

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIRIAM RIOS-FIGUERO and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, San Juan, PR

*Docket No. 01-2106; Submitted on the Record;
Issued March 19, 2003*

DECISION and ORDER

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

The issue is whether appellant has established an emotional condition causally related to compensable factors of her federal employment.

On April 5, 2000 appellant, then a 43-year-old registered nurse, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) for an injury on March 7, 2000. Appellant alleged that she sustained an emotional condition as a result of harassment by a supervisor, Luz Garcia.

In a decision dated May 26, 2000, the Office of Workers' Compensation Programs denied the claim on the grounds that appellant did not submit sufficient evidence to establish an injury in the performance of duty.

By decision dated June 20, 2001, an Office hearing representative affirmed the May 26, 2000 Office decision. The hearing representative found that appellant had not substantiated a compensable work factor as contributing to an emotional condition.

The Board finds that appellant has not established an emotional condition causally related to compensable work factors.

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 factors of her federal employment.¹ To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric

¹ Pamela R. Rice, 38 ECAB 838 (1987).

disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.²

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 coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.³

In this case, appellant has alleged that she was harassed by a supervisor, Ms. Garcia. At a March 26, 2001 hearing before the Office hearing representative, appellant stated that she used her personal automobile to visit patients and in August 1999 she was involved in motor vehicle accident. According to appellant, Ms. Garcia believed that the resulting medical restrictions did not permit appellant to drive, but that appellant still had to perform all of her patient care functions. She was alleged to have stated at staff meetings and to appellant that she needed a nurse that could perform her duties all of the time, or appellant would have to be replaced. Appellant alleged that Ms. Garcia followed her and checked to see if she was attending her physical therapy and medical appointments. In December 1999, appellant was involved in another motor vehicle accident. On February 29, 2000 appellant had her annual performance review and Ms. Garcia had noted her motor vehicle accidents and indicated that appellant had caused a decline in the group morale. Appellant also indicated that at a subsequent staff meeting it was announced that she would no longer be part of the home care group but would perform primary care.

The Board notes that appellant has identified specific administrative or personnel matters, such as a performance evaluation and a reassignment. It is well established that administrative or personnel matters, although generally related to employment, are primarily administrative functions of the employer rather than duties of the employee.⁴ The Board has also found,

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Anne L. Livermore*, 46 ECAB 425 (1995); *Richard J. Dube*, 42 ECAB 916 (1991).

however, that an administrative or personnel matter may be a factor of employment where the evidence discloses error or abuse by the employing establishment.⁵ In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁶

With respect to a claim based on harassment or discrimination, the Board has held that actions of an employee's supervisors or coworkers which the employee characterizes as harassment may constitute a factor of employment giving rise to a compensable disability under the Act. A claimant must, however, establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁷ An employee's allegation that he or she was harassed or discriminated against is not determinative of whether or not harassment occurred.⁸

The record indicates that appellant filed an Equal Employment Opportunity (EEO) complaint, as the record contains deposition testimony taken pursuant to an EEO investigation, but there are no findings of harassment or discrimination. The December 13, 2000 testimony of Ms. Garcia stated that the information she received from appellant's physician was that appellant could not drive, but could otherwise perform the duties of the position. Ms. Garcia indicated that it was sometimes difficult to coordinate appellant's visits with other staff members. According to Ms. Garcia, appellant asked to be transferred after the February 2000 performance evaluation. The EEO investigator advised Ms. Garcia that appellant was also claiming harassment with respect to being asked to return her cellular telephone, and Ms. Garcia explained that when staff are on leave equipment needed to be returned in case it was needed by other staff members.

There is no evidence in the record sufficient to substantiate a claim based on harassment, nor is there evidence of error or abuse in a specific administrative action. There are no findings of harassment, and the testimony evidence does not establish a pattern of harassment by the supervisor. There is an allegation, for example, that appellant was followed by the supervisor, but no evidence was submitted to support the allegation.

With regard to the February 29, 2000 performance evaluation, appellant indicated that she was upset that the supervisor referred to her motor vehicle accidents and the detrimental effect on group morale. Ms. Garcia indicated that the rating was highly satisfactory, and when appellant expressed her dissatisfaction with some of the comments in the evaluation, Ms. Garcia agreed to remove the comments. There was no admission of error, and a change in the performance evaluation does not in itself show error or abuse.⁹

⁵ See *Michael Thomas Plante*, 44 ECAB 510 (1993); *Kathleen D. Walker*, 42 ECAB 603 (1991).

⁶ *Anna C. Leanza*, 48 ECAB 115 (1996).

⁷ *Gregory N. Waite*, 46 ECAB 662 (1995); *Barbara J. Nicholson*, 45 ECAB 803 (1994).

⁸ *Helen P. Allen*, 47 ECAB 141 (1995).

⁹ See *Tanya A. Gaines*, 44 ECAB 923 (1993) (a change in the performance evaluation from fully successful to highly successful did not establish a compensable work factor).

The Board cannot find any probative evidence to substantiate a compensable work factor in this case. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.¹⁰

The decision of the Office of Workers' Compensation Programs dated June 20, 2001 is affirmed.

Dated, Washington, DC
March 19, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

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