

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CONNIE WIESNOSKI and DEPARTMENT OF VETERANS AFFAIRS,  
Mare Island, CA

*Docket No. 03-1497; Submitted on the Record;  
Issued November 5, 2003*

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DECISION and ORDER

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

The issues are: (1) whether appellant sustained an emotional condition causally related to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On August 19, 2002 appellant, then a 44-year-old program support clerk, filed an occupational disease claim alleging that she sustained an emotional condition and stress-related physical problems due to having her job assignment changed, receiving inadequate training, having leave requests denied, being closely monitored, being unfairly disciplined and having other problems with the employing establishment's handling of administrative and personnel matters; having her compensation claim mishandled; hearing that a supervisor made negative comments about her; having her medical restrictions exceeded; and being harassed and discriminated against. Appellant also submitted medical evidence in support of her claim. She indicated that she first became aware of her condition on November 4, 1999.

By decision dated January 7, 2003, the Office denied appellant's claim for an emotional condition on the grounds that she failed to establish that her condition was caused by any compensable employment factors.

On January 18, 2003 appellant requested reconsideration. She submitted a copy of a September 15, 2002 letter indicating that her continued keyboard entry duty exacerbated her cubital tunnel syndrome and that she was harassed to do more work.

By decision dated March 28, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence did not warrant further merit review.

The Board finds that appellant failed to establish that she sustained an emotional condition 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 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.<sup>1</sup> 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.<sup>2</sup> Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of personnel matters, coverage may be afforded.<sup>3</sup> Where appellant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>4</sup>

Appellant alleged that the employing establishment erred or acted abusively in its handling of administrative and personnel matters. She alleged that she was unreasonably required to make long distance telephone calls to request leave and she had other difficulties requesting leave, she was detailed to another location and the travel involved was a hardship, she was denied access to computer keys, her position involved work that was not measurable for accuracy yet she was allowed only four errors per rating period, she was unfairly disciplined for making errors. She further alleged that Shannon Hill, a coworker and trainer, unreasonably monitored her and informed Marcia Westhof, a supervisor, of her errors daily, she received inadequate training and was denied a request to attend a training course. As a general rule, an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is 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.<sup>5</sup> However, the Board has also held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.<sup>6</sup> In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.<sup>7</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>3</sup> *Michael Thomas Plante*, 44 ECAB 510 (1993).

<sup>4</sup> *Joel Parker, Sr.*, 43 ECAB 220 (1991).

<sup>5</sup> *Michael L. Malone*, 46 ECAB 957 (1995); *Gregory N. Waite*, 46 ECAB 662 (1995).

<sup>6</sup> *Elizabeth Pinero*, 46 ECAB 123 (1994).

<sup>7</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

Supervisor Robin Meyers responded to appellant's allegations of error or abuse in the employing establishment's handling of administrative or personnel matters. She stated that, when appellant was detailed to a different location because there was no work available for her at her regular location, she complained that it hurt her arms to drive. Ms. Meyers noted, however, that when appellant worked at her regular location she drove to work everyday, often drove somewhere at break time, and drove home and back at lunchtime most of the time. She denied that she ever refused appellant's leave requests.

Supervisor Westhof stated that she had been appellant's supervisor since July 23, 2001 and, as their work locations were in separate cities, they communicated primarily by e-mail. She stated that she had suggested solutions to appellant's problems and pointed out her errors solely for performance improvement. Ms. Westhof stated that she had received complaints about appellant's work and had therefore, asked Ms. Hill to forward errors so that she could determine how to help appellant improve. She stated that all of appellant's requests for training had been approved with the exception of a mentoring class for supervisors and managers which was not appropriate for appellant because she was not a supervisor or manager.

Supervisor Diane Kubancik stated that appellant's duties included reviewing reports for accuracy, assigning transcription work to the contract service, screening reports for urgent/critical items and insuring the timeliness of the workflow. She stated that an accurate transcription of medical dictation was critical and the level of attention given to attempting to reduce appellant's errors was a proper administrative function. Ms. Kubancik noted that appellant was reviewing an average of 70 reports in a 7-hour workday but, other employees could average 98 reports in 1 hour and appellant should be able to complete her keyboarding tasks in 2.45 hours a day, leaving the rest of the day to complete her other duties. She stated that appropriate leave was granted to appellant based on medical documentation. Ms. Kubancik denied that she unreasonably denied appellant's request to attend a training course. She indicated that supervisors restricted employee access to security-protected computer keys to control the number of potential errors while the employee gained competence.

Thus, the employing establishment has refuted appellant's allegations of error or abuse and provided an adequate explanation regarding these administrative and personnel matters. She did not submit probative evidence sufficient to establish any error or abuse by the employing establishment.

Appellant also alleged that her supervisors harassed her by yelling at her and "stalking" her while she was on her break, criticizing her job performance, ignoring her and treating her in a condescending and authoritative manner, intimating her into withdrawing a stress claim, pressuring her to increase production, admonishing her when she did not complete her assignments, unfairly blaming her for errors and accusing her of failing to show her job offer to her physician. She alleged that she experienced hostility and verbal abuse from coworkers and supervisors when she began her modified job due to her inability to complete her assignments. 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.<sup>8</sup> However, for

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<sup>8</sup> *David W. Shirey*, 42 ECAB 783 (1991); *Kathleen D. Walker*, 42 ECAB 603 (1991).

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.<sup>9</sup>

Ms. Meyers responded to appellant's allegations of harassment and discrimination by denying that she ever yelled at appellant. She stated that she did speak with a strict tone when appellant ignored her medical restrictions. Ms. Meyers denied that she had harassed appellant by trying to get her to withdraw a compensation claim.

Ms. Kubancik stated that she was not aware of any complaints of harassment from appellant or any incidents of supervisory misconduct and denied that appellant was ever ignored. She indicated that appellant's errors were identified and corrected for quality control purposes. Ms. Kubancik denied that she had ever intimidated appellant into withdrawing a compensation claim.

In a September 17, 2002 statement, two coworkers stated that, on several occasions, Ms. Meyers yelled at appellant to wear her hand splints although appellant had advised her that the splints cut into her hands and, on one occasion, appellant tried to show Ms. Meyers how difficult it was to operate a keyboard with hand splints on but, Ms. Meyers told her, "[y]ou [are] hardly typing because of your light duty." The coworkers stated that appellant also had difficulty filing while wearing hand splints but, Ms. Meyers insisted that she wear the splints. The coworker's statements lack sufficient detail to establish that Ms. Meyers harassed or discriminated against appellant. Appellant did not submit probative evidence establishing a claim based on harassment or discrimination in this case. In view of the supervisor's statements and the lack of supporting evidence, the Board finds that appellant has not established a compensable work factor based on harassment or discrimination.

Appellant also alleged an emotional reaction to an incident when Jack Mackey was overheard by a coworker saying:

"If [appellant] does [not] want to work she can come here and sit in a corner for eight hours a day and do absolutely nothing. We need her desk for the temps that are starting next week. She [has] got to work, obviously they can [not] come up with anything for her to do -- it [is] a nuisance...."

Appellant was not present and learned of the incident through e-mail from a coworker. Ms. Kubancik responded to this allegation by stating that Mr. Mackey was stating his personal opinion and the obvious fact that the desk space was needed and appellant was supposed to be working at a different location. The evidence is insufficient to establish that the incident involving Mr. Mackey constitutes a compensable employment factor.

Appellant further alleged that she was given misleading information about filing a compensation claim and that the employing establishment and union did not provide sufficient assistance to her regarding her compensation claim. The Board notes that the development of any emotional condition related to such matters would not arise in the performance of duty as the

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<sup>9</sup> *Donna J. DiBernardo*, 47 ECAB 700 (1996); *Jack Hopkins, Jr.*, 42 ECAB 818 (1991).

processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.<sup>10</sup>

Appellant also alleged that her supervisors did not comply with her medical restrictions<sup>11</sup> and that she was not provided with appropriate equipment. The Board has held that being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record.<sup>12</sup>

Ms. Westhof stated that appellant had reported wrist, shoulder, back and eye problems that she alleged were due to her accepted wrist conditions and the ergonomics of her work station and equipment and her work duties. She stated that an ergonomics specialist had twice evaluated appellant's work area and she had been provided with a special large computer terminal, her desk and work table had been lowered and a special chair had been ordered. Ms. Westhof noted that the employing establishment had received medical limitations regarding appellant's wrist but no restrictions about any other conditions. She stated that the employing establishment had complied fully with appellant's medical restrictions and noted that a recent medical report actually increased the permitted keyboarding time.

Ms. Meyers noted that appellant frequently refused to follow her medical restrictions and told Ms. Meyers that she could perform certain tasks even though her restrictions did not allow them. Appellant would become argumentative when Ms. Meyers stressed the importance of following the restrictions. She indicated that, although appellant alleged that she spent 80 percent of her time keyboarding and writing and 20 percent on the telephone, it was actually the reverse.

Ms. Kubancik stated that the Office had assigned a case manager to appellant to insure that her medical restrictions were understood and followed and that several pieces of equipment were provided to accommodate appellant's needs. She noted that appellant expressed annoyance when she was asked to provide documentation of medical treatment and work restrictions and had to be reminded to abide by her restrictions. Ms. Kubancik noted that management attempts to place appellant into appropriate temporary jobs were met with resistance because appellant wished to work near home. When appellant's condition was determined to be permanent, in January 2001, she was given a permanent job as a transcription coordinator with physical requirements that did not exceed her medical restrictions, including keyboarding limited to two hours a day. Because of appellant's small stature, physical changes were made to her work area, including providing a special chair, reducing the height of desks and readjusting all her furniture to meet her needs. She was given a telephone headset. However, appellant complained that her condition was getting worse and the job was not what she wanted to do and she did not think it would be "so much work." Ms. Kubancik met with appellant to discuss her work assignment and appellant stated that she did not like her job and could not perform it but, Ms. Kubancik

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<sup>10</sup> *George A. Ross*, 43 ECAB 346 (1991).

<sup>11</sup> Appellant has accepted claims for bilateral wrist tendinitis, carpal tunnel syndrome and cubital tunnel syndrome.

<sup>12</sup> *Diane C. Bernard*, 45 ECAB 223 (1993).

noted that there was no medical evidence that she could not perform the job. She stated that an occupational therapist had twice visited appellant's work site and determined that she should be able to accomplish her tasks while adhering to her medical restrictions.

There is insufficient evidence to establish as factual appellant's allegation that the employing establishment required her to perform work that exceeded her medical restrictions.

In summary, appellant has not shown error or abuse in the employing establishment's administration of personnel matters, has not shown harassment or discrimination and has not established any other employment factors as compensable under the Act. As appellant has not established any compensable factors of employment, the Office properly denied her claim.<sup>13</sup>

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.<sup>14</sup> When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>15</sup>

In support of her request for reconsideration, appellant submitted a statement alleging that her keyboard entry duty exacerbated her accepted cubital tunnel syndrome and she also stated that she was harassed to do more work. Her statement regarding her cubital tunnel syndrome does not constitute relevant and pertinent evidence not previously considered by the Office in her claim for an emotional condition because the Office previously considered and rejected appellant's contention that the employing establishment required her to perform work that exceeded her medical restrictions. Her allegation that she was harassed to do more work was addressed, in the Office's January 7, 2003 decision, and does not constitute relevant and pertinent evidence not previously considered by the Office. As appellant did not 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.

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<sup>13</sup> Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. See *Garry M. Carlo*, 47 ECAB 299 (1996).

<sup>14</sup> 20 C.F.R. § 10.606(b)(2).

<sup>15</sup> 20 C.F.R. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated March 28 and January 7, 2003 are affirmed.

Dated, Washington, DC  
November 5, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member