

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY J. HIGGS and DEPARTMENT OF LABOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS, Dallas, TX

*Docket No. 03-1447; Submitted on the Record;
Issued December 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an emotional condition due to factors of her employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review.

On March 14, 2002 appellant, a 42-year-old claims examiner, filed an occupational disease claim alleging that on September 12, 2001 she first realized that her depression was due to her employment.¹ Specifically, she attributed her depression to being forced to work outside her restrictions and being unable to meet her performance standards. At the time appellant filed her claim, she was performing a light-duty modified position as a result of previous work-related injuries.²

In an attached statement, appellant alleges that she was assigned to a position where the prior claims examiner "let her work pile up" and a majority of these cases were "outside the required timeframes." As a result appellant contended: "No matter how hard I tried I couldn't keep up." Next appellant alleges that the performance standard she was given did not take into consideration her physical restrictions as they contained no modifications. She also alleges that she believes that management retaliated against her because of her duties as a union steward and her filing of grievances, unfair labor practices and Equal Employment Opportunity complaints.

The factual and medical evidence submitted by appellant to support her claim included a light-duty job offer signed by appellant on July 23, 2001; an August 13, 2001 claims examiner roster noting her assignment to a number block of a claims examiner who had recently resigned and left a backlog of work; performance standards for the period April 1, 2001 to April 30, 2002; appellant's written comments regarding her performance standards; emails dated August 22 and

¹ This claim was assigned claim number 11-2007176.

² The Board notes that appellant had previously filed a claim for carpal tunnel syndrome which was accepted by the Office and was assigned claim number 11-0182040.

24, 2001, a work capacity evaluation dated October 2, 2001 by Dr. Thomas C. Diliberti, an attending Board-certified orthopedic surgeon, with a subspecialty in hand surgery; a December 3, 2001 claims examiner roster showing that appellant was no longer on the list; a September 13, 2001 report and March 20, 2002 attending physician's report (Form CA-20), by Dr Louis E. Deere, an osteopath specializing in psychiatry; and an August 20, 2001 memorandum to file regarding appellant meeting with her supervisor on her performance standards.

On July 23, 2001 appellant accepted a temporary-job assignment. Physical restrictions included, typing limited to 4 hours a day, an hourly 10-minute stretch break and no lifting more than 25 pounds. Initially appellant was to work four hours a day which would increase to eight hours within two weeks.

Appellant submitted a copy of an email dated August 21, 2001 from herself to management, requesting assistance with working within her restrictions. She notified management that she was having difficulty working within her restrictions and the performance standards that she was issued.

In a September 13, 2001 report, Dr. Deere diagnosed generalized anxiety disorder with multiple phobias, major depression, adjustment disorder, chronic pain, severe dysfunction with supervisors and job, bilaterally repetitive motion disorder cephalgia, severe back and cervical pain. He opined that appellant's "job injury produced chronic pain; however, she was allowed to return to work with restrictions and the history reveals that these restrictions were violated, which probably caused an exception of the pain in the hands, wrists, arms and neck and the aforementioned edema."

In concluding, Dr. Deere opined that appellant's "compensable injury on her job did produce the anxiety and depression" which currently needs to be treated.

In a March 20, 2002 Form CA-20, Dr. Deere diagnosed major depression, generalized anxiety disorder with multiple phobias and mixed adjustment disorder and indicated that appellant was totally disabled due to these conditions during the period September 17, 2001 to the present. He attributed appellant's condition to working outside her medical restrictions and her workload. Dr. Deere also attributed her depression to being unable to meet her performance standards.

In a letter dated March 26, 2002, the Office requested additional factual and medical evidence to support her claim.

Appellant responded by letter dated April 2, 2002, to the Office's request for additional information. With her letter appellant submitted a summary of her November 19, 2001 grievance, an October 4, 2001 letter from Zee Massey, a union steward, an October 25, 2001 step 2 grievance response by E. Martin Walker, Regional Director, an August 24, 2001 email regarding her work and that she was having a difficult time with managing her workload within her restrictions; and copies of her worklog detailing her workflow.

In an October 25, 2001 step 2 grievance response, Mr. Walker denied appellant's grievance that her performance standards were inappropriate. He noted: "How the restrictions will impact on the quantity and quality of her work is not known at this time. However, as has

been the case in the past, factors outside the control of [appellant] will be taken into consideration at the time of evaluation.”

The employing establishment responded to appellant’s comments on April 26, 2002. Rita Gray, appellant’s supervisor, denied telling her “that it would be impossible for her to meet her standards with her restrictions.” She contended that appellant’s performance standards “did not need to be modified to fit her restrictions because the job of a claims examiner does not require continuous typing or repetitive wrist movements for eight hours a day.” Ms. Gray contended that appellant “should have been able to adjust her workload to perform within these restrictions.”

By decision dated May 7, 2002, the Office denied appellant’s claim on the basis that she failed to establish any compensable factor of employment and thus fact of injury was not established.

In a May 8, 2002 letter, appellant requested an oral hearing which was held on October 24, 2002.

In a December 9, 2002 decision, the hearing representative affirmed the denial of benefits, but modified it to reflect that appellant had failed to establish an injury in the performance of duty.

By decision dated May 7, 2003, the Office denied appellant’s request for merit review on the basis that the evidence submitted was cumulative.

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 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.³ 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.⁴

To establish that she sustained an emotional condition in the performance of duty, the claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.⁵

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Janice I. Moore*, 53 ECAB — (Docket No. 01-2066, issued September 11, 2002); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Alice F. Harreil*, 53 ECAB __ (Docket No. 01-1249, issued August 1, 2002).

Appellant has alleged retaliation by the employing establishment due to her duties as a union steward in filing grievances, equal employment opportunity complaints and unfair labor practices. In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur.⁶ Appellant has not presented evidence of harassment or of retaliation for her union activities. She has thus failed to establish a compensable factor of employment in this respect.

Appellant alleged that her claimed emotional condition was due in part to being made to work outside of her restrictions. The Board has held that being made to work beyond one's physical limitations or prescribed restrictions may be a compensable factor of employment.⁷ Appellant, however, has not submitted sufficient evidence to support this contention. In support of her allegations appellant submitted a copy of her performance standards, the light-duty job offer signed by her on July 23, 2001, an October 25, 2001 step 2 grievance response on her performance standards by Mr. Walker; and a copy of an email, dated August 21, 2001, from appellant to management. The evidence establishes that the regular duties of a claims examiner were within the restrictions set forth by appellant's physicians. The July 23, 2001 light-duty position accepted by appellant indicated that she was limited to 4 hours of typing a day, no lifting over 25 pounds and a 10-minute break to stretch every hour. The physical restrictions of her performance description as a claims examiner complied with these physical restrictions as it is classified as a sedentary position. There is no evidence that appellant's position required her to work beyond her restrictions. Therefore, she has not established a compensable factor of employment on this issue.

Appellant has alleged that her emotional condition was caused by her attempts to keep up with her workload. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.⁸ In *Joseph A. Antal*,⁹ a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Lillian Cutler*,¹⁰ found that the claimant was entitled to compensation. In *Georgia F. Kennedy*,¹¹ 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. Appellant has submitted evidence emails from her to her supervisor requesting assistance with keeping up with her workload and her worklog detailing her workflow, supporting her allegation that her stress was due to attempting to meet her deadlines. The Board has held that conditions related to stress resulting from situations in which an employee is trying to meet her position

⁶ *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁷ *Jamel A. White*, 54 ECAB — (Docket No. 02-1559, issued December 10, 2002); *Kim Nguyen*, 53 ECAB (Docket No. 01-505, issued October 1, 2001).

⁸ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

⁹ 34 ECAB 608, 612 (1983).

¹⁰ 28 ECAB 125 (1976).

¹¹ 35 ECAB 1151 (1984).

requirements are compensable.¹² In the instant case, appellant has alleged that her stress was due in part to the time constraints imposed by her job and the amount of work she had to perform. Supporting documentation include emails from appellant to her supervisor, her working and Dr. Deere's report attributing appellant's depression in part to her difficulty in meeting her performance standards all supported appellant's allegation of her difficulty in trying to keep attempting to meet deadlines and keep up with her workfiow. The Board finds that appellant has established a compensable factor of employment with respect to her attempting to meet her work deadlines and keep up with her workload.

Appellant has established as a compensable factor of employment her attempting to meet her work deadlines and keeping up with her workload. However, her 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.¹³ In a report dated March 20, 2002, Dr. Deere opined that appellant's depression was due to her inability to meet her performance standards and her workload.

The Board finds that, although Dr. Deere did not provide sufficient medical rationale explaining how the accepted employment factor caused or contributed to appellant's emotional condition, his report is generally supportive of appellant's claim and sufficient to require further development by the Office. It is, therefore, sufficient to require further development of the case by the Office.¹⁴

On remand, the Office should further develop the medical evidence by referring appellant and a statement of accepted facts to an appropriate Board-certified specialist for a rationalized medical opinion on the issue of whether appellant's emotional condition is causally related to the accepted employment factor of attempting to keep up with her workload.¹⁵

In view of the Board's finding regarding the December 9, 2002 decision of the Office, the issue of whether the Office, in its May 7, 2002 decision, properly denied appellant's request for merit review is moot.

¹² *Trudy A. Scott*, 52 ECAB 309 (2001).

¹³ *See William P. George*, 43 ECAB 1159, 1168 (1992).

¹⁴ *See O. Paul Gregg*, 46 ECAB 624 (1995); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(6) (July 2000). (A claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted).

The decisions of the Office of Workers' Compensation Programs dated May 7, 2003 and December 9, 2002 are hereby set aside and the case remanded for further proceedings consistent with the above opinion.

Dated, Washington, DC
December 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member