

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN A. LEAHY and DEPARTMENT OF THE ARMY,
THIRD INFANTRY DIVISION, Fort Stewart, GA

*Docket No. 01-2168; Submitted on the Record;
Issued June 4, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's emotional condition claim; and (2) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

On September 25, 1997 appellant, a 50-year-old protocol officer, filed a notice of occupational disease, alleging that she developed post-traumatic stress disorder, depression and anxiety due to a hostile environment, sexual harassment, disparate treatment, intimidation, verbal abuse, humiliation, personal attacks and retaliation for Equal Employment Opportunity (EEO) complaints. On the reverse of the form, her supervisor noted that appellant received a notice of proposed removal on August 28, 1997 and that she was terminated on October 7, 1997. In a letter dated December 2, 1997, the Office requested additional factual and medical evidence. By decision dated June 1, 1998, the Office accepted appellant's claim for acute reaction to stress and adjustment reaction due to the accepted work-related factors, that on August 28, 1997 she was told to pack up and get out in front of her staff and that on August 31, 1997 appellant had a panic attack at the employing establishment which caused her to return home.

In a decision dated July 7, 1998, the Office rescinded the acceptance of appellant's claim, finding that it failed to provide the employing establishment with an opportunity to respond to her allegations and that the record, therefore, did not contain sufficient evidence pertaining to her allegations of employment factors. The Office concluded that appellant had not submitted sufficient evidence to substantiate her allegations of harassment; and that personnel actions constituted error or abuse in the administration of a personnel matter.

Appellant requested an oral hearing on April 6, 1998. By decision dated October 14, 1999, the hearing representative found that appellant had failed to substantiate a compensable factor of employment and, therefore, failed to meet her burden of proof in establishing that she developed an emotional condition as a result of her federal employment. The hearing representative further found that the Office's rescission of appellant's claim was justified based

on the new legal argument that her reaction to the August 28, 1997 removal was not an injury sustained in the performance of duty as it was an administrative matter and as there was no showing of error or abuse.

The Board finds that the Office met its burden of proof to rescind the acceptance of appellant's emotional condition claim.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act¹ and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in a manner provided by the compensation statute. It is well established that, once the Office accepts a claim for compensation, it has the burden of justifying termination or modification of compensation benefits. 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.³

The Office accepted appellant's claim for an emotional condition finding that she had substantiated compensable factors of employment. Specifically, the Office found that on August 28, 1997 she was told to pack up and get out in front of her staff and that on August 31, 1997 appellant had a panic attack at the employing establishment which caused her to return home. The Office found that the medical evidence established that her emotional condition was due to these employment factors.

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁴ In its June 1, 1998 decision, the Office failed to adjudicate or make any factual findings as to whether there was any error or abuse by the employing establishment in the actions of August 28, 1997. Furthermore, a panic attack is generally considered to be a symptom of an emotional condition rather than a compensable factor in and of itself. The Office, in its June 1, 1998 acceptance decision, failed to address how and why appellant's panic attack on August 31, 1997 was a compensable factor of employment. The Board further notes that at the time of the Office's July 7, 1998 decision rescinding acceptance of appellant's claim, there was no corroborating evidence establishing appellant's allegations of a hostile environment, sexual harassment, disparate treatment, intimidation, verbal abuse, humiliation, personal attacks and retaliation for EEO complaints. The Board accepts the Office's legal argument that it erred when it initially accepted appellant's

¹ 5 U.S.C. §§ 8101-8193, § 8128(a).

² 20 C.F.R. § 10.610.

³ *Constance I. Galbreath*, 49 ECAB 401, 406 (1998).

⁴ *Martha L. Watson*, 46 ECAB 407 (1995).

claim because none of the factors alleged to have caused or contributed to her claim were established as compensable and, therefore, medical evidence was irrelevant.⁵

The Board further finds that appellant has failed to meet her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

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 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 is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.⁶

Appellant alleged that her position description was not correct and that she was not allowed to rate her protocol staff nor given hiring and firing authority. She stated that she was subjected to an additional layer of supervision, beyond that which she expected when she accepted the position and that she improperly received disciplinary actions including letters of reprimand, counseling, a suspension and her letter of removal. Appellant asserted that her performance appraisals were inaccurate and late and that she received her evaluations and counseling in front of witnesses, including those she supervised. She stated that her supervisor, Major Jack Kammerer, provided her with her letter of removal and instructed her to "pack up and get out." Appellant stated that the employing establishment improperly denied her request for annual leave restoration and that she improperly was credited with absence without leave for an EEO meeting, although she admitted that she neglected to inform her supervisor of the EEO activity until after the fact. She stated that she did not receive training she requested.

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions and improperly issued disciplinary actions in the presence of coworkers and subordinates, issued unfair performance evaluations, wrongly addressed leave issues, improperly denied training and improperly assigned work duties, 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.⁷ Although the handling of disciplinary actions, evaluations and leave, the assignment of work duties are generally related to the employment, they are administrative functions of the employment and not duties of the employee.⁸ As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing

⁵ *Barasharat A. Jamil*, 49 ECAB 379, 387 (1998).

⁶ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

⁷ 5 U.S.C. §§ 8101-8193; see *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁸ *Id.*

establishment in what would otherwise be an administrative or personnel matter or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁹

In support of her claim, appellant submitted a statement from Sergeant James Coleman, who stated:

“In approximately July 1996, I witnessed Maj[or] Pressley throwing a letter of suspension at [appellant] at 5:00 on her last day on the job in front of [appellant’s] new supervisor, Major Woolfolk, accusing [appellant] of being absent without leave and insubordination. A few minutes late[r], I witnessed Major Pressley with her ear pressed to [appellant’s] door while [appellant] was on the [tele]phone and I asked if I could help her. Major Pressley seemed flustered and left.”

Sergeant Coleman’s statement is insufficient to establish that the employing establishment improperly issued the July 1996 disciplinary action. He was not in a position to ascertain whether appellant, in fact had been absent without leave or insubordinate. In regard to the method of delivery and the timing of the letter, the Board finds that it is not unreasonable to present an employee with a disciplinary action when she was still under Major Pressley’s supervision. In regard to the assertion that Major Pressley threw the letter at appellant, the Board finds that there is insufficient evidence to establish that this was a literal throw, rather than a figurative one and, therefore, does not establish error or abuse. Appellant has not submitted any evidence that the employing establishment acted unreasonably in assigning duties, awarding leave or administering discipline. Therefore, the Board finds that appellant has not established these actions as compensable employment factors.

In addition, appellant attributed her emotional condition to the handling of her EEO complaints. She submitted four complaints, two dated October 15 and August 4, 1997 complaint and one dated August 1, 1997. On December 18, 1997 the EEO Commission remanded appellant’s August 1, 1997 complaint finding that the issues were dismissed based on “procedurally incorrect” rationale. The Board has held that stress or frustration resulting from failure to obtain appropriate redress or corrective actions from other administrative agencies, before which complaints are filed against the employing establishment are not covered by the Act.¹⁰ Thus, the actions of a particular administrative agency in reviewing and investigating appellant’s charges and rendering a decision have no relationship to her assigned duties and, therefore, are not compensable under the Act.¹¹

Appellant also alleged that she overheard various sexual remarks and endured verbal abuse. Sergeant Coleman stated: “I noticed several incidents of verbal abuse and harassment against [appellant] whether in her office, by officers she often did not know but also at public

⁹ *Martha L. Watson*, 46 ECAB 407 (1995).

¹⁰ *Bernard Snowden*, 49 ECAB 144, 149 (1997)

¹¹ *Eileen P. Corigliano*, 45 ECAB 581, 585 (1994).

ceremonies and events. One such incident occurred such as the Commanding General's Christmas party." Although the Board has recognized the compensability of verbal abuse in certain circumstances, this does not imply that every statement uttered in the work place will give rise to coverage under the Act.¹² As Sergeant Coleman did not substantiate a specific incident of verbal abuse alleged by appellant, his statement is insufficient to substantiate verbal abuse as a compensable factor of employment.

Appellant attributed her emotional condition to harassment, disparate treatment, intimidation, humiliation and personal attacks as well as retaliation for filing her EEO claims. 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. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹³

In addition to alleging that the events addressed above constituted harassment, appellant also alleged that the employing establishment solicited statements from her subordinates in an attempt to discredit her. The record contains statements from Captain Damon M. Vrabel, complaining about appellant's management style. He submitted statements of his personal observations as well as submitting statements from subordinates. There is no indication that these statements were anything but voluntary criticism from Captain Vrabel. Appellant denied the allegations and asserted that the statements were in retaliation for her criticism of a male coworker. There is no evidence in the record that these statements were submitted to harass appellant or for discriminatory or retaliatory purposes.

Appellant submitted statements from other female workers at the employing establishment asserting that they had been subjected to disparate treatment. These statements did not address the specifics of her claim and are insufficient to establish harassment, discrimination or retaliation on the part of the employing establishment against appellant. For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty. As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record.¹⁴

¹² *Harriet J. Landry*, 47 ECAB 543, 547 (1996).

¹³ *Alice M. Washington*, 46 ECAB 382 (1994).

¹⁴ *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

The October 14, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member