

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SEETA SOOKDEO and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Orlando, FL

*Docket No. 02-1451; Oral Argument Held May 21, 2003;
Issued August 7, 2003*

Appearances: *Harold L. Levi, Esq.*, for appellant; *Julia Mankata-Tamakloe, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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

On May 4, 2001 appellant, then a 36-year-old attorney, filed a notice of traumatic injury alleging that on April 26, 2001 she developed an emotional condition due to being slapped on the left cheek by her supervisor, Rene Mateo, during a staff meeting where three other attorneys and a legal assistant were present. Appellant explained that although Mr. Mateo was the supervisor of the Orlando, Florida office, his own office was located in Miami, Florida and that on April 26, 2001 he visited appellant's Orlando office in order to conduct a meeting. She further stated that it was during this meeting, while she was seated with Mr. Mateo standing by her left side, that the incident occurred. Appellant asserted that, as a result of this unpermitted, unwarranted, unexpected, unwelcomed and unwanted action on the part of Mr. Mateo, she felt humiliated, demeaned, shamed and embarrassed. She stated that, for the rest of the meeting and for the rest of the day, she was in total shock and simply went through the motions of her job as though in a dream. Appellant asserted that she contacted both the employing establishment's union steward and the Orlando police on the evening of April 26, 2001 and informed them that she was contemplating filing complaints against Mr. Mateo. She explained that she did not file formal complaints until a few days later, after she fully understood the ramifications of doing so. Appellant stated that, following the incident, she felt extremely stressed, could not sleep and had lost her appetite, but nonetheless returned to work on Friday, April 27, 2001, in order to consult with her coworkers about the April 26, 2001 incident. However, on Saturday April 28, 2001 two days after the incident, she experienced excruciating headaches and painful vomiting and sought treatment at the emergency room. She stated that she was told by the emergency room personnel that her symptoms were likely stress related and was advised not to return to work. Appellant

subsequently sought psychiatric treatment and remained off work until she was released to return to work on June 28, 2001.

Each of the other attendees of the April 26, 2001 meeting submitted statements describing the events of the meeting. Kathy Giraitis and Margaret Santiago each submitted statements asserting that they did not witness or were not aware of any bodily contact between appellant and Mr. Mateo which took place during the meeting and Linda Hopkins and Wilfred Calero stated that they only witnessed Mr. Mateo touch appellant near or on her shoulder. No change in appellant's demeanor was observed by any of the witnesses. However, in a statement dated April 27, 2001, Mr. Mateo acknowledged that, during the April 26, 2001 meeting, while standing to the immediate left of appellant who was seated facing the others, he "tapped her" with his hand on her left cheek. In a subsequent statement dated August 30, 2001, Mr. Mateo further explained that, at the meeting, everyone was talking at once and in order to capture appellant's attention, he tapped her on the left cheek with the back of his right hand. Mr. Mateo vehemently denied having slapped appellant and stated that appellant was relaxed and friendly toward him throughout the rest of the day.

On May 2 and May 3, 2001 respectively, appellant filed official complaints with both the Orlando Police Department and the employing establishment's Office of the Inspector General, each of whom thoroughly investigated the incident. In a report dated May 18, 2001, Detective Laura Houston, of the Orlando Police department, summarized the investigation which arose from appellant's complaint that Mr. Mateo had committed battery against her during the April 26, 2001 meeting. Detective Houston concluded that, while the evidence supported that some type of physical contact occurred between appellant and Mr. Mateo, there was no evidence that Mr. Mateo intentionally battered appellant and the case should be considered unfounded. In a report dated October 24, 2001, Special Agent Susan Howell, of the Department of Justice, Office of the Inspector General, noted the findings of the Orlando police and summarized the results of her own investigative interviews. Special Agent Howell noted that the evidence of record supported that Mr. Mateo touched appellant, but did not support that he struck her and concluded that no further investigative activity was warranted.

In support of her claim, appellant submitted the April 28, 2001 emergency room treatment notes, as well as several medical reports from her treating physicians. In reports dated May 22 and June 26, 2001 and January 22, 2002, Dr. David J. Fleischmann, a licensed psychologist, noted appellant's history of having been touched or slapped by Mr. Mateo, diagnosed adjustment disorder with mixed anxiety and depressed mood and opined that her psychiatric condition was causally related to the April 26, 2001 incident. In narrative reports and treatment notes dated May 31, June 7, 8, 12 and 21, 2001 and January 22, 2002, Dr. Sonny Joseph, a Board-certified psychiatrist, noted appellant's history of having been slapped by her supervisor while in a professional meeting, diagnosed mild post-traumatic stress disorder and major depression, moderate and opined that appellant's emotional reaction was the direct result of the April 26, 2001 incident.

In a decision dated July 26, 2001, the Office of Workers' Compensation Programs denied appellant's claim for an employment-related emotional condition. Following a review of the written record performed at appellant's request, in a decision dated February 25, 2002, an Office hearing representative affirmed the prior denial of appellant's claim on the grounds that the

evidence of record did not establish that appellant had been forcefully slapped in the face by Mr. Mateo and, therefore, she failed to meet her burden to establish that the April 26, 2001 incident occurred in the time, place and in the manner alleged. As the Office hearing representative found that appellant failed to establish any prerequisite compensable factors of employment in support of her claim, he did not review the medical evidence of record.

The Board finds that the issue of whether appellant sustained an emotional condition causally related to her employment is not in posture for decision.

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.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 his 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 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 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.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

¹ 5 U.S.C. §§ 8101-8193.

² *Anna C. Leanza*, 48 ECAB 115 (1996); *see Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Id.*; *see also Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Id.*; *see also Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *Id.*; *see also See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384 389-90 (1992).

⁶ *Margaret S. Krzycki*, *supra* note 5; *Norma L. Blank*, *supra* note 5.

In this case, appellant attributed her emotional condition to being slapped on the left cheek by her supervisor, Mr. Mateo, during an April 26, 2001 meeting, at which several coworkers were present. The Board initially finds that there is no evidence in the record which supports a finding that Mr. Mateo actually “slapped” appellant during the April 26, 2001 meeting. Each of the witnesses present at the meeting either stated that they did not see any physical contact between Mr. Mateo and appellant or reported that Mr. Mateo merely touched her. In addition, no one observed any change in appellant’s behavior in response to the alleged slap. This finding is further supported by the report of Detective Houston of the Orlando Police Department, who concluded that, while the evidence supported that some type of physical contact occurred between appellant and Mr. Mateo, there was no evidence that he intentionally battered her and the report of Special Agent Howell of the Department of Justice, Office of the Inspector General, who also found that the evidence of record supported that Mr. Mateo touched appellant, but did not support that he struck her and concluded that no further investigative activity was warranted. Therefore, the Board affirms the Office’s finding that Mr. Mateo did not “slap” appellant in the face during the April 26, 2001 meeting, as alleged. The Board further finds, however, that, although there is no evidence of record to support that Mr. Mateo slapped appellant’s cheek, the evidence does support a finding that some physical contact occurred between Mr. Mateo and appellant during the April 26, 2001 meeting, in that Mr. Mateo himself acknowledged that he did touch or tap appellant on the left cheek. The Board has held that physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award of compensation if the medical evidence establishes that a condition was thereby caused or aggravated.⁷ Therefore, the Board finds that appellant has implicated a factor of employment that falls within the scope of coverage of the Act.⁸

The Board notes that, the fact that appellant may have exaggerated the scope of the incident does not defeat her claim. In *Alton L. White*,⁹ the employee alleged that he sustained a stress-induced illness as the result of a “physical attack” by his supervisor, while the employee’s supervisor acknowledged only that he had touched the employee’s elbow.¹⁰ The Board held that, despite the factual discrepancy as to the nature and extent of the physical contact made in the case, as the evidence established that physical contact was made in the course of employment, the employee had established a compensable factor of employment. Therefore, the Board

⁷ See *Helen Casillas*, 46 ECAB 1044 (1995); *Alton L. White*, 42 ECAB 666 (1991); Cf. *Constance G. Patterson*, 41 ECAB 206 (1989). Appellant’s burden of proof is not discharged, however, by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor. See *William P. George*, 43 ECAB 1159, 1168 (1992).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Alton L. White*, *supra* note 7.

¹⁰ See also *Constance G. Patterson*, *supra* note 7, in which the employee alleged that a coworker poked her twice, causing her to jump and resulting in neck pain and headache. The Board held that the question of whether the coworker intentionally poked the employee was irrelevant because the issue before the Board -- whether the employee sustained an injury in the performance of duty -- required no determination of intent. The Board found that the employee sustained an injury at the time, place and in the manner alleged and remanded for a determination of resulting disability, if any.

remanded for evaluation of the medical evidence. In this case, as in *Alton L. White*, despite the fact that there is a factual discrepancy as to the nature of the touching by Mr. Mateo, the evidence clearly establishes that physical contact was made in the course of employment.

As noted above, once an appellant has established a compensable factor of employment, the Office must base its decision on an analysis of the medical evidence.¹¹ However, prior to analyzing the medical evidence, it is the Office's responsibility to provide a complete and proper frame of reference for a physician.¹² In this case, while the Office properly determined that a "slap" did not occur, the Office has not fulfilled its duty to determine the exact nature and degree of the touching that did occur.¹³ The Office's procedure manual provides that the Office must carefully develop and analyze the identified employment incidents to determine whether or not they in fact occurred and if they occurred whether they constitute factors of the employment. When all available evidence has been obtained, the Office must prepare an objective and neutral statement of accepted facts and where the evidence is in conflict, the Office must decide which is the best supported and most likely version. The evaluating physician will be required to give a rationalized opinion specifying which activities and circumstances, as set forth in the statement of accepted facts, caused or contributed to the condition found on examination.¹⁴

In the present case, in support of her claim, appellant submitted several medical reports from her treating physicians, Dr. David Fleischmann, a licensed psychologist and Dr. Sonny Joseph, a Board-certified psychiatrist. While Dr. Fleischmann diagnosed adjustment disorder with mixed anxiety and depressed mood and opined that appellant's psychiatric condition was causally related to the April 26, 2001 incident and Dr. Joseph diagnosed mild post-traumatic stress disorder and major depression, moderate and opined that appellant's emotional reaction was the direct result of the April 26, 2001 incident, the Board notes that both physicians based their opinions in part on an incorrect factual history of the event, *i.e.*, that appellant was slapped by Mr. Mateo, rather than touched or tapped. As medical reports which are based on an incorrect factual history are of diminished probative value, the reports of Drs. Fleischmann and Joseph are insufficient to establish appellant's claim for an employment-related emotional condition.¹⁵

On remand, the Office should prepare a statement of accepted facts reflecting the precise nature and degree of contact which occurred between Mr. Mateo and appellant and refer appellant for a second opinion evaluation as to whether the incident, as described in the statement of accepted facts, was sufficient to cause appellant's diagnosed psychiatric conditions. Additionally, the Office should seek supplemental medical opinions from appellant's treating physicians as to whether the described lesser degree of contact between Mr. Mateo and appellant

¹¹ *Margaret S. Krzycki*, *supra* note 5; *Norma L. Blank*, *supra* note 5.

¹² *Donald E. Ewals*, 51 ECAB 428 (2000).

¹³ In an emotional condition case, the resolution of facts concerning working conditions is an Office adjudicatory function. *Constance I. Galbreath*, 49 ECAB 401 (1998).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.13.b. (June 1995).

¹⁵ A medical opinion must be based on a complete and accurate factual and medical history. *Joseph M. Popp*, 48 ECAB 624 (1997); *Billie C. Rae*, 43 ECAB 192 (1991).

was sufficient to have caused appellant's diagnosed emotional condition. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated February 25, 2002 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
August 7, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member