in excess of three hours on January 13, 14 and 15, 2000. She stated that it was not unreasonable for Mr. Barbacci to ask her on January 21, 2000 to deliver mail in excess of two hours because she had voluntarily done this for several days.

By decision dated December 4, 2000, the Office hearing representative affirmed the Office's April 11, 2000 decision.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her employment.

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 she 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 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

In the present case, appellant alleged that she sustained an emotional condition as a result of two employment factors, being told to work outside her medical restrictions and being

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 See *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ See *Effie O. Morris*, 44 ECAB 470, 473 (1993).

⁵ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389 (1992).

⁶ *Id.*

harassed and threatened on January 21, 2000. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that on January 21, 2000 Mr. Barbacci told her to deliver mail for more than two hours which violated her work restrictions. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.⁷ In this case, Mr. Barbacci denied that he told appellant to deliver mail for more than two hours on January 21, 2000. He stated that he only asked her if she would deliver for more than two hours and his request was based on his belief that she had voluntarily performed more than two hours of street delivery on several recent occasions. Mr. Barbacci stated that when she told him that she could not work more than two hours that day he obtained assistance from the overtime committee in covering her route. None of the witnesses who provided statements in this case indicated that Mr. Barbacci told appellant that she had to complete more than two hours of street delivery. Therefore, appellant has not established a compensable factor of employment as to this allegation.

Appellant has also alleged that Mr. Barbacci harassed and threatened her on January 21, 2000. She alleged that Mr. Barbacci tried several times on January 21, 2000 to get her to deliver mail for more than two hours although she told him this violated her medical restrictions and, when she started to document the incident in writing, he became irate, threatened her, tried to grab her paper, shook his finger in her face and told her he would start watching her and documenting occasions when she left her case. She alleged that Mr. Barbacci told her that she would not be able to prove he threatened her and no one would believe her. 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.⁸ 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.⁹ In the present case, Mr. Barbacci denied that he harassed appellant by ordering her to work outside her restrictions or that he tried to grab her paper or threatened her and she has provided insufficient evidence to establish her claim of harassment.¹⁰ None of the witnesses who provided statements in this case indicated that they saw Mr. Barbacci harass or threaten appellant. One witness stated that he saw Mr. Barbacci speak to appellant at her case a number of times on January 21, 2000 and that appellant told the witness that she was upset but he did not report that he actually observed any act of harassment by Mr. Barbacci. Another witness stated that appellant and Mr. Barbacci had a "heated" discussion about how much assistance she needed that day and appellant later told a union steward that Mr. Barbacci threatened her but this witness did not provide any details indicating

⁷ See *Diane C. Bernard*, 45 ECAB 223, 227 (1993).

⁸ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ See *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ 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).

any harassing behavior by Mr. Barbacci. The third witness, the union steward, related that when he saw appellant that appellant was upset after talking to Mr. Barbacci but the steward did not report that he witnessed any acts of harassment himself. Thus, appellant has not established a compensable employment factor under the Act in this respect.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.¹¹

The decisions of the Office of Workers' Compensation Programs dated December 4 and April 11, 2000 are affirmed.

Dated, Washington, DC
January 2, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹¹ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki, supra* note 5.