U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA ELLIS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Jackson, MS

Docket No. 02-145; Submitted on the Record;
Issued June 20, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty causally related to factors of her employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On January 9, 2000 appellant, then a 29-year-old licensed practical nurse, filed an occupational disease claim alleging that she sustained an emotional condition due to having a confrontation with a coworker on January 11, 2000,[1] having an increased workload,[2] being harassed and discriminated against by supervisors and coworkers, being reprimanded in error by a supervisor,[3] having her work "sabotaged" or undermined by coworkers,[4] being assigned more difficult work duties than other employees, being closely monitored by supervisors, being denied requested days off to attend religious services, being disciplined when she was late for work, not receiving a performance award and having her request for leave under the Family and Medical

[1] Appellant alleged that Roosevelt Davis verbally assaulted her by saying "You [a]re full of shit" when she told him that it was his turn to dispense medications. She alleged that she thought that Mr. Davis might strike her.

[2] Appellant indicated that frequently there was only one licensed practical nurse available to perform tasks usually performed by two nurses. She provided a chart that she had prepared listing "rare" staffing levels, "occasional" staffing levels and the "most common" staffing level, with the fewest employees, that included one registered nurse, one licensed practical nurse and two nursing assistants. Appellant indicated that there had also been an increase in the number of patients on ward 2L when cancer patients were added (this ward had previously been solely a neurology ward). She alleged that there had been an "exodus of staff transferring to other wards or resigning from the hospital."

[3] Appellant alleged that in August 1999 the head nurse asked her if she was responsible for attaching an IV (intravenous) bag containing an incorrect medication. She stated that she considered the questioning to be a verbal reprimand.

[4] Appellant alleged that, when she was assigned to dispense medications, some were missing and she believed a coworker took the medications so that she would be accused of stealing or tampering with them. She alleged that on one occasion she found that an IV line on one of her patients had come apart and on another occasion the pillow of a comatose patient had been removed.

Leave Act (FMLA) improperly handled. Appellant also filed a claim for harassment and discrimination with the Equal Employment Opportunity (EEO) Commission.

In a statement dated November 6, 1999, Pamela Johnson, appellant's supervisor, denied that she was given more difficult assignments than other employees and stated that all employees were closely monitored to ensure proper patient care. She indicated that she was not aware of anyone sabotaging appellant's work. Ms. Johnson stated that appellant had requested Wednesdays off to attend church and had been granted her requests but, beginning October 1, 1999, the employing establishment could not grant appellant every Wednesday off due to staffing shortages.

Glen Tally, a nurse, indicated on January 14, 2000 that a hostile environment did not exist and stated that the only problem he had witnessed occurred one day when appellant and Mr. Davis argued about whose turn it was to dispense medication. Nurse Shari Vaughn stated her opinion that there was no hostile working environment on appellant's evening shift. Susan Park, a nursing supervisor, stated that Mr. Davis reported having an argument with appellant on January 11, 2000 concerning whose turn it was to give medications and he admitted telling appellant, "You [a]re full of shit" under his breath. He was advised that his comment was inappropriate. Linda Moore, a registered nurse and chief of the nursing service, stated that the staff denied appellant's allegations of harassment.

In statements dated March 15, 2000, Ms. Park noted that appellant had requested FMLA leave. She indicated that there had apparently been a temporary misunderstanding about the fact that appellant was requesting extended leave and that a head nurse told appellant that she might be charged with being absent without leave. Ms. Park indicated that she sent a letter to appellant requesting that she specify the hours and type of advanced leave that she needed.[5]

Dorothy White-Taylor, associate chief of ambulatory care/research, stated on April 25, 2000 that appellant had never advised her of any problems with her work environment. Hazel Collier, head nurse of Primary Care/Urgent Care, stated that appellant had never complained of any problems with her work environment and had stated that she liked her work. Nursing Coordinator Charles Gallagher stated that he visited all nursing care areas each evening and made himself available to staff but he had never sought out appellant specifically to scrutinize her work. Josephine Alvis, another nursing coordinator, stated that she routinely visited each unit to assure that patients' needs were met and to solve problems when necessary. She indicated that she frequently spoke with appellant but did not seek her out more than other employees. Barbara Yeager, one of appellant's supervisors, stated that she had never given appellant a reprimand and appellant had received only compliments about her work from patients and their families and her coworkers. She indicated that appellant had never advised her of any problems with her job or coworkers. Mr. Tally stated that on January 11, 2000 he heard appellant and Mr. Davis talking in a raised tone of voice but he did not observe any action by Mr. Davis that was hostile or antagonistic. Nurse Elizabeth Barnes stated that during the incident on January 11, 2000 Mr. Davis did not yell at appellant.

In a letter dated September 7, 2000, T.J. Testman, acting chief of the Human Resources Management Service, denied that the employing establishment had violated the provisions of the

[5] In a memorandum dated August 11, 2000, Ms. Park indicated that appellant's request for leave under the FMLA was granted but her request for advanced sick and annual leave was denied.

FMLA and noted that appellant's request was processed and approved within 30 days of her request. He stated that appellant had never received any disciplinary action from any supervisor at the employing establishment.

By decision dated September 29, 2000, the Office denied appellant's claim on the grounds that she had failed to establish that her emotional condition was causally related to compensable factors of her employment.

By letter dated October 29, 2000, appellant requested a review of the written record by an Office hearing representative.

By decision dated and finalized June 18, 2001, an Office hearing representative affirmed the Office's September 29, 2000 decision.

By letter dated July 31, 2001, appellant requested reconsideration and submitted additional evidence.

Appellant submitted a notice dated May 17, 2001 from an EEO administrative law judge in which he returned the case to the local EEO office for a final decision. Appellant argued that the notice issued by the EEO established her allegations against the employing establishment as having merit.

By decision dated October 1, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant further merit review.

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty causally related to factors of her 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 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.[6] 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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.[7]

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.[8] This burden includes the submission of a detailed description of

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

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

the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[9]

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.[10] 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.[11]

In this case, appellant attributed her emotional condition to a number of employment incidents and conditions. The Board must, thus, initially determine whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding the incident between appellant and Mr. Davis on January 11, 2000, an altercation between coworkers that arose out of a claimant's regularly or specially assigned duties could be considered an employment factor.[12] Appellant alleged that Mr. Davis verbally assaulted her by saying "You [a]re full of shit" when she told him that it was his turn to dispense medications. She alleged that she thought that Mr. Roosevelt might strike her.

Supervisor Park stated that Mr. Davis reported having an argument with appellant on January 11, 2000 concerning whose turn it was to give medications and told appellant, "You [a]re full of shit" under his breath. However, Mr. Tally, a nurse, stated that Mr. Davis was not hostile or antagonistic during that incident. Ms. Barnes, a registered nurse, stated that Mr. Davis did not yell at appellant. Based on the evidence of record, it appears that on January 11, 2000 Mr. Davis made an inappropriate comment when he and appellant disagreed about whose turn it was to dispense medication but there is insufficient evidence that he acted in a manner that would rise to the level of a compensable factor of employment. Thus, appellant has not established a compensable factor in this regard.

Appellant's allegations regarding the employing establishment's close monitoring of her work, denial of her requested days off to attend religious services, denial of leave, reprimand regarding a medication error, discipline when she arrived late for work, assignment of difficult work duties and denial of a performance award relate to administrative or personnel matters and are unrelated to the employee's regular or specially-assigned work duties. Thus, they do not fall within the coverage of the Act.[13] Although such matters are generally related to the employment, they are

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[9] *See Effie O. Morris*, 44 ECAB 470, 473 (1993).

[10] *See Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

[11] *Id.*

[12] *See Irene Bouldin*, 41 ECAB 506, 514 (1990).

[13] *See Dinna M. Ramirez,* 48 ECAB 308, 313 (1997); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

administrative functions of the employer and not duties of the employee.[14] 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 this case, the employing establishment denied that it erred or acted abusively in its handling of administrative or personnel matters and appellant has provided insufficient evidence of error or abuse.

Ms. Johnson, appellant's supervisor, denied that she was given more difficult assignments or more closely monitored than other employees and indicated that she was not aware of anyone sabotaging appellant's work. She stated that appellant had requested Wednesdays off to attend church and had been granted her requests in the past but the employing establishment could not continue to grant appellant Wednesdays off due to staffing shortages. Ms. Park stated that appellant had requested FMLA leave and there had been a temporary misunderstanding but the record shows that the FMLA leave was eventually granted. Mr. Gallagher and Ms. Alvis, nursing coordinators, stated that they did not monitor appellant more closely than other employees. Ms. Yeager, one of appellant's supervisors, stated that she had never given appellant a reprimand and appellant never told her of any problems with her job or coworkers. Mr. Testman of the human resources management service denied that the employing establishment had violated the provisions of the FMLA and noted that appellant's request was processed and approved within 30 days of her request. He stated that appellant had never received any disciplinary action.

Thus, appellant's supervisors have denied that appellant was given more difficult assignments or was more closely monitored than other employees, was unfairly denied leave or was ever unfairly disciplined. They were not aware of any employee sabotaging her work. The supervisors explained that they accommodated appellant's requests for time off to attend church unless there was a staffing shortage. They denied that appellant's request for leave under the FLMA was mishandled. Appellant did not provide evidence that the employing establishment erred or acted abusively in denying a performance award. She has failed to provide sufficient evidence establishing that the employing establishment erred or acted abusively concerning its handling of administrative and personnel matters as factual. Thus, she has not established a compensable employment factor under the Act in this respect. As previously noted, disability is not covered where it results from frustration from not being permitted to work in a particular environment.[15]

Regarding appellant's allegation that she had an emotional reaction to an increased workload due to a staffing shortage and an increase in patients on ward 2L, the Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements may be compensable. In *Joseph A. Antal*,[16] 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 *Cutler*, found that the claimant was entitled to compensation. In *Georgia F. Kennedy*,[17] the Board, citing the principles of *Cutler*, listed employment factors which would be covered under the Act, including an unusually heavy work

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[14] *See Anne L. Livermore,* 46 ECAB 425, 431-32 (1995); *Richard J. Dube,* 42 ECAB 916, 920 (1991).

[15] *See Eileen P. Corigliano*, 45 ECAB 581, 583-84 (1994).

[16] 34 ECAB 608 (1983).

[17] 35 ECAB 1151 (1984).

load and imposition of unreasonable deadlines. In this case, in support of her allegation of overwork, she described her work duties and provided a chart showing her estimation of the various staffing levels on her ward. However, she did not provide evidence that the "most common" staffing level, which had the lowest number of nurses, was insufficient to perform the required duties and thus caused overwork for appellant. Therefore, her allegation of overwork is not deemed a compensable employment factor.

Appellant has 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 her regular duties, these could constitute employment factors.[18] 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.[19] In this case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to substantiate that she was harassed or discriminated against by her supervisors or coworkers.[20]

Mr. Tally, Ms. Vaughn and Ms. Moore denied that a hostile environment existed. Ms. White-Taylor, associate chief of ambulatory care/research, and Ms. Collier, a head nurse, stated that appellant had never advised them of any problems with her work environment. Thus appellant's supervisors have denied that she was harassed and appellant has failed to provide sufficient evidence to establish that she was harassed or discriminated against by the employing establishment. Therefore, appellant has not established a compensable employment factor under the Act in this respect.

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 while in the performance of duty.[21]

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

The Code of Federal Regulations provides 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 evidence not previously considered by the Office.[22] When a

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

[19] *See Donna J. DiBernardo,* 47 ECAB 700, 703 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[20] *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).

[21] Because appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Garry M. Carlo*, 47 ECAB 299, 305 (1996).

[22] 20 C.F.R. § 10.606(b)(2).

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.[23]

In support of her request for reconsideration, appellant submitted a notice dated May 17, 2001 from an EEO administrative law judge in which the judge returned the case to the local EEO office for a final decision. Appellant argued that the notice issued by the EEO established her allegations against the employing establishment as having merit. However, the May 17, 2001 notice was not a final decision on the merits of appellant's EEO claim, merely a notice returning the case to the local EEO office for a final decision. As such, it does not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant failed to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated October 1 and June 18, 2001 are affirmed.

Dated, Washington, DC
June 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[23] 20 C.F.R. § 10.608(b).