U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMELIE R. CADY and DEPARTMENT OF JUSTICE,
U.S. ATTORNEYS OFFICE, San Jose, CA

Docket No. 03-1740; Submitted on the Record;
Issued October 24, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish that she sustained an emotional condition causally related to compensable employment factors.

On April 23, 2001 appellant, then a 61-year-old paralegal specialist, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging work-related stress. The reverse of the claim form indicates that she stopped work on August 13, 2001. On September 20, 2001 appellant filed a notice of occupational disease and claim for compensation (Form CA-2), alleging work-related stress due to reprisal for responding to an erroneous performance appraisal.

In a statement received by the Office of Workers' Compensation Programs on October 15, 2001, appellant discussed her claim and provided a "chronology of events." Appellant alleged that, on February 5, 2001, she was called into Supervisor Elizabeth de la Vega's office; also present was another assistant U.S. Attorney, Gary Fry. According to appellant, Ms. de la Vega "started telling me how Mr. Fry had told her all the various mistakes I had been making on the things [that] [he] had given me to do. Which totally shocked me, since this was the first I had heard of this. I was not allowed to explain. Ms. de la Vega was so angry [that] she was yelling.…." Appellant stated that in May 2001 she was assigned to only one attorney, Mr. Braun, while other support staff had two or three attorneys assigned to them. She asserted that "it was a deliberate, well planned scheme directed by Ms. de la Vega, to use [Mr.] Fry and Adam Braun to pressure me into leaving, by making me look incompetent." With respect to Mr. Braun, appellant stated that "he was overly demanding and critical about everything I did."

Appellant indicated that, on June 15, 2001, she received a poor performance appraisal; appellant stated that "most of what was written was not true and I proved it with pertinent documents attached to what I wrote. Instead, Ms. de la Vega's demeanor and attitude towards me changed dramatically, she hardly spoke to me and appeared very angry with me." According to appellant, on August 3, 2001, Mr. Braun told her that he had no confidence in her ability and

stopped giving her any work to perform. On August 6, 2001 appellant alleged that Ms. de la Vega questioned her about documentation to support her absences for jury duty, which appellant felt was another attempt to find "something else to write me up on." Appellant then described a meeting on August 9, 2001 with Ms. De la Vega and Mr. Braun; she alleged that she was accused of lying with respect to jury duty on June 22, 2001.

The employing establishment submitted detailed statements from Ms. de la Vega and Mr. Braun with respect to appellant's claim. In a statement dated September 14, 2001, Ms. de la Vega discussed the deficiencies in appellant's work performance with respect to tracking cases, accuracy in preparing documents, timeliness in preparation and filing of documents and general professional conduct. She indicated that a meeting was held on August 9, 2001 to further discuss these deficiencies, as well as appellant's representation that she was absent all day due to jury duty. In a statement dated September 14, 2001, Mr. Braun also discussed appellant's work performance problems and indicated that, a meeting was held on August 9, 2001 to provide "a global review of her performance deficiencies."

In addition, Ms. de la Vega and Mr. Braun provided specific responses to appellant's allegations contained in her supporting statement. In a February 11, 2002 response, Ms. de la Vega stated that, on February 5, 2001, she met with appellant and Mr. Fry to review appellant's work performance plan for the coming year. According to Ms. de la Vega, "although the meeting was serious, neither [Mr.] Fry nor I expressed anger and we were, in fact, not angry." Ms. de la Vega indicated that, in May 2001, appellant was assigned to Mr. Braun because he was taking over the Immigration and Naturalization Service (INS) caseload and appellant was the designated INS paralegal. Mr. Braun reported to Ms. de la Vega that there were problems with nearly every assignment performed by appellant and that they attempted to work out the problems but were unsuccessful. According to Ms. de la Vega, the June 15, 2001 performance appraisal reflected the work performance problems, but they were not conveyed in an angry tone and the attempt was to focus on areas that appellant could improve her performance. With respect to jury duty, Ms. de La Vega indicated that contact with the Santa Clara Superior Court had confirmed that appellant misrepresented her jury service duty. She indicated that the August 9, 2001 meeting was another attempt to address appellant's work performance and that neither she nor Mr. Braun acted in an unprofessional manner.

Mr. Braun also submitted a statement dated February 11, 2002, stating that neither he nor Ms. de la Vega raised their voices on August 9, 2001 or at any other meeting with appellant; he stated that there was no conspiracy to take away appellant's work assignments, but her work product was poor and unreliable. The record also contains a brief statement from Mr. Fry dated February 11, 2002. Mr. Fry indicated that appellant's statement that she was unaware of problems prior to February 5, 2001 was untrue, as he had repeatedly explained how to do the mostly repetitive paralegal immigration casework, but appellant kept making mistakes.

By decision dated March 8, 2002, the Office denied appellant's claim. The Office found that appellant had not established a compensable work factor with respect to a personnel matter.

On October 31, 2002 a hearing was held before an Office hearing representative with respect to appellant's clam. Appellant offered testimony in support of her claim, samples of work performed and submitted two witness statements. In a statement dated November 11,

2002, Lia Cherian reported that from August 1999 to May 2000 she worked as a legal secretary with the employing establishment. She stated that appellant's work performance was always professional, courteous and of high quality. Ms. Cherian stated that appellant excelled at a job that required her to handle over 300 INS cases and track cases on three different computer programs. In a statement dated November 6, 2002, Yolanda Kyle indicated that she worked in appellant's office at the employing establishment from 1992 until August 2001. Ms. Kyle stated that appellant was a conscientious, willing and capable employee who worked diligently in a professional matter.

In a decision dated April 1, 2003, the Office hearing representative affirmed the March 8, 2002 denial of the claim. The hearing representative found that appellant had not established compensable work factors as contributing to an emotional condition.

The Board finds that appellant did not meet her burden of proof in establishing an emotional condition causally related to her federal employment.

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 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 his 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 the present case, appellant has alleged that she sustained an emotional condition as a result of actions of her supervisors. She has generally indicated that she felt that she was subject to unwarranted criticism and verbal abuse, that she received a poor performance appraisal and was treated unfairly by her supervisors. It is well established that administrative or personnel

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

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

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

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, 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]

In order to establish a compensable work factor, the evidence must establish error or abuse with respect to the actions of her supervisors in the performance of their administrative duties. To the extent that appellant or her representative characterizes the actions of the supervisors as harassment, the evidence of record must contain probative evidence to support a finding of harassment.[7]

The evidence of record does not establish error or abuse in this case. Appellant alleged that Ms. de la Vega was angry and yelled at her during a February 5, 2001 meeting, but this allegation is refuted by Ms. de la Vega and Mr. Fry. The allegation that she was subject to a deliberate scheme to pressure her into leaving employment is simply not supported by the record. Both supervisors provided detailed statements with respect to their concerns regarding appellant's work performance and their attempts to improve work performance. Appellant submitted documents that she apparently prepared during her employment; these isolated documents do not themselves address the variety of concerns expressed by the supervisors and are of little probative value in establishing error or abuse by the supervisors. The witness statements provide general opinions regarding appellant's work performance without providing specific evidence of error or abuse by the employing establishment.

The June 15, 2001 performance appraisal itself cannot be considered a compensable work factor unless there is probative evidence of error or abuse.[8] Appellant alleges that many of the statements on the performance appraisal were untrue, but it is not clear what specific statements are alleged to be false, nor is there any specific evidence to support a finding of error in the performance appraisal.

With respect to the August 9, 2001 meeting, appellant alleged that she was wrongly accused of being untruthful with respect to her absence due to jury duty on June 22, 2001. Ms. De la Vega indicated that contact with the Superior Court revealed that appellant had misrepresented her claim of absence and there is no evidence of record that the conduct of the supervisors on August 9, 2001 constituted error or abuse.

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

[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] *See, e.g., James E. Norris*, 52 ECAB 93 (2000).

[8] *Sammy N. Cash*, 46 ECAB 419 (1995).

As noted above, a compensable work factor may be established based on a claim of harassment. In this case no probative evidence was presented that can support a finding of harassment by the supervisors.

The Board accordingly finds that based on the evidence of record, appellant did not allege and substantiate a compensable work factor with respect to her claim. Since she has not established a compensable work factor, the Board will not address the medical evidence.[9]

The decision of the Office of Workers' Compensation Programs dated April 1, 2003 is affirmed.

Dated, Washington, DC
October 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[9] *See Fred Faber*, 52 ECAB 107 (2000).