U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON D. FORDE and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket No. 02-1449; Submitted on the Record;
Issued March 24, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs hearing representative properly denied appellant's request for subpoenas.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet her burden of proof to establish that she sustained an emotional condition while in the performance of duty.

Appellant filed three claims for traumatic injuries on March 20, April 3 and May 6, 1999 and one claim for an occupational disease arising on or before May 22, 1999. All of appellant's claims pertained to emotional conditions which she claimed arose out of or were aggravated by her work factors. The Office consolidated appellant's claims into the present file. In an August 12, 1999 letter, appellant presented her allegations pertaining to incidents which she claimed caused or aggravated her emotional condition. Thirty-three incidents in total were claimed. In a September 29, 1999 letter, the employing establishment controverted appellant's allegations. In a December 2, 1999 letter, appellant rebutted the employing establishment's contentions. Medical evidence was received.

By decision dated December 15, 1999, the Office found the evidence of record insufficient to establish that appellant sustained any injury as alleged. In an accompanying memorandum, the Office addressed the 33 incidents and found that appellant failed to establish a compensable employment factor. The Office found that the Form CA-1 submitted for an alleged injury on March 20, 1999, when appellant was denied the right to work based upon medical reports, was an administrative issue revolving around whether or not to offer limited duty and found there was no administrative error or abuse. It was noted that the other CA-1s referenced events in the general statement submitted for all claims.

In a January 10, 2000 letter, appellant, through her attorney, requested an oral hearing before an Office representative. By decision dated October 18, 2000, the Office hearing representative affirmed the Office's December 15, 1999 decision.

In an October 17, 2001 letter, appellant requested reconsideration of the hearing representative's decision. Duplicative evidence of record was submitted along with new evidence.[1] By decision dated February 4, 2002, the Office denied modification of its prior decision on the grounds that the additional evidence was insufficient to establish error or abuse by the employing establishment in its administrative actions or to prove harassment or discrimination.

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 the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.[2]

Perceptions and feelings alone are not compensable. 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.[3] 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 disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[4]

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[1] The new evidence consisted of a certification of physician dated January 20, 1994 noting that appellant had valvular heart disease, which precluded strenuous physical work and lifting heavy weights, a September 14, 2001 employing establishment form completed by Dr. Jennifer Smith diagnosing mitral stenosis and setting forth the guidelines and restrictions for light-duty work appellant could perform, a November 28, 1995 letter to appellant from Donna Galloway, Manager, Human Resources which addressed the investigation pertaining to the events of October 21, 1995, a December 9, 1995 witness statement from Angelika Moye pertaining to the events of December 7, 1995, a March 26, 1996 statement from Roger Keathly described the events of February 21, 1996 and advised that he had given appellant the required Family Medical Leave Act packet so appellant could cover her absence from work due to stress and a September 28, 1996 routing slip from Marilyn Layden advising appellant requested to be taken to the hospital, was told to complete a CA2 and see her own physician as the employing establishment only took employees to the hospital for on-the-job accidents.

[2] *Lillian Cutler*, 28 ECAB 125 (1976).

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

[4] *Donna Faye Cardwell*, 41 ECAB 730 (1990).

Appellant's primary allegation is that she suffered harassment and discrimination at the employing establishment and sustained an emotional condition as a result. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.[5] Mere perceptions alone of harassment and discrimination are not compensable under the Act.[6] To discharge her burden of proof, a claimant must establish a factual basis for her claim by supporting her allegations of harassment with probative and reliable evidence.[7] The Board finds that appellant failed to provide sufficient probative and reliable evidence in this case to sustain her allegations.

The Office properly found that the following alleged incidents were not factual, not within appellant's performance of duty or noncompensable:

Appellant alleged that on July 8, 1994 she requested leave to seek medical treatment for her heart condition and her manager, Sarah Jamis, yelled and screamed at her in front of two witnesses, including an American Postal Workers' Union (APWU) steward. She later amended her initial allegation to a denial of medical treatment by a supervisor and that she had requested treatment of her heart condition as a work-related injury. Appellant asserted that the manager breached confidentiality when she discussed appellant's medical condition in front of other people. She submitted a statement from James St. Cyr, who noted that appellant had told him about the incident after he met appellant in 1995. The employing establishment disputed appellant's assertion that it had denied her medical treatment or having yelled at appellant at any time. The Office found this allegation was not established factual. In this case, the Office properly noted that although a specific event was identified appellant failed to submit sufficient evidence contemporaneous to the event from any actual witness to the event.

Appellant alleged that on August 27, 1995 she witnessed a supervisor, Ms. Barnard, yelling and screaming at one of her coworkers and suffered disabling emotional stress as a result. She advised that she reported the incident to another supervisor, Ms. Layden. The coworker stated that Ms. Barnard had yelled at her, while Ms. Barnard denied ever having yelled. The Office found that although a discussion may have occurred between appellant's coworker and Ms. Barnard, there was no evidence that appellant was acting in any representational function for her coworker. Accordingly, there was no evidence that the incident involving the coworker would be part of appellant's work duties, appellant's emotional reaction would not be compensable.

Appellant alleged that in August 1995 she was directed by Supervisor Barnard to work outside her normal bid position. She asserted that she was treated differently from other individuals and that the work assignment was outside her work restrictions. The employing establishment asserted that the assignment of work was a management prerogative and that appellant failed to provide any factual evidence that management had erred in making such work

[5] *Donna Faye Cardwell*, *supra* note 4; *Pamela R. Rice*, *supra* note 3.

[6] *Wanda G. Bailey*, 45 ECAB 835 (1994); *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

[7] *Ruthie M. Evans*, *supra* note 6.

assignment. Appellant failed to submit any supporting evidence to support her allegation that the work assignment was outside her restrictions and/or that she had been treated differently from other individuals. The Office properly found that such incident was noncompensable.

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken at the employing establishment are not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.[8] The Board has held, however, that coverage under the Act will attach if the factual circumstances surrounding the administrative or personnel action establish error or abuse by the employing establishment superiors in dealing with the claimant.[9] Absent evidence of error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

The allegations made by appellant that fall into this category of administrative or personnel actions include the employing establishment's investigation into various incidents; disciplinary actions in terms of appellant's possible removal from the employing establishment and the issuance of letters of warning; the assignment of work and matters related to such assignments; denial of leave requests under the Family Medial Leave Act; scheduling of fitness-for-duty examinations; the filing of claim forms; the denial of a request for a meeting/discussion with management; and medical authorization issues.

Appellant alleged that on October 21, 1995 she was violently body checked by Ms. Kurcz, a coworker. A second such body check was alleged to have occurred in November 1995. Appellant alleged that such incidents caused her stress. The employing establishment reported that Ms. Kurcz denied such allegations and that statements from other employees concurred with Ms. Kurcz's version of the events. The employing establishment stated that an investigation into the incident was held and found to be without merit. As there is no showing of error or abuse on the part of the employing establishment into the investigation of such incidents, this is not a compensable factor of employment.

Appellant stated that on November 6, 1995 a meeting between management, the union, and appellant took place regarding the October 21, 1995 incident of Ms. Kurcz violently body checking appellant. The result of the meeting was an agreement that appellant and Ms. Kurcz would not be in close proximity (no more than four to six feet) to each other. Appellant asserted that during the meeting, Sarah Jamis yelled and screamed at appellant and threatened to have her removed when she was explaining her concerns about work place violence. Supervisor Jamis stated that if appellant behaved inappropriately at the meeting, she could have suggested that she would be removed if she did not calm down and/or if she was out of control. She denied having threatened appellant. The Office accepted that such meeting took place and that appellant's removal from the facility was discussed due to her behavior in the meeting. The Office properly found that the record was devoid of any evidence indicating that Ms. Jamis acted unreasonably

[8] *Thomas D. McEuen*, 41 ECAB 389 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

in response to appellant's behavior at the meeting. As the issuance of disciplinary actions relates to an administrative function of the employing establishment and there is no evidence of any error or abuse in Ms. Jamis's warning that appellant was acting inappropriately and could be removed, appellant's response is not compensable.

Appellant asserted that on February 21, 1996 she was assigned work outside her known work restrictions and she worked it as ordered. She indicated that, when she complained, management found her 1993 work restrictions in her CFS file. Appellant asserted that her work restrictions should not have been in her CFS file nor reviewed by her representative or management. The employing establishment denied that appellant was assigned to work outside her restrictions. It was noted that appellant's 1993 work restrictions were not found in a file where they should not have been. The assignment of work and the location of where work restrictions are filed 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.[10] As there is no evidence of error or abuse, appellant's reaction is not compensable.

Appellant stated that her request for leave under the Family Medical Leave Act was disapproved on June 9, 1996. She indicated that the denial should have been issued within two days, but was issued three months after it was requested. The employing establishment asserted that the denial was issued because appellant failed to submit the required information. Allegations pertaining to wrongly denied leave relate to administrative or personnel matters.[11] There is no showing that the employing establishment acted unreasonably in denying appellant's leave request.[12] Thus, appellant has not established a compensable employment factor with regard to administrative matters.

Appellant asserted that she was required to undergo a fitness-for-duty examination based on medical information illegally obtained from her CFS file. She stated that the examination was later cancelled due to the employing establishment's failure to follow appropriate procedures. The employing establishment stated that such examinations were a management prerogative and the cancellation of the examination did not establish error or abuse. The scheduling of a fitness-for-duty examination is administrative in nature. The record is devoid of any evidence to establish any error or abuse in the scheduling of such examination. The mere fact that the examination was later cancelled does not, in and of itself, constitute error or abuse by the employing establishment.[13]

Appellant asserted that on September 12, 1996 she was extremely overwhelmed by stress and fatigue and Supervisor Castillo took her to the emergency room. She related that she was diagnosed as having "job-related stress and fatigue." Appellant asserted that Ms. Newberry from the injury compensation office found her absence not to be job related and denied payment of the

[10] *See Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993).

[11] *Id.*

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

[13] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

hospital bill or her time off. She indicated that Ms. Newberry had denied her request for a CA-1 or CA-2. The employing establishment noted that the supervisor had indicated that the problem was with appellant's medication and denied not providing requested forms to appellant. The record is devoid of any evidence that appellant had specifically requested forms to file a claim for worker's compensation. The filing of a workers' compensation claim is an administrative function and there is no showing of error or abuse in this case.

Appellant asserted that on September 26, 1996 Ms. Reynolds "interrogated" her with regard to her medical history and that her refusal to provide such information resulted a retailation by Ms. Reynolds with the rejection of her request for leave under the Family Medical Leave Act. She further advised that the decision on the leave request was not issued within the required two days and that Ms. Reynolds had a poor reputation with certain employees. The supervisor asserted that she never interrogated appellant nor requested any medical documentation not required under the Family Medical Leave Act. The Board finds there is no evidence to support appellant's allegation that she was interrogated by Ms. Reynolds or subject to retailation by Ms. Reynolds with regard to the denial of her request for leave under the Family Medical Leave Act. As previously noted, the record is devoid of any evidence that the employing establishment erred or abused its authority in denying appellant's leave request. The record reflects that the employing establishment attempted to advise appellant of the information required and provided her with a her reasonable time in which to submit such information before denying her leave request. The opinions of appellant and her coworkers with regard to Ms. Reynold's reputation is irrelevant to the issue of a showing of error or abuse.

Appellant asserted that on October 5, 1996 she was assigned to work in close proximity to Ms. Kurcz, in violation of the November 6, 1995 agreement. She advised that Ms. Kurcz was removed from the area after she complained to Ms. Layden, the supervisor. In the December 2, 1999 statement, Mr. St. Cyr stated that appellant had informed him about the October 5, 1996 incident. The employing establishment denied having assigned appellant to work in close proximity to Ms. Kurcz. As previously noted, the assignment of work concerns personnel or administrative actions and are not compensable without a showing of error or abuse. In this case, there is no evidence of any error or abuse as it appears the situation was resolved immediately upon appellant's complaint to her supervisor. Accordingly, appellant's reaction to the incident is not compensable.

Appellant stated that on October 8, 1996 she was violently body checked by a coworker, Ms. Griego, in a stairwell attempting to knock her down a flight of stairs. She stated that she attempted to talk to Ms. Griego, who had reported the incident to management. In his October 15, 1996 statement, Mr. Cyr reported that he was walking up the stairwell with appellant and Ms. Griego was walking with Shannon Cortez down the stairwell. He stated that when Ms. Griego passed appellant, her shoulder made contact with appellant's chest causing appellant to touch the wall. In a later statement of December 2, 1999, Mr. Cyr asserted appellant's version of the events. Ms. Cortez did not report any violent contact in her witness statement. The employing establishment conducted an investigation into the manner which found that all employees had committed unsafe acts in the stairwell and were instructed in safe behavior while in stairwells. The Board notes that Mr. Cyr's 1996 contemporaneous recitation of events more credible than his later explanation in December 1999, which is not supported by any

documentation. Although an incident did occur, the Office properly found that appellant's perception as to Ms. Griego's motives could not be ascertained. There is no indication of error or abuse in the employing establishment's investigation and resolution of the issue; appellant's reaction to the incident is not a compensable factor.

Appellant further stated that she spoke with Ms. Griego the next day on October 9, 1996 concerning the incident. She alleged that Ms. Barnard told Bea Castillo that appellant was out of control and that Ms. Griego could not handle her. In her October 4, 1999 statement, Ms. Barnard denied appellant's allegation. The Boards finds that, although appellant related she had a conversation with Ms. Griego, she reported what Ms. Bernard had allegedly told Ms. Castillo. As there are no witness statements addressing to the conversation between Ms. Castillo and appellant. The allegation that Ms. Barnard said appellant was out of control and that Ms. Griego could not handle her is not established as factual.

Appellant asserts that on October 9, 1996 Ms. Castillo walked up behind her and committed battery by grabbing her by her shoulders and wrenching her around. In a November 7, 1996 statement, Ms. Castillo stated that she had touched appellant's chair, meant nothing by it, and had apologized to appellant. The Office found that although the incident had occurred, as there remained a dispute as to exactly what transpired, the incident did not rise to the level of harassment. The Board finds that as there is insufficient evidence to substantiate appellant's allegation of being grabbed by the shoulders. As Ms. Castillo's statement is contemporanous to the incident and there is no other evidence of record that appellant reported the incident had occurred in the manner she alleged. This allegation is not substantiated.

Appellant further asserted that the next day, October 10, 1996, she attempted to speak with Ms. Reynolds about the "battery," but Ms. Castillo told her that Ms. Reynolds would not speak to her. She further stated that, when she asked to speak with Ms. Reynold's supervisor, Mr. Caruthers, someone told her to send the information by telefax. The employing establishment stated that Ms. Reynolds was not available, as she had left for the day, and that Mr. Caruthers had advised appellant to send him her concerns in writing. A request for a discussion and/or meeting with a manager is administrative in nature. There is no showing that there was any error or abuse in the employing establishment's actions of not calling an immediate meeting concerning the allegation of an October 9, 1996 battery or in directing that appellant's concerns should be addressed in writing to Mr. Caruthers.

Appellant asserted that on November 4, 1996, she submitted a Form 1767 (Report of Hazard, Unsafe Condition or Practice) regarding the violent body check by employee Griego and the battery by Supervisor Barnard. She asserted that management never addressed the incidents. The employing establishment stated that Manager Reynolds responded to the report on November 6, 1996. The record reflects that the employing establishment investigated the incidents and found them to be without merit. As there is no evidence of abuse or error by the employing establishment in conducting the investigation, this is not a compensable incident.

Appellant alleged that Ms. Reynolds was not on duty November 4, 1996, the day she responded to the above Form 1767. Ms. Reynolds stated that she signed the response that day, even if a copy was not given to appellant. The Office properly noted that as there was no

evidence that appellant's duties called upon her to obtain a response from management, this is not a compensable factor.

Appellant alleged that on November 17, 1998 her coworker, Ms. Kurcz, threatened her with violence. She noted that the incident was reported to management. The employing establishment stated that the incident was investigated and it was determined that appellant should be placed on emergency leave pending investigation. They further noted that appellant's Equal Employment Opportunity (EEO) complaint regarding her removal from the workplace was settled without admission of error. The evidence does not establish error or abuse in the employing establishment's investigation into the incident, this is not compensable. The Office had found that although the employing establishment had stated that appellant instigated the incident with Ms. Kurcz, no witness statements were submitted to accept that a threat of violence had been made. The Board finds that, although an inappropriate verbal exchange between two coworkers had occurred, the employing establishment had intervened appropriately.

As a result of the November 17, 1998 incident, appellant alleged that she was placed on emergency off duty status. She further stated that the EEO settlement made her whole and, therefore, was an admission of error. The incident arose from a situation in which appellant blocked Ms. Kurcz and there was no finding of error or abuse in the employing establishment's investigation into the matter. As previously noted, a settlement without prejudice does not establish error or abuse in an administrative matter.[14]

Appellant asserted that on March 10, 1998 an EEO Judge ruled in her favor for improper emergency placement. The employing establishment advised that on March 10, 1998, a prearbitration settlement was issued in which all parties agreed to mutually purge the emergency placement letter and pay $8,500.00 for time missed from work. The settlement did not make any factual findings of error. On rebuttal, appellant asserted that it was an abuse for the employing establishment to reveal the settlement, which was to remain confidential. The Office found that the issue was whether the employing establishment had authority to remove appellant from the premises. The Boards finds that the employing establishment had the authority to remove appellant from the premises and choose not to pursue the matter into an Equal Employment Opportunity Commission (EEOC) hearing. Inasmuch as the employing establishment was responding to appellant's EEO filing, it was not error or abuse for the employing establishment to acknowledge that a settlement had occurred. There is no error or abuse and this allegation is not compensable.

Appellant asserted that on March 12, 1997 she received two notices from the employing establishment advising that they were no longer able to accommodate her heart condition and unable to locate a permanent light-duty position to accommodate hear heart condition. She was advised to apply for disability or retire. Appellant contended that this was a violation of the Americans With Disabilities Act. She further alleged that on April 5, 1999 (later amended to 1997), she was told by a supervisor that the employing establishment would no longer accommodate her. Appellant's allegation is focused on the administrative process by which the employing establishment may provide light duty. Her emotional reaction arises from a

[14] *See Constance I. Galbreath*, 49 ECAB 401 (1998).

frustration at not being permitted to work in a particular environment. The Board finds that these allegations pertaining to the assignment of light duty are not sufficiently related to the employee's regular or specially assigned employment duties so as to arise in the course of employment.

Appellant asserted that as a result of an injury on August 20, 1998 she injured her right shin and aggravated an upper back sprain. She stated that on September 30, 1998 she met with the Postmaster and a supervisor regarding the lost workdays and was admonished for having an accident. Appellant further stated that her requests for union representation were denied. The employing establishment stated that the meeting was conducted to investigate the accident and to make a job offer and there was no need for union representation. The Board finds that appellant has not submitted sufficient evidence to establish that union representation was required under these circumstances. As there is no showing of any error or abuse, this is considered administrative in nature and not compensable.

Appellant asserted that on December 22, 1998 she returned to work with lifting restrictions and she was presented with a limited-duty offer which she signed. She asserted that she was not advised of her "absolute right under the Act for a suitability determination from [the Office]." Appellant contended that she felt coerced and intimidated into signing the limited-duty offer. The employing establishment denied that appellant was forced to sign the limited-duty offer and the employing establishment had followed the proper procedures. The Board notes that a suitability determination by the Office was not needed in this case, as appellant had accepted the job offer and worked in the position for 60 days. Accordingly, as there was no evidence or error or abuse in the employing establishment's following of the procedures, this is not a compensable factor.

Appellant alleged that she worked outside her work restrictions after her physician further limited her in his January 5, 1998 CA-17 report. The employing establishment advised that they could not comment as no specific information was provided other than the allegation. The Board finds that appellant's allegation that she worked outside her new work restrictions has not been established as factual. She failed to submit specific information beyond her general allegation.

Appellant alleged that on January 13, 1999 she was offered and signed a limited-duty position without a suitability determination by the Office. She stated that she performed the offered work. The employing establishment stated that it had followed proper procedures. As noted, the Office was not requested to make a suitability finding on the job offer.

Appellant alleged that she was advised on March 19, 1999 that she needed to fill out claim forms for her alleged injuries of January 28 and February 23, 1999. She stated that she had completed a CA-1 form. Appellant stated that, when she went to Kaiser, she was told that a nurse working for the employing establishment had discussed her claim with a liason for Exempla. The employing establishment denied speaking with or calling anyone from Kaiser to discuss appellant's claims. The Office found that a conversation did occur regarding appellant's claim between an employing establishment representative and a liason for Exempla. However, there is evidence that the employer is forbidden to discuss medical care authorization issues with the selected medical provider. The telephonic request for information by the employing

establishment has not been established as erroneous. The Office noted that Kaiser does not treat workers' compensation issues, but refers them to Exempla. This is considered an administrative issue and is not compensable.

Appellant asserted that on April 3, 1999 she was given an official discussion by her supervisor about lost time from work due to her injuries of January 28 and February 23, 1999. She alleged that this violated procedures and constituted error by the employing establishment. The employing establishment advised that appellant was admonished for failure to report the accidents in a timely manner. Appellant was not disciplined for having accidents, but for not reporting the accidents timely. The Board finds that the evidence does not establish the official discussion constituted error or abuse.

Appellant submitted a request under the Family Leave Medical Act on April 13, 1999 and it was denied on May 4, 1999, beyond the two-day period for a decision. The employing establishment stated that appellant's request was ultimately denied because she did not provide necessary documentary information, after being provided opportunity to do so. The Board finds that the employing establishment did not commit any error or abuse in denying appellant's incomplete application after she was given the opportunity to perfect her request.

Appellant asserted that on May 6, 1999 she was given a letter of warning for not reporting her January 28 and February 23, 1999 injuries in a timely manner. She further asserted that Ms. Kurcz was assigned a place "directly behind" her, which was a violation of the November 6, 1995 agreement. The employing establishment stated disciplinary procedures were followed in providing the letter of warning. Appellant's supervisor at the time of the assignment was unaware of the 1995 agreement pertaining to appellant and Ms. Kurcz but that appellant could have sought placement elsewhere. The Board finds insufficient evidence of record to support a finding of error or abuse by the employing establishment pertaining to the issuance of the letter of warning. Although it appears that Ms. Kurcz was assigned near appellant, the evidence does not establish be ascertained whether a violation of the 1995 agreement. The Office noted that appellant had immediately objected to the arrangement.

Appellant asserted that on May 5, 1999, she received an accident interview with her supervisor regarding the alleged injuries of March 20, 1999 and April 3, 1999, which she characterized as disciplinary in nature. The employing establishment noted the purpose of the interview was not to discipline appellant but rather to assist her to work safety and to avoid future accidents. No evidence has been submitted to show that this was a disciplinary proceeding or that the employing establishment erred in holding the interview. Accordingly, this is not a compensable factor.

Since appellant has not established a compensable employment factor under the Act, the Board need not address the medical evidence.[15]

The Board further finds that the Office hearing representative properly denied appellant's request for subpoenas.

[15] *Margaret S. Krzycki*, 43 ECBA 496 (1992).

Section 8126 of the Act provides, in relevant part, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles...."[16]

To establish that the Office abused its discretion, appellant must show manifest error, prejudice, partiality, intentional wrong, an unreasonable exercise of judgment, illogical action, or action that would not be taken by a conscientious person acting intelligently. The mere showing that the evidence could support a contrary conclusion is insufficient to prove an abuse of discretion.[17]

In a March 9, 2000 letter, appellant's counsel requested that the Office issue subpoenas for the following witnesses, Mr. Canty, Mr. St. Cyr, Ms. Moye, Ms. Mabry, Mr. Pearman and Mr. Morrow, as they were the best source of testimony and have the most direct knowledge of the incidents, which were delineated under each individuals name. The attorney advised that subpoenas were needed so that the witness would be available for testimony and the hearing officer could personally ascertain the credibility of appellant's claims.

In the decision of October 18, 2000, the Office hearing representative denied appellant's request on the grounds that appellant failed to demonstrate that the testimony of the specified persons would be pertinent to the issues addressed at the hearing. The Office additionally denied appellant's request on the grounds that she did not demonstrate that the information sought could not be obtained by other means than issuance of subpoenas.

Appellant failed to demonstrate that the testimony of the persons specified in the attorney's letter of March 9, 2000 would be relevant to the issue of whether her emotional condition was caused by factors of her employment could not be obtained by means other than the issuance of a subpoena.[18] Therefore, the Office properly denied appellant's request for a subpoena.

The February 4, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 24, 2003

Colleen Duffy Kiko
Member

[16] 5 U.S.C. § 8126(1).

[17] *See Darlene Menke (James G. Menke, Sr.)*, 43 ECAB 173 (1992).

[18] *See* 20 C.F.R. § 10.134(a).

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member