U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN D. EDISON and U.S. POSTAL SERVICE,
CACTUS STATION, Phoenix, AZ

Docket No. 01-30; Submitted on the Record;
Issued March 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition causally related to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's January 13, 2000 request for reconsideration.

On February 1, 1999 appellant, then a 40-year-old city mail carrier, filed an occupational disease claim, alleging stress and anxiety as a result of her federal employment. In a narrative statement, appellant stated that her illness began a year earlier when elections for union stewards were taking place and it was discovered that she was not a member of the union. She stated that harassment started soon after. Appellant alleged that Susan Hutchinson, the union steward, had called her a scab and a thief and told appellant that she hated everything about her. Appellant stated that her anxiety and stress stemmed from months of harassment by Ms. Hutchinson and other union members.

Dennis Kautz, the station manager, noted that appellant had complained on December 17, 1998 that Ms. Hutchinson was harassing her. He had a meeting with the two that day and concluded that both of them needed to stay away from one another. Mr. Kautz instructed them to act professionally while on the clock and that their only contact should be related to mail delivery.

Appellant submitted, among other things, a May 25, 1999 report from Dr. Royal B. Anspach, who had treated her since January 21, 1999 for severe underlying depression, anxiety/panic attacks and anorexia. Dr. Anspach noted that appellant had a past history of depression and panic attacks but had been in good control for the prior two years and had decreased her medication. He stated: "It is my profession opinion and with a reasonable medical certainty that [appellant's] symptoms are a direct result of the stress she is undergoing at work, more specifically by fellow employees' constant pressure for her to join the union. This is causing not only an acute exacerbation, but the current symptoms she has had, plus new symptoms."

On April 1, 1999 the Office requested that the employing establishment obtain and submit statements from the individuals specified in appellant's claim. The employing establishment conducted an investigation into appellant's allegations on April 7, 1999 and prepared an April 8, 1999 memorandum based on information provided by employees and managers identified by appellant. The memorandum generally failed to corroborate appellant's allegations. The employing establishment made the following findings, however, concerning an incident between appellant and Ms. Hutchinson:

> "Ms. Hutchinson was questioned regarding the alleged confrontation with [appellant] on January 12, 1999. [She] recalls the incident differently than [appellant]. Ms. Hutchinson stated that she leaned over the case and said to [appellant] that 'this is stupid, why don't we just stop tattletailing and try to get along because you have a family and I have a family.' [She] stated that [appellant] started yelling and screaming that 'you are not suppose to talk to me.' Ms. Hutchinson stated that [appellant] then told her that she had a trucker's mouth. In reply to her comment, Ms. Hutchinson stated that she said 'that's your opinion and my opinion is that you are a slut, but whatever the opinion we still have to act like adults.' Ms. Hutchinson denied calling her a slut, she used the word comparatively trying to explain that these are just opinions. It was then that [Ken] Caporale walked by."

In a statement received on March 24, 1999, Mr. Caporale stated the following:

> "A few months ago I witness[ed] [Ms.] Hutchinson talking to [appellant]. I was wet mopping the floor by [appellant's] letter case. When [Ms. Hutchinson] came back in from the street they were both talking about someone who was in the station. When I realize[d] [that Ms. Hutchinson] was talking about [appellant], she was calling her a whore and that she was groping all the men in the station. I do feel that [Ms. Hutchinson] was wrong in her action."

In an April 16, 1999 letter controverting appellant's claim, the employing establishment acknowledged that appellant and Ms. Hutchinson had a difficult relationship but asserted that appellant's perceived harassment was not substantiated by probative or reliable evidence.

In a decision dated September 13, 1999, the Office denied appellant's claim. The Office found that none of the incidents alleged could be established as occurring in the manner alleged by appellant and, therefore, could not be established as factual.

On January 13, 2000 appellant requested reconsideration and stated that she was submitting written statements from two witnesses, Mr. Caporale and a Mr. Betnar, to verify her account of events.[1] Appellant also stated that she was submitting a copy of an audiotape from the December 17, 1998 meeting with the station manager and Ms. Hutchinson. She asserted that the tape clearly showed that her account of events was accurate while the employing establishment had no substance or credibility. Appellant submitted objections and responses to

[1] Appellant's request for reconsideration contained no statement from Mr. Betnar. The statement from Mr. Caporale is a copy of the statement previously submitted.

the employing establishment's April 16, 1999 letter challenging her claim. She also submitted her December 1, 1999 affidavit in an Equal Employment Opportunity investigation.

In a decision dated April 14, 2000, the Office denied a merit review of appellant's claim on the grounds that the evidence submitted in support of her request for reconsideration was immaterial. Indicating that it had received two audio tapes, the Office found that the tapes were of no evidentiary value because there was no certification that the voices on the tapes were the voices of the stated individuals and the Office had no way of verifying their authenticity.

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

A claimant seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[3] including that she is an "employee" within the meaning of the Act[4] and that she filed her claim within the applicable time limitation.[5] The claimant must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[6]

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[7] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[8]

Friction and strain among employees may arise as an inherent part of the conditions of employment and the strain of enforced close contact may in itself provide the necessary work connection.[9] Even if the subject of the dispute is unrelated to work, an assault is compensable if

[2] 5 U.S.C. §§ 8101-8193.

[3] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[4] *Kenneth W. Grant*, 39 ECAB 208 (1987); *James E. Lynch*, 32 ECAB 216 (1980); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357 (1951); *see* 5 U.S.C. § 8101(1).

[5] *Paul S. Devlin*, 39 ECAB 715 (1988); *Emmet L. Pickens*, 33 ECAB 1807 (1982); *Kathryn A. O'Donnell*, 7 ECAB 227 (1954); *see* 5 U.S.C. § 8122.

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989); *see Daniel R. Hickman*, 34 ECAB 1220 (1983).

[7] 5 U.S.C. § 8102(a).

[8] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[9] *Shirley I. Griffin*, 43 ECAB 573 (1992).

the work of the participants brought them together and created the relations and condition that resulted in the clash:

> "This view recognizes that work places men under strains and fatigue from human and mechanical impacts creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences."[10]

While the weight of the factual evidence submitted to the Office in this case fails to establish many of the specific allegations made by appellant,[11] the evidence is sufficient to establish harassment of appellant by Ms Hutchinson. The employing establishment's April 8, 1999 memorandum of interview, which was based on the information provided by employees and managers identified by appellant, establishes that Ms. Hutchinson referred to appellant as a slut. The memorandum quotes her as stating to appellant, "that's your opinion and my opinion is that you are a slut, but whatever the opinion we still have to act like adults." Further, the record contains a witness statement from Mr. Caporale, who overheard appellant and Ms. Hutchinson talking by appellant's letter case. Although Mr. Caporale initially was not certain who the subject of the conversation was, it became clear to him that Ms. Hutchinson was in fact talking about appellant, calling her a whore and stating that appellant was groping all the men in the station. This evidence substantiates Ms. Hutchinson harassed appellant, thereby appellant has established a compensable factor of employment.[12]

In an emotional condition claim, however, a claimant's burden of proof is not discharged by the fact that she has established a compensable factor of employment. She must submit medical evidence establishing that she has an emotional or psychiatric disorder and she must provide a rationalized medical opinion explaining how the diagnosed emotional condition is causally related to the established compensable factors of employment.[13]

In his May 25, 1999 report, Dr. Anspach opined with reasonable medical certainty that appellant's symptoms of severe underlying depression, anxiety/panic attacks and anorexia were a

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[10] *See generally* A. Larson, *The Law of Workers' Compensation* § 8.01 [6][a], (citing *Hartford Acc. & Indem. Com. v. Cardillo*, 72 D.C. App. 52, 112 F.2d 11, 17 (1940)); *see also Edward P. Prior*, 45 ECAB 288 (1994) (positional risk doctrine).

[11] These allegations include that she was harassed because she refused to join the union, that she was called a scab and that she was threatened.

[12] *Abe E. Scott*, 45 ECAB 164 (1993).

[13] *Ruth C. Borden*, 43 ECAB 146 (1991).

direct result of the stress she was undergoing at work, "more specifically by fellow employees' constant pressure for her to join the union." This report is insufficient because it identifies as a causative factor, an allegation that is not established as factual in this case. Medical opinions must be based on an accurate history.[14] A medical opinion must be well reasoned, explaining in medical terms how established incidents or factors of employment caused or contributed to a diagnosed condition.[15]

Because the medical opinion evidence submitted to support appellant's claim is not based on an accepted factual background and is not well reasoned, the Board finds that appellant has not met her burden of proof. The Board will modify the Office's September 13, 1999 decision and will affirm the denial of appellant's claim as modified.

The Board also finds that the Office properly denied appellant's January 13, 2000 request for reconsideration.

Section 10.606(b) of the Code of Federal Regulations[16] provides that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. The request may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If the Office grants reconsideration, the case is reopened and reviewed on its merits. Where the request fails to meet at least one of the standards described, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17]

To support her request for a merit review, appellant did not argue or submit evidence to show the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by her. She submitted a copy of Mr. Caporale's undated statement, which marked as received on March 24, 1999. This evidence, however, was previously submitted and does not constitute new evidence. She submitted an audiotape to support her account of the December 17, 1998 meeting with the station manager and Ms. Hutchinson. The Office found, however, that this evidence was of no evidentiary value because there was no certification that the voices on the tapes were the voices of the stated individuals and it had no way of verifying the authenticity of the tapes. As appellant provided the Office no authentication with speakers identified, the Board finds that the Office did not

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[14] *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

[15] Medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

[16] 20 C.F.R. § 10.606(b).

[17] *Id.* § 10.608.

abuse its discretion in the matter. The remaining evidence submitted to support appellant's request -- her reply to the employing establishment's April 16, 1999 letter challenging her claim

and her Equal Employment Opportunity affidavit -- is repetitive in nature and not considered new or relevant.[18]

Because appellant's January 13, 2000 request for reconsideration does not meet at least one of the criterion for obtaining a merit review of her claim, the Board finds that the Office did not abuse its discretion in denying her request.

The April 14, 2000 decision of the Office of Workers' Compensation Programs is affirmed. The September 13, 1999 decision of the Office is affirmed, as modified.

Dated, Washington, DC
March 12, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] The Board has no jurisdiction to consider witness statements, audiotapes or affidavits of authenticity submitted for the first time on appeal.