U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLENE T. GUILLERMO and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 02-682; Submitted on the Record;
Issued October 15, 2002

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded acceptance of appellant's claim for compensation; and (2) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On August 11, 1988 appellant, then a 47-year-old letter carrier, filed a notice of traumatic injury alleging that she suffered from anxiety attacks and depression due to harassment at work. Appellant stated on an attachment that on August 1, 1988 she attempted to clock in, but her supervisor Annie Sadler, raised her voice from behind appellant and told her not to punch in. She alleged that Ms. Sadler approached her two hours later and asked why she was carrying two plastic trays to which appellant replied that she was performing her job. Ms. Sadler allegedly stated "Oh! Well I thought you should be using the other trays there [sic] lighter for you because of your injury." Appellant also alleged that Ms. Sadler approached her again and asked of her plans for the day. When appellant informed her that she was going to deliver mail, Ms. Sadler told appellant she was not going out on the street and that there was no work for her to do that day. Appellant related that she requested a Form CA-8 to see her physician and filled out a Form 3971 (notification of absence) that Ms. Sadler refused to sign.

In a supervisor statement received by the Office on August 26, 1988 Ms. Sadler indicated that she observed appellant clocking in and then taking a Form 3971 (notification of absence) at the beginning of her shift on August 11, 1988. Ms. Sadler stated that she asked appellant what her plans were and appellant stated that she was planning on casing mail then going on her delivery route. Ms. Sadler acknowledged telling appellant she could not go out on the street. Ms. Sadler contended that she had bulk mail for appellant to handle at the station and that she did not want appellant going out on the street and driving while under medication. Ms. Sadler explained that the in-house duties were in keeping with appellants light-duty requirements. Ms. Sadler denied stating that there was no work for appellant. She related that appellant checked the continuation of pay ("COP") box on a Form 3971 but Ms. Sadler had received instructions from the injury compensation office not to approve COP. Ms. Sadler indicated that the Form CA-8 was mailed to appellant at her home address.

The record contains a Form CA-1038 whereby the Office accepted the claim for temporary aggravation of preexisting anxiety disorder. The Office wrote:

> "[Appellant's] discussion with her supervisor is considered a factor of employment per 29 ECAB 652 by which the Board held that a claimant was not required to show that a supervisor's actions constituted harassment or were improper as long as the claimant could show that [her] disability arose directly from [her] experience of them and reaction to them and the actions themselves were appropriately related to the employee's assigned duties and position. Medical evidence supports a work-related condition of temporary aggravation of anxiety disorder."

Appellant stopped work on August 12, 1998 and did not return and she received appropriate compensation for wage loss on the periodic rolls.

On April 5, 1999 the Office issued a notice of proposed termination of compensation. The Office noted that the original acceptance of the claim was erroneous as the incidents occurring on August 11, 1998 had been determined to arise in the performance of duty.

Appellant responded by submitting an additional narrative statement and copies of grievances she filed for events that occurred during August 1988 and an incident that occurred on December 9, 1987.

The employing establishment subsequently submitted copies of grievance resolutions dated February 5, June 24 and October 24, 1998 and a resolution dated September 14, 1989. The October 24, 1998, resolution concerned a grievance by appellant alleging that Ms. Sadler had improperly handled her Form CA-1 claim submitted on August 12, 1988. The agreement stated that the allegations by appellant were without merit, however, management agreed to submit all Forms CA-1 as expeditiously as possible in the future. The remaining resolutions do not concern the August 11, 1998, work incident and involve complaints by appellant against prior supervisors for harassment.

On September 20, 2000 the Office issued a second notice of proposed termination, advising appellant that it intended to rescind its prior acceptance of the claim on the grounds that the record established that she did not sustain an emotional condition in the performance of duty. The Office noted that the incidents of August 11, 1998, concerned administrative matters and, in the absence of error or abuse by Ms. Sadler, the Office erred in finding that appellant established a compensable work factor.

In a decision dated October 26, 2000, the Office terminated appellant's compensation and rescinded the acceptance of her claim.

On November 19, 2000 appellant requested a hearing and submitted witness statements.

In a witness statement dated February 17, 2001, Annette Santiago alleged that appellant had been harassed by Ms. Saddler on numerous occasions. Ms. Santiago did not address the August 11, 1998 work incidents.

In a February 16, 2001 witness statement, Denise Venagas alleged that Ms. Sadler told appellant she could not whistle while working, that she shouted at appellant for having visitors and seemed everyday to have something negative to say about appellant to try and make her mad.

In a March 13, 2001 witness statement, Dennise Graham stated that Ms. Sadler was famous for intimidation and that Ms. Graham had heard Ms. Sadler yell across the room to tell appellant to stop talking and to get to work. She stated that Ms. Sadler was unprofessional and a bully.

In a decision dated June 28 2001 and finalized on June 29, 2001 an Office hearing representative affirmed the Office's October 26, 2000 decision.

Appellant requested reconsideration on August 6, 2001 and submitted a witness statement from a former coworker, Rafael Portillo. In the statement dated March 2, 2001, Mr. Portillo stated: "Ms. Sadle[r] was a difficult person to get along with and was extremely hard to work under her as she was rude and disrespectful." He stated Ms. Sadler "singled out Arlene as her target" that she would "stand behind Arlene and make rude comments about her not being able to do her job." He indicated also that "the harassment was constant and to the point that it was obvious to everyone in the section."

In a decision dated October 17, 2001, the Office denied reconsideration of its prior decision.

The Board finds that the Office properly rescinded acceptance of appellant's claim.

The Board has upheld the Office's authority under 5 U.S.C. § 8128(a) to reopen a claim at any time on its own motion and, where supported by evidence, set aside or modify a prior decision and issue a new decision.[1] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[4]

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness

[1] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[2] *Id.*

[3] *See Frank J. Meta, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *See supra* note 1; *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129 (1990), *petition for recon. denied*, 42 ECAB 659 (1991).

has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.[5] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[6]

As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[7] However, the Board has also held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.[8] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[9]

In the present case, the Office originally accepted appellant's claim on the basis that appellant's allegations were established by the evidence of record. The Office rescinded acceptance of the claim on the grounds that: (1) there had been changes in the law clarifying that acceptance of the claim had been erroneous; and (2) at the time of the acceptance the Office had not properly prepared a statement of accepted facts. The Office reviewed the evidence to find that appellant did not establish that the employing establishment committed error or abuse in the handling of the administrative matters concerning appellant.

The basis for appellant's emotional condition claim is that she was harassed by her supervisor on August 11, 1988 when she was told she could not deliver her route. The Office accepted the claim based on the conversation between appellant and her supervisor. The Board, however, has held on numerous occasions that any emotional condition or disability sustained by an employee related to his or her frustration at not being able to work in a particular environment, such as working on a particular shift of her choosing, or holding a particular position or job with duties of her choosing, does not constitute personal injury while in the performance of duty within the meaning of the Act.[10] Although the assignment of duties is generally related to the employment, it is an administrative function of the employer and not a duty of the employee.[11] The Board has held that an employee's reaction to administrative

[5] 5 U.S.C. §§ 8101-8193.

[6] *Joel Parker, Sr.*, 43 ECAB 220 (1991).

[7] *See Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

[8] *See Elizabeth Pinero*, 46 ECAB 123 (1994).

[9] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[10] *See Ruth C. Bordon*, 43 ECAB 146 (1991).

[11] *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

matters such as assignment of work duties is only compensable when there is evidence of error or abuse by the employing establishment.[12]

The Board finds that the Office has shown that the initial acceptance of the claim was in error as the assignment of appellant's work duties is an administrative function of the employing establishment. Given that Ms. Sadler had authority to make work assignments and there is no evidence of error or abuse with her decision to take appellant off the street on August 11, 1988 based on appellant's light-duty status and medications. Appellant's reaction to her supervisor's instructions is self-generated and not a compensable factor of employment.[13]

Although appellant submitted several witness statements to indicate that she was harassed by her supervisor, none of the witnesses addressed the August 11, 1998 work incidents. The Board has held that actions of an employee's supervisor, which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, for harassment to give rise to a compensable disability under the Act, there must be some evidence that harassment or discrimination did in fact occur. Mere perceptions alone of harassment and discrimination are not compensable under the Act.[14] Because Ms. Sadler reasonably explained that appellant was taken off the street because of fear that her medication would impair her driving ability, the Board finds no factual support for appellant's allegation that this constituted harassment.

Because the Office properly found that appellant failed to allege a compensable factor of employment, the Board finds that the Office rescinded acceptance of the claim and terminated appellant's compensation effective October 26, 2000.

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

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[15] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[16] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a

[12] *See Id*; *Helen Castillas*, 46 ECAB 1044 (1995) (a letter carrier was not able to work the route she wanted due to route inspections and the evidence established no error or abuse with regard to the employee's work assignment).

[13] Although appellant submitted documentation pertaining to a union grievance, the settlement agreements notes that the employing establishment denied any wrongdoing by Ms. Sadler.

[14] *George A. Ross*, 43 ECAB 346 (1991).

[15] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[16] 20 C.F.R. § 10.606(b) (1999).

basis for reopening a case.[17] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[18] 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 on the merits.[19]

Appellant's submission of an additional witness statement does not constitute new and relevant evidence as the witness did not specifically address whether appellant was harassed on August 11, 1998 as alleged or otherwise discuss the described work incident. The medical evidence is not relevant, as the issue is whether appellant established a compensable factor of employment.

Appellant has also failed to show that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. Because appellant has not satisfied the requirements of section 8128, the Board finds that she was not entitled to a merit review of her claim.

The October 17 and June 28, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 15, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[17] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[18] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[19] 20 C.F.R. § 10.608(b).