

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MYRNA PARAYNO and U.S. POSTAL SERVICE,
BURIEN STATION, Seattle, WA

*Docket No. 01-1101; Submitted on the Record;
Issued June 12, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

On January 11, 1999 appellant, then a 39-year-old window distribution clerk, filed an occupational disease claim alleging that she sustained an emotional condition on December 14, 1998 causally related to factors of her employment.¹ She alleged a stressful interaction with her supervisor, Manager Lou Kush, on December 14, 1998 when she saw him at an investigative interview on that date. Appellant alleged the presence of Mr. Kush at the interview violated a work restriction of no contact with Mr. Kush set forth in a July 29, 1998 report of her attending psychologist, Dr. Mary G. Denny. She alleged that at the December 14, 1998 interview Mr. Kush stared at her. In a statement on appellant's claim form, Walter Higginbotham stated that appellant asked him to be her union representative at the December 14, 1998 investigative interview. He stated that Mr. Kush and Edward Schierberl, manager of customer service operations, were waiting in the meeting room when they arrived but Mr. Kush was not allowed to attend the meeting.

In a report dated July 29, 1998, Dr. Denny noted that appellant reported a history of talking to an employing establishment employment assistance intervention analyst on July 17, 1998. She had responded to the call after attending to all the customers in line but Mr. Kush told her that there were additional customers at the window and she returned to her station. Mr. Kush told appellant that he intended to conduct an investigative interview and instructed her to come to his office. Appellant told him she was entitled to union representation but he began to question her alone. She attempted to close the door so they could speak privately but he insisted

¹ In a prior appeal, Docket No. 00-868 (issued March 26, 2001), appellant alleged an emotional condition due to an encounter with her supervisor Lou Kush on July 17, 1998. The Board found that appellant failed to establish her allegations of administrative error or abuse on the part of her supervisor and that she acknowledged placing excrement on his desk.

that the door remain open. Both of them raised their voices at various points in the discussion. Mr. Kush accused appellant of conducting personal business on the telephone and she offered to give him the name and telephone number of the person to whom she had been speaking. Appellant felt an urgent need to go to the restroom but Mr. Kush insisted that she not leave the room. She stated, “[d]o you want me to poop in my pants” and left the room. When appellant arrived at the restroom, she found that she was already mildly incontinent. She wrapped the panty-liner she was wearing (with excrement on it) in brown paper and returned with it to Mr. Kush’s office along with a sick leave form. Appellant placed the paper containing her excrement on his desk.” Mr. Kush allegedly responded, “[h]ow dare you” and called the employing establishment police to escort appellant from the building. He notified her that she was being placed on administrative leave. Since the incident, appellant had repeated dreams and flashbacks of what occurred and felt agitated and tearful and did not know how she could possibly continue working with Mr. Kush. Dr. Denny diagnosed an acute stress disorder.

In a narrative report and duty status report dated November 19, 1998, Dr. Denny diagnosed post-traumatic stress disorder and indicated that the cause of appellant’s condition was stressful interaction with her supervisor. She released appellant for part-time work gradually increasing to full time within the next two months and wrote, “[c]annot return to [the employing establishment] under current manager.”

In a narrative report and a duty status report dated December 18, 1998 regarding a December 17, 1998 examination, Dr. Denny stated that appellant had a relapse of her stress disorder and was unable to work. She related that when appellant reported for work on December 14, 1998, Jim Griffey, her supervisor at her new work site, told her to proceed to his office for an investigative interview regarding the July 17, 1998 incident. Mr. Schierberl was conducting the interview. Appellant was “shocked” to find that her former supervisor, Mr. Kush, was present. When appellant produced a copy of Dr. Denny’s November 19, 1998 duty status report, Mr. Schierberl arranged for Mr. Kush to leave the room but she remained anxious throughout the interview, aware of Mr. Kush’s presence outside the door. At the conclusion of the interview, appellant was placed on administrative leave. Dr. Denny stated in a work restriction evaluation that appellant “cannot be in presence of former manager.” She further stated:

“[T]he conditions of [appellant’s] return to work were specifically designed to provide that she gradually resume her work role in a setting other than the [employing establishment]. This stipulation was made so that her anxiety would remain under control so that she could proceed with her responsibilities as an employee. The primary reason [appellant] was not able to return to [the employing establishment] was because she was not able to feel safe in the presence of Mr. Kush and, consequently, could not perform her work functions in that setting. Unfortunately, [appellant’s] premature encounter with Mr. Kush on [December 14, 1998] precipitated a relapse of her anxiety disorder from last summer; she is now no longer able to work in any postal service setting at this time.”

* * *

“[Appellant] thought she was managing her anxiety day to day reasonably well during her first week back at work, until her surprise encounter with Mr. Kush in her new work setting.”

In a letter dated January 21, 1999, Linda Smith, an employing establishment human resources manager, stated that appellant was placed off work by Dr. Denny on July 20, 1998 and she was released to return to work four hours a day effective November 19, 1998 with a notation from Dr. Denny stating, “[c]annot return to [the employing establishment] under current manager.” Appellant returned to work on December 8, 1998 at the Seattle Processing and Distribution Center and worked four hours a day through December 11, 1998. Appellant was not scheduled to work December 12 and 13, 1998. On December 14, 1998, at appellant’s new worksite, the employing establishment conducted an investigative interview regarding the July 17, 1998 incident. Mr. Kush did not conduct the investigative interview and was not present in the room while the interview was being conducted. As a result of the interview, appellant was placed on administrative leave effective December 14, 1998 and remained off work.

In a report dated January 22, 1999, Dr. Denny released appellant to return to work for four hours a day with a gradual increase to eight hours after three weeks and indicated “[c]annot return to [the employing establishment] or have contact with [the employing establishment] manager.”

On January 28, 1999 the employing establishment advised appellant that she would be removed from her job in 30 days for unacceptable conduct and conduct unbecoming a postal employee and disrespect towards a supervisor on July 17, 1998.² According to an attached memorandum, on July 17, 1998 Mr. Kush saw two customers in line with no clerk to serve them and so advised appellant and another clerk. Appellant went to Mr. Kush’s office a few minutes later, accused him of singling her out and shouted and waved her arms. He asked her to be quiet but she ignored him. Another clerk came into the room and appellant stated that she was leaving. Mr. Kush told her not to leave because he was not finished talking to her but she shouted, “I have to go to the bathroom. What do you want me to do, sh-- all over the floor?” Mr. Kush told her to get a union steward as the situation had now become an investigative interview. Appellant left the office without responding. She later returned, quickly went towards his desk and raised her right hand high in the air and he thought she was going to strike him. She slapped a leave form on his desk and shouted that she was stressed and was going to see her doctor. Mr. Kush told her he still had questions to ask her and she violently spun around and shut the door. He asked her to open the door, she ignored him, then closed the door when he got up to close it. Appellant then quieted down somewhat and sat down at Mr. Kush’s desk across from him. She placed a paper towel on his desk and unfolded it. Inside appeared to be toilet tissue with excrement and she said, “[s]ee, I told you I had to take a sh--.” Mr. Kush informed her that she was on administrative leave and should leave the building.

In a statement dated March 9, 1999, Mr. Kush stated that on December 14, 1998 he was present with Mr. Schierberl at the beginning of an investigative interview with appellant

² The record shows that appellant was reinstated on April 27, 1999 at a new work location following an Equal Employment Opportunity Commission (EEOC) settlement agreement.

concerning the incident on July 17, 1998. He stated that he was there only to be a witness. Mr. Kush stated:

“It was decided, knowing that there is language in her medical restrictions [concerning] contact with [the employing establishment’s] management, that it would be best for Mr. Schierberl to conduct the interview and since I am the immediate supervisor, I can be present to hear what was being said concerning her responses.

“When [appellant] entered the room, I looked at her to acknowledge her presence, she may have glanced at me briefly as she sat down, but did not look my way or seem to acknowledge my presence. She only seemed to pay attention to Mr. Schierberl. I heard [appellant] request from Mr. Schierberl to call her doctor and she wanted to talk in private. Mr. Schierberl, shop steward Higginbotham and myself immediately left the room.

“Shortly, [appellant] asked for Mr. Schierberl to come back into the room. He then came out into the hallway and requested that I not be present during the investigative interview because she had shown him a [medical report] that specified that she has no contact with [the employing establishment’s] management. I stayed in another empty room during the investigative interview.

“I have not had contact with [appellant] since July 17, 1998 when I placed her on [a]dministrative [l]eave after her violent outburst and the display of her own [excrement] on my desk. I did not speak to her on December 14, 1998 and, in fact, I may have been in the same room with her for less than five minutes.

“[Appellant’s] claim that I was staring at her [is] false. After I realized immediately upon her entering the room that she did not apparently acknowledge my presence, I focused my attention to Mr. Schierberl until we were asked to leave for [appellant’s] [tele]phone call to her doctor.”

By decision dated April 29, 1999, the Office of Workers’ Compensation Programs denied appellant’s claim for an emotional condition on the grounds that she had failed to establish that her emotional condition was causally related to compensable factors of her employment.

By letter dated May 5, 1999, appellant requested a hearing that was held on November 18, 1999.

In a report dated July, 8, 1999, Dr. Denny diagnosed acute stress disorder and stated that on July 17, 1998 appellant was on the telephone arranging a meeting time with the employing establishment’s employment assistance intervention analyst, Dr. David Picard. Mr. Kush, interrupted the telephone conversation to tell her that postal customers were waiting at the window. Appellant responded by getting Dr. Picard’s return telephone number, ending the conversation and returning to her other work duties, providing customer services. Dr. Denny stated that the altercation between appellant and Mr. Kush on July 17, 1998 led to the onset of her acute stress disorder.

In a settlement agreement dated April 22, 1999 between appellant and the employing establishment, it was agreed that appellant's removal would be changed to a 14-day suspension and reassignment to another facility. It was agreed that for three years she would not apply for a position in the Seattle post office customer services, she would not apply for any position at any facility where Mr. Kush was assigned, that her files would be maintained according to employing establishment rules and regulations and that all EEOC complaints and grievances would be withdrawn. The settlement agreement stated that management agreed to the contents of the agreement solely to resolve appellant's allegations and it should not be construed as an admission of discrimination or wrongdoing by the employing establishment.

In a letter dated December 2, 1999, submitted in response to the hearing, Roy Stanley, an injury compensation manager at the employing establishment, stated that Mr. Kush was at the investigative interview on December 14, 1998 because he was appellant's supervisor at the time that her actions resulted in her being placed on administrative leave. He stated that Mr. Kush would ordinarily have been the one conducting the interview but it was determined that it would not be a violation of her work restriction if he was just there as an observer and to be available to answer any questions from Mr. Schierberl. Mr. Stanley stated that there was no interaction between appellant and Mr. Kush and he left upon being asked.

By decision dated and finalized February 29, 2000, the Office hearing representative affirmed the Office's April 29, 1999 decision.

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 he claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed

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).

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

Appellant alleged that the employing establishment violated a medical restriction by allowing Mr. Kush to be present at the investigative interview held on December 14, 1998. The Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.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

Appellant alleged that Dr. Denny's July 29, 1998 medical report prohibited any contact with Mr. Kush. However, Dr. Denny stated in her report, "[i]n the future, [appellant] is likely to need a gradual return to work, beginning with part time at a site where her present manager cannot interact with her." In a November 19, 1998 report, Dr. Denny stated that appellant could not work at her assigned worksite under her current manager. The restriction given by Dr. Denny in her July 29 and November 19, 1998 reports, prior to the December 14, 1998 investigative interview, was that appellant could not interact or work with Mr. Kush. The record shows that appellant saw Mr. Kush briefly at the location set for the December 14, 1998 investigative interview but they did not speak to each other and that Mr. Kush left the area after being asked to do so by the individual conducting the interview. Given the nature of appellant's conduct on July 17, 1998, Dr. Denny's reports which diagnosed a post-traumatic stress disorder are not well rationalized with regard to the relationship of appellant's condition with her federal employment. The Board finds that the employing establishment acted reasonably in asking Mr. Kush to attend the interview so that he might be available to answer questions about the

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).

⁸ *Id.*

⁹ See *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

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

July 17, 1998 incident. The employing establishment also acted reasonably in asking Mr. Kush to leave when it appeared that his presence became upsetting to appellant. Mr. Kush was not scheduled to conduct the interview nor was appellant asked to interact with Mr. Kush at the interview. The Board notes that in a December 18, 1998 report that followed the December 14, 1998 investigative meeting, Dr. Denny stated that appellant “cannot be in the presence of Mr. Kush.” However, this was not the work restriction in effect at the time of the December 14, 1998 interview and her rationale for imposing this additional restriction is not well rationalized. Considering all the circumstances, the employing establishment did not act in error or abusively in its handling of the investigative interview on December 14, 1998. 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 while in the performance of duty.¹¹

The decision of the Office of Workers’ Compensation Programs dated February 29, 2000 is affirmed.

Dated, Washington, DC
June 12, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ Because appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Garry M. Carlo*, 47 ECAB 299, 305 (1996).