

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE FREDERICK and DEPARTMENT OF THE NAVY,
NAVAL HOSPITAL, Camp Lejune, NC

*Docket No. 01-2191; Submitted on the Record;
Issued June 17, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review under 5 U.S.C. § 8128(a).

On September 7, 2000 appellant, then a 43-year-old clinical social worker, filed an occupational disease claim alleging that on June 9, 2000 she first realized that her stress, anxiety, depression and upset stomach were caused or aggravated by factors of her federal employment. Appellant stopped work on August 30, 2000 and she returned to work on January 10, 2001.

By decision dated February 27, 2001, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty. In a May 24, 2001 letter, appellant requested reconsideration of the Office's decision.

In a June 6, 2001 decision, the Office denied appellant's request for a merit review of her claim on the grounds that it was of a cumulative nature and thus, insufficient to warrant a review of its prior decision.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty.

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 illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the

employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.¹

Perceptions and feelings alone are not compensable. 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 factors of her federal employment.² To establish her claim that she sustained an emotional or physical condition in the performance of duty, appellant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the diagnosed condition.³

Appellant has alleged that her emotional condition was caused by harassment from her immediate supervisor, Commander Kevin Gallagher, and to the actions of management officials. Appellant alleged that on June 9, 2000 Commander Gallagher came to her office to reportedly discuss her position description. Appellant stated that when she requested to have Ms. Thomas, a civilian personnel representative present, Commander Gallagher became highly agitated and his face flushed. She further stated Commander Gallagher moved in close towards her causing her to be backed against the wall. Appellant further stated that Commander Gallagher denied her request to have Ms. Thomas present. She also stated Commander Gallagher yelled in a loud threatening voice that she was being fired due to a reduction-in-force and that the paperwork was being processed.

Appellant has further alleged that following the reorganization of her department, she tried to obtain an updated position description from Captain S.G. Ranck, her supervisor. She noted that her position was transferred to another department after her former department was dissolved. Appellant alleged that her rights were being violated by the employing establishment's failure to provide her with an updated position description.

Appellant further alleged that on June 16, 2000 she had a discussion with Commander Gallagher regarding her performance appraisal. She stated she received an acceptable rating and that Commander Gallagher denied her request to have a closeout rating by Captain Ranck.

On July 17, 2000 appellant contended that she obtained a copy of her timecard, which reflected that her paycheck had been docked for official travel time used on July 5, 2000. On July 18, 2000 appellant alleged that she had a verbal altercation with Commander Gallagher regarding this matter. She stated that he yelled at her and he tried to threaten and intimidate her because she was a female.

¹ *Lillian Cutler*, 28 ECAB 125 (1976).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ *Ruby I. Fish*, 46 ECAB 276 (1994); *Mary A. Sisneros*, 46 ECAB 155 (1994).

Appellant also contended that on July 31, 2000 Captain Ranck told her that her request for a transfer to another department had been approved, but that it was subsequently denied by the executive officer.

Appellant further contended that Commander Gallagher denied her request to attend a quarterly meeting held on September 6 and 7, 2000.

Appellant alleged that Commander Gallagher did not ask her to participate in a telephone conference.

On August 18, 2000 appellant noted that she had a counseling session with Commander Gallagher regarding her tardiness and use of excessive sick leave. Appellant stated that Commander Gallagher told her that there was a 15-minute grace period and that contrary to her belief about the employing establishment's policy she could not make up the time at the end of the day.⁴

Appellant alleged Commander Gallagher had pulled her Internet records without any probable cause and that he did not pull any other employees' Internet records.

Appellant contended that Commander R.L. Rothen told her that the executive officer was going to move her office directly beside Commander Gallagher's office. She stated that this plan was cruel.

Appellant filed a complaint with the Equal Employment Opportunity (EEO) Commission concerning the denial of her request for a transfer.

Actions of an employee's supervisor, which the employee characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.⁵ Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.⁶ An employee's charges that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.⁷ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.⁸

⁴ The record contains an August 18, 2000 document signed by Commander Gallagher, indicating that appellant was counseled regarding her current work hours, the maximum grace period of 15 minutes and work that could not be automatically made up at the end of the day unless approved by her supervisor, Commander Gallagher need to be notified when she was late or not feeling well and if he was not available then Pat McDowell should be notified, concern about her excessive use of sick leave in the last 9 months and the availability of Linda Passingham, an employee in the civilian employee assistance program, if she required assistance.

⁵ *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

⁶ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

⁷ *William P. George*, 43 ECAB 1159 (1992).

⁸ *See Anthony A. Zarcone*, 44 ECAB 751 (1993); *Frank A. McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*,

In a February 7, 2001 narrative statement, Commander Gallagher acknowledged that he became frustrated with appellant during the June 9, 2000 incident, but that he never raised his voice or moved near her. He noted that he carefully chose his words whenever he interacted with appellant. He stated that there was a considerable prior history of problems with her and her supervisor. Commander Gallagher stated that both Ms. Milligan and Ms. Thomas could vouch for his almost daily visits to civilian personnel to get advice on how to handle this difficult supervision situation. He stated that when he visited appellant's office he remained in the entry hall and was always more than five feet from appellant. He further stated that he spoke to Ms. Thomas who told her that she did not want to be present at the counseling session and that if appellant had any questions she could set up an appointment with her to get those questions answered. In an October 6, 2000 narrative statement, Commander Rothen provided that she did not have first hand knowledge of the June 9, 2000 incident, but that the type of behavior described by appellant was very much out of character for Commander Gallagher.

Although appellant alleged Commander Rothen told her that the executive officer had counseled Commander Gallagher to not interact with her unless there were 500 people around, she has failed to establish that Commander Gallagher actually harassed her on June 9, 2000. The Board finds that appellant has failed to establish that she was harassed by Commander Gallagher based on his statement and that of Commander Rothen. Thus, appellant has failed to establish a compensable factor of employment.

The employing establishment's reorganization,⁹ the writing of appellant's position description,¹⁰ appellant's performance appraisal and denial of her request to have a witness present,¹¹ the use of leave,¹² denial of a request for a transfer¹³ and request to attend a quarterly meeting,¹⁴ refusal to allow appellant to participate in a telephone conference, counseling session,¹⁵ an investigation of appellant's Internet records,¹⁶ plan to move appellant's office¹⁷ and filing of an EEO complaint,¹⁸ involve administrative or personnel matters. However, where the

41 ECAB 416 (1990).

⁹ *Peggy Ann Lightfoot*, 48 ECAB 490 (1997).

¹⁰ *See Jose L. Gonzales-Garced*, 46 ECAB 559 (1995).

¹¹ *Harriet J. Landry*, 47 ECAB 543 (1996).

¹² *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993).

¹³ *James W. Griffin*, 45 ECAB 774 (1994).

¹⁴ *See Janet I. Jones*, 47 ECAB 345 (1996); *Michael Thomas Plante*, *supra* note 12.

¹⁵ *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

¹⁶ *Anne L. Livermore*, 46 ECAB 425 (1995).

¹⁷ *Michael Thomas Plante*, *supra* note 12.

¹⁸ *Diane C. Bernard*, 45 ECAB 223 (1993).

evidence demonstrates that the employing establishment either erred or acted abusively in the handling of administrative matters, coverage may be afforded.¹⁹

Regarding the employing establishment's reorganization, Commander Rothen explained that a new position was created and given to Catherine Hill, appellant's coworker, in January 2000 while appellant received a second position in June 2000 due to appellant's department head position being abolished.

In response to appellant's allegation regarding a position description, Commander Gallagher explained that he and appellant worked on her position description and they had a verbal understanding that the final document was an accurate description of her duties. He stated that he and appellant signed it, but when it was classified it came back for a GS-11 position and appellant held him personally accountable for this.

Appellant has not submitted any evidence corroborating her allegation that Commander Gallagher committed error or abuse in denying her request to have a witness present during her performance appraisal.

Commander Gallagher explained that he had disallowed 12 hours of travel time for a conference based on the advice of appellant's timekeeper and the payroll accounting technician. He further explained that, after appellant complained to payroll, the accounting division supervisor informed him that a civilian could take a full day for travel the day before a conference took place. He noted that he tried to apologize to appellant for the error and to tell her about the information he received from the accounting supervisor, but she interrupted him and continued talking despite his attempts to relay the information. He denied raising his voice at appellant and noted that in frustration he asked appellant why it was so difficult for her to understand him. Commander Rothen noted appellant took an additional travel day while the other participants left the meeting and returned at the same time. He stated that Commander Gallagher admitted that he had made a mistake on appellant's timecard in charging her for the extra day.

Concerning the denial of appellant's request for a transfer, Commander Rothen responded that appellant's transfer to the new department was an attempt to find a better fit for her, but when the department head of this department found that he would lose a full-time employee in the transfer, he stopped it. The department head only wanted appellant if she came without a loss to his department.

In denying appellant's request to attend a quarterly meeting, Commander Gallagher explained that he, appellant and Ms. Hill had decided in February 2000 that one of them should always be present at the command to take care of utilization management issues because it was important. He stated that appellant and Ms. Hill would alternate attending the meeting. Commander Gallagher noted that appellant was present at the July meeting. He further noted that there were four slots available for the meeting and one went to a physician. Commander Gallagher also noted that, since appellant had transferred to another department, her supervisor, Captain Ringler, had the right to approve her request and that he could offer the slot to Ms. Hill

¹⁹ *James W. Griffin, supra* note 13.

as it was her turn to go to the meeting. Commander Gallagher noted that he offered a slot to the nursing department and Captain Ringler offered the slot to his clinic manager rather than to appellant. Commander Rothen stated that the group that attended the meeting better served it. He noted that the command's needs had changed with the establishment of a new department and residency program and only one person from utilization management needed to attend the meeting.

Regarding the telephone conference, Commander Gallagher stated that it involved utilization management rather than case management. He stated that Ms. Hill was the command representative for utilization management. He further stated that if the conference call had involved case management, then appellant would have participated.

Concerning the counseling session, Commander Gallagher stated that appellant's pattern of coming to work late and lingering by the time clock in the afternoon prior to checking out were widely known throughout the command. He further stated that when it became known that he was going to be appellant's supervisor, numerous individuals pulled him aside and told him to watch his back because appellant was a "sly one." Commander Gallagher also stated that appellant's timekeeper told him to check her card carefully because she was always trying to get away with something. He noted that appellant's inability to complete tasks on time was also widely known. Commander Gallagher further noted that he discussed appellant's inability to get to work on time on numerous occasions and even offered to change her work hours. Commander Rothen stated that appellant was given a list of projects to be completed and that appellant had not completed any of the projects. He also stated that appellant misquoted the regulations concerning the employing establishment's policy of making time up.

Appellant did not submit any evidence establishing that Commander Gallagher committed error or abuse in investigating her Internet usage.

Commander Rothen denied telling appellant that her office would be moved directly next to Commander Gallagher's office. Rather, he stated that the employing establishment was looking to move the utilization management department from its current location on the third floor to the main administrative area on the first floor where it would be more accessible. He further stated that it was being considered to place this department in the nursing services office space, which was a far distance from Commander Gallagher's office.

Regarding appellant's filing of an EEO complaint, the employing establishment stated that appellant decided not to proceed to a formal unit with her complaint.

The Board finds that appellant has failed to establish that Commander Gallagher and management officials erred or acted abusively in handling any of the above administrative matters. The Board finds that appellant has failed to establish any compensable employment factor that could have caused or contributed to her emotional condition. As such she has failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.²⁰

²⁰ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment, the medical evidence need not be addressed. *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.²² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²³ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.²⁴

In her request for reconsideration, appellant did not raise any new relevant legal argument or show that the Office erroneously applied or interpreted a specific point of law. Appellant also did not submit any relevant and pertinent new evidence with her request for reconsideration. The Office therefore acted within its discretion in denying appellant's reconsideration request for a merit review.

²¹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

²² 20 C.F.R. § 10.606(b)(1)-(2).

²³ *Id.* at § 10.607(a).

²⁴ 20 C.F.R. § 10.608(b).

The June 6 and February 27, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 17, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member