U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHANIE A. KUKKONEN and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket No. 03-551; Submitted on the Record;
Issued August 4, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

On July 28, 2000 appellant, then a 34-year-old modified carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained an emotional condition including "depression, anxiety and possible post-traumatic stress disorder" due to various incidents and conditions at work.[1] She stopped work on June 19, 2000.

In a July 28, 2000 statement, appellant stated that she was on modified duty due to an August 21, 1995 employment injury and as a result, she sustained stress as she was treated improperly and ignored. She alleged the employing establishment attempted to modify her limited-duty job offer and interfered with her attempts to obtain medical attention, that her injury caused her to be unproductive in her employment and that she was harassed regarding her Family Medical Leave Act (FMLA) requests and for filing her Equal Employment Opportunity (EEO) complaints; along with her job site evaluation and her functional capacity findings.

In a September 6, 2000 statement Dennis Johnson, appellant's manager, acknowledged changing appellant's modified position within her restrictions, denied treating appellant unprofessionally and indicated that the on-the-job site recommendations were being implemented.[2]

By letter dated September 15, 2000, the employing establishment controverted the claim.

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[1] The record reflects that appellant had a prior claim for an August 1995 injury (#012-0156432).

[2] Mr. Johnson also noted that appellant's EEO complaints were settled.

In a September 18, 2000 decision, the Office of Workers' Compensation Programs found that the evidence was insufficient to establish that appellant sustained an injury in the performance of duty.[3]

In a September 15, 2000 statement, appellant repeated her concerns and alleged that her supervisors screamed, berated, spoke to her in a loud tone of voice and harassed her.[4]

By letter dated September 21, 2000, appellant requested reconsideration.

By letter dated October 28, 2000, the employing establishment provided further comments and statements regarding appellant's claim.

In an October 25, 2000 statement, Ms. Summerfield denied that she or Mr. Johnson shouted at, yelled at or blocked appellant. Further, she denied following appellant to the bathroom.

In an October 29, 2000 statement, Mr. Johnson confirmed changing appellant's station and denied ignoring the job site evaluations or concerns regarding redbook training and leave usage. He denied making comments regarding having appellant removed. He also denied that appellant's workload exceeded her restrictions, that he blocked appellant at her desk or that he screamed, shouted at or berated appellant.

In an October 28, 2000 statement, the employing establishment again denied appellant's allegations.

In a November 30, 2000 statement, appellant responded to the employing establishment comments.

In a December 20, 2000 decision, the Office reviewed appellant's claim on the merits and denied modification of its prior decision.

[3] The Office indicated that appellant submitted medical reports establishing that she had a medical condition and fact of injury was thus, established. However, the Office noted that those reports related appellant's depression to her physical injury, which would not be compensable under the current claim.

[4] Appellant also alleged that her FMLA requests were problematic, that her job was not modified to meet her physical restrictions, that she was hassled regarding her uniform and again repeated that she was treated improperly and stated that Mr. Johnson yelled at her, pounded his fist and shook papers at her.

By letter dated October 18, 2001, appellant, through her attorney, requested reconsideration.[5] Additional evidence accompanied the request.[6]

In a January 28, 2002 statement, Mr. Johnson responded to the allegations made in Mr. Knight's January 26, 2001 statement. He indicated that he did not threaten, yell or waive papers at appellant during the meeting. Mr. Johnson explained that his desk had a very expensive glass top which could easily be broken if such behavior occurred.

By letter dated January 23, 2002, the employing establishment submitted additional information.[7]

By decision dated February 12, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

[5] It appears a request was also made on October 16, 2001, under the wrong claim number.

[6] The additional evidence comprised of statements from Steve Martinez regarding his own grievance, a December 13, 2000 statement from Dan Enghdahl concerning an incident between himself and Mr. Johnson, wherein Mr. Johnson acted aggressively, a February 27, 2001 statement from Chris Walker wherein he stated that he witnessed an incident in April 2000 wherein Ms. Summerfield and Mr. Johnson yelled at and harassed appellant for approximately 10 to 15 minutes until she became upset and started to cry, a January 25, 2001 statement from Rick Helgeson, a union steward, regarding a January 16, 2000 incident wherein Ms. Summerfield began yelling at appellant regarding "red books" and "new growth," a February 16, 2001 statement from Chuck Hensel regarding an episode from the summer 1999 when he witnessed Mr. Johnson become angry at appellant for a problem with regard to ordering rubber stamps and he indicated that the yelling was so loud that customers in the front counter could hear him, he also described another incident wherein he saw Mr. Johnson yelling at appellant and an incident in 1999 when he overheard a conversation between Mr. Johnson and Ms. Summerfield regarding trying to get rid of appellant, a January 26, 2001 statement from Ed Knight regarding a February 9, 1999 meeting with appellant and Mr. Johnson concerning her use of family leave. He indicated that, at one point during the meeting, Mr. Johnson leaned over his desk and while continuing to yell, pounded his fist on the desk and violently waived forms in appellant's face.

[7] The employing establishment noted the location of appellant's workplace was relocated due to their needs; that appellant did not have any productivity requirements or standards for her assignment; that the employing establishment was not aware of the functional capacity evaluation months before it was given to her by Mr. Johnson; that Mr. Johnson advised appellant there was no proof her condition was chronic and appellant did not complete the proper materials relevant to her condition; Mr. Johnson repeated that he did not yell at appellant. The employing establishment denied: that the functional capacity evaluation was not ignored; that appellant's headset was ordered but was incomplete; the telephone was moved per the job site evaluation; the back pillow was not required, but rather that her pillow needed to be adjusted; appellant was not ordered to have a monitor stand, but rather her monitor was to be moved forward; a tray was ordered but there was no room for the mouse; that appellant was placed in a location where people would touch her shoulder as there was no factual evidence to substantiate any violation of her restrictions; regarding being taken off red books, the employing establishment indicated that SOUP mail needed to be done prior to red books and they took precedence. Regarding appellant's allegation that she was wrongly told to order labels, the employing establishment denied this claim. Further, the employing establishment indicated that changes were made to Route 4 and they were changing the locks, they again denied blocking appellant's exit, denied referring to her injury as a water skiing injury, denied threatening appellant with a letter of warning with respect to her on-the-job injuries, that they did put appellant on notice regarding her continued call-ins regarding requesting FMLA and that he attempted to assist appellant with regard to her continued call-ins, that meetings were held with respect to her conduct regarding failing to follow instructions.

The Board finds that this case is not in posture for decision.

Workers' compensation law does not apply to each and every 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 concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[8] 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.[9]

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.[10] 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.[11]

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 the physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[12] 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 the matter establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[13]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated December 26, 2000, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board will, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

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[8] 5 U.S.C. §§ 8101-8193.

[9] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 126 (1976).

[10] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

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

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

[13] *Id.*

Regarding appellant's allegations that: the employing establishment wrongly denied leave; gave her improper equipment; improperly assigned work duties; questioned her mileage; gave her insufficient training; required her to complete an FMLA package and unreasonably monitored her activities at work such as following her to the restroom, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[14] Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[15] 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.[16] The employing establishment denied any error or abuse and further confirmed that regarding the restroom, it was a coincidence that the supervisor was near the location at the same time as appellant. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant contends that she was overworked in her job and was requested to perform tasks outside her job description. The Board has held that overwork may be a compensable factor of employment.[17] The evidence in this case, however, does not establish that appellant was overworked. In fact, the employing establishment has consistently stated that her job did not have any productivity requirements. Her general allegations of being overworked are not factually supported in the record and, therefore, cannot constitute a compensable factor of employment.

Appellant alleges that the location of her work area was changed several times. The Board has held that an employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[18]

Regarding appellant's allegation that her supervisor made comments that told people to "walk softly over there" and made comments that maybe she hurt herself skiing. This was denied by the employing establishment. Although the Board has recognized the compensability

[14] *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).

[15] *Id.*

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

[17] *Robert W. Wisenberger*, 47 ECAB 406 (1996).

[18] *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

of verbal abuse in certain circumstances, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[19]

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[20] However, for harassment or discrimination to give rise 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.[21] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination. Appellant has alleged that her supervisors, Mr. Johnson and Ms. Summerfield yelled at her on numerous occasions, including regarding an FMLA package and on one occasion blocked her path. Mr. Johnson denied the allegation. However, the record contains a January 26, 2001 statement from Mr. Knight, wherein he confirmed that Mr. Johnson began shouting at appellant to fill out forms and threatened her with her job. The employing establishment responded to Mr. Knight's statement and indicated that Ms. Summerfield had interviewed Mr. Knight concerning the incident and he did not indicate that to her at that time. The record, however, contains additional statements from several witnesses confirming this sort of behavior. Mr. Martinez confirmed similar aggressive behavior in his December 8, 1995 statement. In a December 13, 2000 statement, Dan Enghdahl also confirmed an incident between himself and Mr. Johnson, wherein Mr. Johnson acted aggressively, including leaning over the desk towards him, while berating him and threatening him with removal and trying to block him from leaving. In a February 27, 2001 statement, Chris Walker witnessed an incident in approximately April 2000 wherein he watched Ms. Summerfield and Mr. Johnson yell and harass appellant for approximately 10 to 15 minutes until she became upset and started to cry. In a January 25, 2001 statement, Rick Helgeson confirmed that on January 16, 2000, Ms. Summerfield yelled at appellant. Further, in a February 16, 2001 statement, Chuck Hensel recalled an episode from the summer of 1999 when he witnessed Mr. Johnson yell at appellant so loud that customers in the front counter could hear him, he also described another incident wherein Mr. Johnson yelled at appellant and an incident in 1999 when he overheard a conversation between Mr. Johnson and Ms. Summerfield regarding trying to get rid of appellant. Finally, the record contains a January 26, 2001 statement from Mr. Knight regarding a February 9, 1999 meeting with appellant and Mr. Johnson concerning her use of family leave. He indicated that, at one point during the meeting, Mr. Johnson leaned over his desk and while continuing to yell, pounded his fist on the desk and violently waived forms in appellant's face. The Board finds that this is sufficient to establish that appellant was harassed or discriminated against by her supervisors.[22] Thus, appellant has established a

[19] *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

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

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

[22] *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).

compensable employment factor under the Act with respect to the claimed harassment and discrimination, which includes the yelling.[23]

In the present case, appellant has established compensable factors of employment with respect to the performance of her day-to-day duties. She has established that she was harassed and yelled at by her supervisors. However, appellant's burden of proof is not discharged 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.[24]

As appellant has implicated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[25] The Office should prepare a statement of accepted facts and refer appellant to an appropriate medical specialist for an opinion on whether she sustained an emotional condition in the performance of duty causally related to a compensable factor of employment. After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

[23] *Georgia F. Kennedy*, 35 ECAB 1151(1984).

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

[25] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

The February 12, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
August 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member