U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANNIE D. SMITH-NEWBY and DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, Washington, DC

Docket No. 01-1504; Submitted on the Record;
Issued May 3, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant met her burden of proof to establish that she sustained emotional and stress-related conditions in the performance of duty.

The Board finds that appellant did not meet her burden of proof to establish that she sustained emotional and stress-related conditions 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 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 or stress-related reaction to her 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 her 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

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[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] *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.[4]

In cases involving emotional or stress-related conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office of Workers' Compensation Programs, 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]

On June 13, 2000 appellant, then 41-year-old senior claims examiner, filed a claim alleging that she sustained an ulcer, acid reflux disease, hypertension and depression due to a number of employment incidents and conditions.[7] By decision dated May 14, 2001, the Office denied appellant's claim that she sustained an emotional or stress-related condition due to employment factors. The Office found that appellant had established employment factors related to her workload and her job duties as a senior claims examiner and acting supervisory claims examiner. The Office further determined, however, that appellant did not submit sufficient medical evidence to establish that she sustained an emotional or stress-related condition due to these accepted employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant claimed that she was issued unfair performance evaluations covering periods between 1997 and 2000 and that her concerns regarding these evaluations were not adequately addressed. She alleged that she was unfairly assigned cases to work on with respect to the complexity and number of the cases, particularly with regard to the assignment of hepatitis cases in April and March 2000. Appellant alleged that she had inadequate training for her service as an acting supervisory claims examiner. She claimed that, on a number of occasions, including instances in July 1999 and March 2000, she was not provided adequate sufficient support to deal with computer problems. Appellant indicated that she was wrongly criticized by supervisors on a number of occasions.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, improperly assigned work duties, and mishandled training and computer matters, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] Appellant stopped work on June 5, 2000.

work duties and do not fall within the coverage of the Act.[8] Although these types of matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[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 has not submitted sufficient evidence to establish that the employing establishment committed error or abuse with respect to the above-detailed matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant has also alleged that harassment and discrimination on the part of her supervisors contributed to her claimed stress-related condition. She alleged that, on July 8, 1999, Vinicia McNeil, a supervisor, spoke to her in a loud and rude manner regarding the placement of a group of files. She alleged that on July 12, 1999 and March 9, 2000 Ms. McNeil rudely dealt with her regarding computer matters and that, on July 15, 1999, Ms. McNeil wrongly criticized her regarding the meeting of adjudication deadlines. Appellant claimed that on July 20, 1999 Ms. McNeil embarrassed her in front of her coworkers by wrongly charging her with trying to avoid telephone duty. She claimed that Ms. McNeil lied to her regarding her performance evaluation during a meeting on June 1, 2000. Appellant claimed that on June 8, 2000 Ms. McNeil spoke to her in a loud and rude manner while she was on the telephone. She identified other instances when she felt that Ms. McNeil spoke rudely to her or unfairly criticized her.

Appellant alleged that on an occasion when she discussed her performance evaluation with Michael Johnson, a supervisor, she was subjected to loud and abusive language. She claimed that Mr. Johnson said she "screwed" things up when she served as a supervisory claims examiner and that he further subjected her to "insults and allegations." Appellant indicated that Mr. Johnson jumped up suddenly and that she felt he was going to hit her. She indicated that in March 2000 Mr. Johnson failed to respond to her concerns about her heavy workload and suggested that she was assigned additional cases in retaliation for expressing her concerns.

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.[11] However, for harassment or discrimination to give rises 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.[12] In the present case, the employing

[8] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[9] *Id.*

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

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

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

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.[13] Appellant alleged that supervisors made statements and engaged in actions which she believed constituted harassment and discrimination, but she provided insufficient evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.[14] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant claimed that for extended periods between July 1998 and June 2000 she served as an acting supervisory claims examiner and was the only senior claims examiner in the special claims unit of her workplace. She asserted that she had an especially heavy workload with short deadlines. Appellant indicated that she had to work overtime to keep up with her work. She indicated that her workload dramatically increased in July 1998 and that she worked on a number of demanding assignments, including the Kenya and Tanzania embassy bombing cases, Central Intelligence Agency cases and a medical call-up project. Appellant alleged that the acting supervisory claims examiner duties which she performed were demanding, including the requirement that she institute disciplinary actions and review the work of others.

The Board has held that stress-related reactions to situations in which an employee is trying to meet his position requirements are compensable.[15] In *Antal*, a tax examiner filed a claim alleging that his stress-related condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*, found that the claimant was entitled to compensation. In *Kennedy*, the Board, also citing the principles of *Cutler*, listed employment factors which would be covered under the Act, including an unusually heavy workload and imposition of unreasonable deadlines. The record contains evidence which support appellant's claims with respect to her heavy and complex workload, her overtime work, and her demanding duties as a senior claims examiner and an acting supervisory claims examiner. Therefore, as has been determined by the Office, these matters are accepted as constituting compensable employment factors.

In the present case, appellant has established compensable factors with respect to her workload and her job duties as a senior claims examiner and acting supervisory claims examiner. However, appellant's burden of proof is not discharged by the fact that she has established employment factors which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional or stress-related condition, appellant must also

[13] *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).

[14] *See William P. George*, 43 ECAB 1159, 1167 (1992). The record contains a statement in which a person speaking on the telephone to appellant on June 8, 2000 indicated that she heard a person ask appellant in a loud voice why she was in a given room. Appellant identified this person as Ms. McNeil, but this witness statement would not, by itself, establish that Ms. McNeil's actions rose to the level of harassment.

[15] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

submit rationalized medical evidence establishing that she has such a disorder and that it is causally related to an accepted compensable employment factor.[16]

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained an emotional or stress-related condition due to an accepted employment factor. In a report dated July 14, 2000, Dr. Joseph Marnell, an attending Board-certified psychiatrist, described appellant's emotional condition and diagnosed major depressive disorder and anxiety disorder and panic disorder. Dr. Marnell generally indicated that appellant reported experiencing stress at work, but he did not provide a clear opinion that appellant sustained a diagnosable condition due to an accepted employment factor.[17] In reports dated March 14 and April 30, 2001, Dr. Bruce Hershfield, a Board-certified psychiatrist who served as an Office referral physician, determined that he could relate appellant's emotional condition to the accepted employment factors which related to her workload and work duties. Dr. Hershfield diagnosed recurrent major depression in partial remission and panic disorder without agoraphobia. He stated that the accepted employment factors would not be sufficient by themselves to cause the diagnosed emotional conditions to develop.

For these reasons, appellant did not meet her burden of proof to establish that she sustained emotional and stress-related conditions in the performance of duty.

The decision of the Office of Workers' Compensation Programs dated May 14, 2001 is affirmed.

Dated, Washington, DC
May 3, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[16] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[17] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship). Dr. Marnell suggested that appellant's workload should be lessened, but such a comment would not amount to an opinion on the cause of her emotional condition. He also made reference to certain matters which were not established as employment factors, such as appellant's relationships with her supervisors.