U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET L. TERRY and U.S. POSTAL SERVICE,
POST OFFICE, Hermiston, OR

Docket No. 00-1673; Oral Argument Held January 23, 2002;
Issued June 5, 2002

Appearances: *Steven Zielinski, Esq.,* for appellant; *Jim C. Gordon, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT[1]

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

On March 22, 1998 appellant, then a 39-year-old rural letter carrier, filed an occupational disease claim alleging that she sustained an emotional condition because she was required to work on her day of religious observance and was discriminated against because of her religion and because the employing establishment improperly delayed the submission of her compensation claim to the Office of Workers' Compensation Programs. She alleged that on March 5, 1998 the employing establishment informed her that she would be required to deliver mail on her regular route, Route 3, on Saturday, March 7, 1998, which is her day of worship.[2] In December 1997, the substitute rural carrier who delivered mail on Saturday on Route 3 suddenly left. Until a replacement was hired, other substitute carriers or regular letter carriers who were available carried Route 3 on Saturdays. When no substitute was available, the regular route carrier on the route, in this case, appellant, would be expected to deliver the mail on Saturday. Appellant filed a grievance complaining that management should not have waited until two days before Saturday, March 7, 1998 to find a relief carrier and that management had not filled the vacancy for the substitute carrier during the two months the vacancy existed. She also alleged that she felt pressured, during a meeting of an unspecified date, at which the employing establishment solicited volunteers to work her relief day. Appellant also alleged that on

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[1] Bradley T. Knott was no longer a member of the Board after January 27, 2002 and did not participate in the preparation of this decision.

[2] Appellant is a Seventh Day Adventist.

March 9, 1998 another employee was denied leave to be with her family during a medical emergency and this reminded her of her own situation and caused her to be upset.

In a disability certificate dated March 10, 1998, Dr. I-Yen Yang, appellant's attending Board-certified internist, indicated that appellant was unable to work from that day through March 16, 1998 due to job-related stress.

In a statement dated August 11, 1998, Bradley Smith, a supervisor, stated that he told the postmaster that all carriers who knew Route 3 would be on their own routes and that the regular carriers had plans for their days off and could not work Route 3 on Saturday, March 7, 1998. He told appellant she would have to work that day.

In a letter dated August 4, 1998, the employing establishment stated that its decisions to assign appellant her days to work were administrative functions and were based upon the needs of the employing establishment and were not intended as disparate or improper treatment of appellant.

In a disability certificate dated September 28, 1998, Dr. Yang stated that appellant was seen on March 10, 1998 for an acute anxiety reaction.

In a letter dated September 23, 1998, appellant alleged that she filed her claim for compensation on March 22, 1998 and gave her claim form to her postmaster but it was not submitted to the Office until August 10, 1998 because it had been misplaced.

In a letter dated October 8, 1998 to appellant, an employing establishment injury compensation specialist stated that the delay in filing appellant's compensation claim was not intentional but was due to an inexperienced acting supervisor and a failure in communications on the part of the postmaster. She apologized to appellant for the delay.

By decision dated March 10, 1999, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that her emotional condition was causally related to any compensable factors of employment.

In an undated letter received by the Office on April 13, 1999, appellant requested a hearing that was held November 18, 1999.

In an undated statement, the postmaster stated that appellant had worked several Saturdays over the past few years when asked. He stated that she worked without any complaint on Saturday, December 20 and Saturday, December 27, 1997 when her relief carrier suddenly quit. The postmaster stated that appellant was given Saturdays off because of her religious beliefs until Saturday, March 7, 1998 when the employing establishment was unable to find someone other than appellant to work that day. He stated that there was no other option but to ask appellant to work that day. The postmaster stated that appellant later told him that she resented being told to work on March 7, 1998 by Mr. Smith rather than being asked to work. He indicated to her that Mr. Smith was a former military officer and was used to giving orders rather than making requests. Appellant indicated to him that she was satisfied with this explanation and had decided not to file a claim for stress but later changed her mind.

On October 6, 1999 appellant, through her representative, requested subpoenas for: Dr. Yang, to testify as to the nature and severity of appellant's condition; Marie Peck, a licensed clinical social worker, to testify as to the nature and severity of appellant's injury; Michael Schaefer, a supervisor, to testify concerning appellant's religious beliefs and preexisting agreements respecting those beliefs and to demonstrate bias and lack of credibility on the part of the employing establishment; Mr. Smith, to testify that he carried out instructions from Mr. Schaefer to violate preexisting agreements and religious beliefs of appellant and to demonstrate bias and lack of credibility; Ms. Meeks to testify about appellant's physical and mental state and violations of Mr. Smith and Mr. Schaefer about preexisting agreements with appellant concerning her religious beliefs; Ms. Cordova, to testify about "events and injury in workplace"; Louise Chandler, a carrier, to testify about "events and injury in workplace" and a hostile work environment; Greg Hamilton, Diana Justice, Joel Stahl and Fred Christian, to testify regarding mental and physical harm arising from religious discrimination; two Office claims examiners; and Elaine Hayward, to testify about Oregon law.

In a statement dated November 14, 1999, coworker Sherryle Meeks stated that in March 1998 appellant was required to work her regularly scheduled relief day, Saturday and that the employing establishment was aware that Saturday was appellant's day of religious observance and had known since December 1997 that a relief carrier was needed for appellant's route. She stated that on another occasion appellant became upset when another employee was denied a day of leave to be with a family member who was having surgery.

In a statement dated November 16, 1999, coworker Barbara Cordova stated that appellant felt stress and anxiety because she was required to work her relief day and indicated that management knew that she did not want to work on Saturday.

In a report dated November 17, 1999, Dr. Yang stated that appellant was evaluated for a severe anxiety reaction following a conflict between her work and her religious beliefs.

The record shows that appellant filed a grievance because she was required to work on her relief day, Saturday, March 7, 1998, which was her day of religious observance. In a settlement agreement dated August 30, 1998, the employing establishment and appellant's union representative agreed that Saturday should be scheduled as the relief day for regular rural routes unless the relief day was changed to another day by mutual agreement between the regular carrier and the postmaster. There was no finding of error or abuse by the employing establishment in the settlement agreement.

By letter dated October 7, 1999, the Office hearing representative stated that appellant's request for subpoenas for various individuals to appear at the hearing was being denied and a formal decision would be incorporated into the hearing decision when rendered. She stated that appellant had not indicated why statements from the individuals listed in the request for subpoenas could not be obtained another way or the relevance of their testimony. In the case of the individual appellant wished to subpoena to address Oregon law, the hearing representative stated that state law was not relevant to federal workers' compensation law. She also noted that appellant had requested that two claims examiners be issued subpoenas and the Office's regulations at 20 C.F.R. § 10.619 did not allow subpoenas for Office employees acting in their official capacity as decision-makers or policy administrators. The hearing representative stated

that appellant could obtain signed narrative statements from these individuals and submit them at the hearing.

By decision dated and finalized January 6, 2000, the Office hearing representative affirmed the Office's March 10, 1999 decision but modified the decision to find that the employing establishment's delay in filing appellant's compensation claim was a compensable factor of employment that was not established as causing appellant's emotional condition by the medical evidence of record. She denied appellant's request for subpoenas.

The Board finds that appellant failed to establish that she sustained an emotional condition 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.[3] 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.[4]

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.[5] 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.[6]

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.[7] 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

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[3] 5 U.S.C. §§ 8101-8193.

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

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

[6] *See Effie O. Morris*, 44 ECAB 470, 473 (1993).

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

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[8]

In this case, appellant attributed her emotional condition to a number of employment incidents and conditions. The Board must, thus, initially determine whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that she had an emotional reaction on March 9, 1998 when another employee was denied leave to attend to a family medical emergency. This allegation bears an insufficient relationship to appellant's regular or specially assigned duties and is not deemed a compensable factor of employment.

Appellant has also alleged that harassment and discrimination on the part of her supervisors regarding her religion contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[9] 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.[10] In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors or coworkers.[11] She alleged that the employing establishment practiced religious discrimination in requiring her to work on Saturday, March 7, 1998, a day of worship for her. However, the scheduling of workdays and relief days is an administrative function of the employing establishment and administrative or personnel matters are not compensable absent a showing of error or abuse.[12] In a statement dated August 11, 1998, Mr. Smith, a supervisor, indicated that there was no one other than appellant available to cover Route 3 on Saturday, March 7, 1998 because all the other carriers who knew Route 3 would be on their own routes or had already requested the day off. By letter dated August 4, 1998, the employing establishment stated that its decisions to assign appellant her days to work were administrative functions and were based upon the needs of the employing establishment and were not intended as disparate or improper treatment of appellant. The postmaster stated that appellant had worked several Saturdays over the past few years when asked and had worked without any complaint on Saturday, December 20, 1997 and Saturday, December 27, 1997 when her relief carrier suddenly quit. The postmaster stated that appellant was given Saturdays off because of her religious beliefs until

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[8] *Id.*

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

[10] *See Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[11] *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).

[12] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

Saturday, March 7, 1998 when the employing establishment was unable to find anyone other than appellant to work that day. Appellant filed a grievance because she was required to work Saturday, March 7, 1998. In a settlement agreement dated August 30, 1998, the employing establishment and appellant's union representative agreed that Saturday should be scheduled as the relief day for regular rural routes unless the relief day was changed to another day by mutual agreement between the regular carrier and the postmaster. However, there was no finding of error or abuse by the employing establishment in the settlement agreement. The Board has held that distress over not being able to fulfill religious responsibilities and obligations does not constitute a compensable factor of employment.[13] Appellant failed to establish that the employing establishment practiced religious discrimination or acted abusively or in error by requiring her to work on Saturday, March 7, 1998. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant alleged that she felt pressured during a meeting of unspecified date at which the employing establishment solicited volunteers to work her relief day. However, she provided insufficient details regarding this allegation and, therefore, it is not deemed a compensable factor of employment.

Appellant alleged that the employing establishment improperly delayed the submission of her compensation claim. In a letter dated September 23, 1998, she alleged that she filed her claim for compensation on March 22, 1998 and gave her claim form to her postmaster but it was not submitted to the Office until August 10, 1998 because it had been misplaced. The Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.[14] Although the handling of a compensation claim is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[15] 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.[16] In this case, the Office accepted that the employing establishment's five-month delay in submitting appellant's compensation claim to the Office constituted a compensable factor of employment.

In the present case, appellant has identified a compensable factor of employment with respect to the employing establishment's delay in submitting her compensation claim. However, appellant's burden of proof is not discharged by the fact that she has established an employment factor that may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized

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[13] *See Robert Gray*, 39 ECAB 1239, 1244 (1988).

[14] *See George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

[15] *Id.*

[16] *See Michael L. Malone*, 46 ECAB 957, 961 (1995).

medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[17]

In a disability certificate dated March 10, 1998, Dr. Yang, appellant's attending Board-certified internist, indicated that appellant was unable to work from that day through March 16, 1998 due to job-related stress. In a disability certificate dated September 28, 1998, he stated that appellant was seen on March 10, 1998 for an acute anxiety reaction. In a report dated November 17, 1999, Dr. Yang stated that appellant was evaluated for a severe anxiety reaction following a conflict between her work and her religious beliefs. However, he did not attribute appellant's anxiety reaction to the employing establishment's delay in submitting her compensation claim. Therefore, this medical evidence is not sufficient to establish that appellant's emotional condition was causally related to the compensable factor of the delay in submitting her compensation claim.

Regarding the Office hearing representative's denial of appellant's request for subpoenas, section 8126[18] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[19]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained."[20] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[21]

Appellant submitted a request for subpoenas on October 6, 1999. She cited several witnesses for which she requested the issuance of subpoenas. Appellant requested subpoenas for: Dr. Yang, to testify regarding her emotional condition; Marie Peck, a licensed clinical social worker, to testify regarding her emotional condition[22]; Michael Schaefer, a supervisor, to testify

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[17] *See William P. George*, 43 ECAB 1159, 1168.

[18] 5 U.S.C. § 8126.

[19] 20 C.F.R. § 10.619.

[20] *Id.*

[21] *Dorothy Bernard*, 37 ECAB 124 (1985).

[22] However, lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion. *See Arnold A. Alley*, 44 ECAB 912, 921 (1993); *Sheila Arbour*, 43 ECAB 779, 788 (1992).

concerning appellant's religious beliefs and to demonstrate bias and lack of credibility on the part of the employing establishment; Mr. Smith, to testify that he carried out instructions from Mr. Schaefer to violate preexisting agreements and religious beliefs of appellant and to demonstrate bias and lack of credibility; Ms. Meeks, to testify about appellant's physical and mental state and violations of Mr. Smith and Mr. Schaefer about preexisting agreements with appellant concerning her religious beliefs; Ms. Cordova and Ms. Chandler, to testify about "events and injury in workplace" and a hostile work environment; Greg Hamilton, Diana Justice, Joel Stahl and Fred Christian, to testify regarding mental and physical harm arising from religious discrimination; two Office claims examiners; and Elaine Hayward, to testify about Oregon law. However, appellant did not show why information from these individuals could not be obtained other than through the subpoena process. Furthermore, as noted above, regulations do not permit the issuance of subpoenas for Office employees acting in their official capacity[23] and testimony from a witness regarding Oregon law is not relevant to federal workers' compensation law. The Board finds that the Office hearing representative acted within her discretion in not issuing subpoenas as requested by appellant.

The decision of the Office of Workers' Compensation Programs dated January 6, 2000 is affirmed.

Dated, Washington, DC
June 5, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

[23] 20 C.F.R. § 10.619(b).