United States Department of Labor
Employees' Compensation Appeals Board

DIANE SHAW, Appellant	)	
and	)	**Docket No. 04-744**
	)	**Issued: August 11, 2004**
DEPARTMENT OF THE ARMY, REGIONAL CONFINEMENT FACILITY, Fort Lewis, WA, Employer	)	

Appearances:
Diane Shaw, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 24, 2004 appellant filed an appeal from a merit decision of the Office of Workers' Compensation Programs dated January 24, 2003, by which the Office found that appellant had not sustained an emotional condition in the performance of duty, and from a nonmerit Office decision dated May 21, 2003, by which the Office found a merit review of its prior decision was not warranted. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both the merit and nonmerit Office decisions.

ISSUES

The issues are: (1) whether appellant sustained an emotional or a cerebral vascular condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim.

FACTUAL HISTORY

On June 2, 2002 appellant, then a 41-year-old military personnel clerk, filed a claim for compensation for an occupational disease that she described as severe headaches, two strokes, coagulopathy of an artery in her brain, numbness of her left upper extremity, slurred speech, and "stress!!!" She attributed these conditions to lack of access to file cabinets containing material she needed to complete her work, and to aggravation by a coworker, Glenda Tullous, who was falsely acting as her supervisor. In a statement accompanying her claim form, appellant contended that she was constantly monitored, improperly trained, investigated based on false allegations and stressed by being required to keep a daily journal. She continued that she received a negative evaluation and rude treatment on February 23, 2000, that she was given only one hour of administrative time for a black history program in February 2000, that she was hollered at for leaving telephone messages on Ms. Tullous' door, that she caught Ms. Tullous searching through her desk, and that she heard rumors that she was having an affair with her supervisor, Nathaniel Pelt, shortly after he was removed from his position on February 7, 2001. Appellant alleged that an April 12, 2001 letter of warning was inappropriate, that she had trouble comprehending when she returned to work on November 1, 2001 following a stroke on August 1, 2001, that beginning January 2, 2002 she was required to keep a daily log of her work activities, that enlisted personnel she trained treated her as if she were an idiot or incompetent, that her medical condition was discussed in a meeting with enlisted personnel, and that Ms. Tullous snatched a facsimile from her hand on March 15, 2002 in front of her supervisor, who denied witnessing it.

In an August 19, 2002 statement, the employing establishment's executive officer stated that attempts were made to accommodate appellant since she was hired in September 1999, but that she had "sporadic and deficient work performance with varying supervisors. At times, she has demonstrated difficult, uncooperative, and negative attitudes accompanied by caustic outbursts during counseling and job performance reviews, both prior to her stroke in September 2001 and after her return to duty." The executive officer continued that the April 2001 letter of warning was issued to appellant for her rude and inappropriate remarks, that she then filed an Equal Employment Opportunity (EEO) claim, which investigators found unfounded, and that appellant's stroke caused a major shift in her duties, with her work hours reduced to a half-day schedule and with limitations on her workload.

The record contains a copy of the April 12, 2001 letter of warning issued to appellant for documented rude comments and name calling, and appellant's response denying that she made rude comments. Also contained in the record are copies of counseling of appellant, including one from February 2000 describing deficiencies in her performance, stating that she was given a key to a file cabinet where clemency and parole packets should be kept rather than in her desk, and proposing that she schedule training in grammar and usage, and, if needed, additional computer classes. A memorandum of performance counseling on February 28, 2002 advised that appellant was not completing her simple tasks and that she had provided documentation of only three weeks of her daily accomplishments, which she was instructed to begin providing in January 2002. Appellant disputed a March 26, 2002 memorandum of event-oriented counseling for leaving work early on March 15, 2002. A May 21, 2002 memorandum of event-oriented counseling stated that appellant's work performance had declined and that she was rude to soldiers.

Appellant submitted medical evidence from her attending physicians. In a September 24, 2001 report, Dr. Jozef A. Ottowicz, a neurologist, stated that appellant was being treated for coagulopathy of an artery in her brain. In an undated report, Dr. Gina L. Bell stated that in September 2001 appellant suffered a basilar artery occlusion assumed to be secondary to a thrombosis, and that appellant continued to have headaches and a decrease in her ability to concentrate, especially in stressful situations. Dr. Bell reported on November 7, 2001 that appellant could return to work four hours per day, and on December 18, 2001 reported that appellant could not deal with high stress situations, and had decreased ability to multitask and focus. In a December 20, 2001 note, Dr. Daniel R. Davidson, an employing establishment physician who is Board-certified in preventive medicine, stated that appellant needed a low demand environment with repetitive tasks.

In an August 19, 2002 report, Dr. Davidson noted that appellant filed a claim for work-related stress as a cause of her two strokes, that she experienced stress when she returned to work, that according to the American Heart Association a high level of stress is thought to contribute to the risk of heart disease and stroke, but that stress was difficult to evaluate and measure and was ubiquitous in the workplace. Dr. Davidson then stated that appellant has "hypertension, transient ischemic attacks and a coagulation disorder, which are known risk factors for stroke. My conclusion is that the last three personal health conditions are the most likely cause of her strokes." In a September 17, 2002 report, Dr. Bell noted that appellant still had problems with anxiety and concentration in fast-paced and noisy environments. In a December 13, 2002 report, Dr. Bell stated that appellant experienced depression and anxiety after her cerebral vascular accident (CVA) in September 2001, that when seen in November 2001 appellant described her job as very stressful and stated that she was having a hard time concentrating, and that appellant had a transient ischemic attack in June 2002. Dr. Bell concluded: "In regards to [appellant's] stress condition and how it relates to her work I have no objective evidence that indicates that her job was the cause of [appellant's] stress. However I do feel it has contributed significantly to problems she has had recovering from her CVA as well as continued stress and anxiety."

In response to an Office request for verification of her allegations, appellant stated that she had been harassed, evaluated by a nonsupervisor, evaluated incorrectly, victimized by false rumors, and worked without a computer for one year. In a December 10, 2002 response to the Office's request for comments on appellant's allegations, the employing establishment's executive officer stated that appellant's work performance was scrutinized because her clerical work consistently needed revision and she had difficulty completing her work in a timely manner, described attempts to train appellant in her duties since her hiring, but noted she demonstrated an inability to comprehend basic concepts. The executive officer then stated that appellant was highly supervised and daily journals required because appellant came in very late, took extended lunch breaks, and claimed to be at briefings when she was on job interviews. He continued that appellant was detailed to another section in November 2000 to alleviate inner office tension and personal animosity, that after her return to work in November 2001 the employing establishment worked closely with appellant and her doctor to accommodate her limitations, that she was again detailed to another branch in June 2002 to perform light office duties and have a quieter work environment, and that she was never treated as incompetent or unprofessionally. With regard to appellant's allegation that Ms. Tullous falsely acted as her supervisor, the executive officer stated that Ms. Tullous' duty description lacked specificity and

allowed supervisory duties less than 25 percent of her allotted time, and that this duty description had been upgraded to correctly reflect additional responsibilities. The record contains a copy of a June 22, 2000 email from the employing establishment's executive officer at that time stating that she had "no clue that Ms. Tullous had been 'supervising' people her whole eight years here," that she did not see how appellant would not know that Ms. Tullous was not a supervisor, and that Ms. Tullous' duty description needed to be upgraded immediately. The record also contains a performance evaluation dated June 15, 2000 which Ms. Tullous signed as the rater.

By decision dated January 24, 2003, the Office found that appellant had not substantiated any compensable factors of employment. Appellant requested reconsideration in a May 5, 2003 letter, contending that she was not informed that she was being investigated, that she received no respect and was monitored as if she were incompetent, that she was rated by someone not authorized to do so, and that she was not given adequate computer equipment after her return to work in November 2001. By decision dated May 21, 2003, the Office found appellant's contentions repetitious and not sufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

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 work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act. 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.[1] 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.[2]

ANALYSIS -- ISSUE 1

Many of the factors cited by appellant relate to actions of the employing establishment in administrative or personnel matters. These include monitoring of her work,[3] being given only one hour of administrative time for a black history program, and the training that she was provided.[4] The employing establishment acknowledged that it monitored appellant's work closely, but adequately explained why it did so, citing that her clerical work necessitated constant

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

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

[3] *Jimmy Gilbreath*, 44 ECAB 555 (1993).

[4] *Lorraine E. Schroeder*, 44 ECAB 323 (1992).

revision and that she had difficulty timely completing her assignments. The employing establishment also described the numerous training opportunities it provided to appellant. Appellant has not shown that the employing establishment's actions in these areas were erroneous or abusive. Appellant also alleged that her performance evaluations[5] were incorrect, but she has not shown that the ratings she received were inappropriate for her performance.

Appellant also alleged that the employing establishment investigated her based on false allegations. The only investigations of appellant described in the case record were the one resulting in the April 12, 2001 letter of warning for rude comments and name calling, one resulting in counseling on March 26, 2002 for leaving work early, and another resulting in counseling on May 21, 2002 for being rude to soldiers. Appellant has not shown that these actions by the employing establishment were erroneous or abusive.[6] She pursued Equal Employment Opportunity (EEO) counseling regarding the letter of warning, but did not show that this was resolved in her favor. The record contains appellant's written response to the March 26, 2002 counseling, but this response does not establish that appellant's position on her whereabouts on March 15, 2002 was correct. The record contains no response by appellant to the May 21, 2002 counseling.

Appellant's claim was also predicated in part on her perceptions of harassment. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act. 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 alone of harassment or discrimination are not compensable under the Act.[7]

Appellant's allegations of harassment are, for the most part, vague, as in her allegation that she was treated as if she were an idiot or incompetent. Appellant did cite some specific instances of harassment, such as Ms. Tullous hollering at her for leaving telephone messages on her door, searching through her desk, and snatching a facsimile from her hand on March 15, 2002. However, appellant provided no corroborating evidence, such as witness statements, to establish that these incidents actually occurred as alleged.[8] Also uncorroborated are appellant's allegations that her medical condition was discussed in a meeting of military personnel and that she was not provided appropriate computer equipment after her return to work in November 2001. Gossip of coworkers regarding an alleged affair does not relate to appellant's job duties or requirements and is therefore not compensable.[9]

[5] *Elizabeth W. Esnil*, 46 ECAB 606 (1995).

[6] The Board has held that investigations are an administrative function of the employing establishment. *Jimmy B. Copeland*, 43 ECAB 339 (1991).

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

[8] *See William P. George*, 43 ECAB 1159 (1992).

[9] *Sharon R. Bowman*, 45 ECAB 187 (1993).

Appellant has established some compensable factors of employment. While being required to keep a daily journal of her work activities might be considered an administrative action by the employing establishment, keeping track of her daily work activities in a journal became a requirement of appellant's employment and a day-to-day duty, which can be covered under the Act. Appellant has shown that Ms. Tullous was acting as her supervisor, including rating her performance on June 15, 2000, when she was not authorized to do so. This is established by the employing establishment's June 22, 2000 statement that Ms. Tullous was not a supervisor but that her position would be upgraded, and the employing establishment's December 10, 2002 statement that Ms. Tullous' position had been upgraded, as it was previously wrongly described due to an organizational oversight. The evidence also supports appellant's allegation that she was not given keys to the six file cabinets. The employing establishment's responses to appellant's allegations are silent on this point, but an employing establishment memorandum prepared in March 2000 indicates appellant was given the key to one file cabinet.

However, appellant's burden of proof is not discharged by the fact that she has established employment factors that may give rise to a compensable disability under the Act. To establish her occupational disease claim, appellant must also submit rationalized medical evidence establishing that the conditions for which she claims compensation are causally related to accepted compensable employment factors.[10] The medical evidence appellant submitted is not sufficient to establish her claim for compensation for an emotional or cerebral vascular condition related to compensable employment factors. Only two medical reports address causal relationship. The August 19, 2002 report from Dr. Davidson notes that, according to the American Heart Association, a high level of stress is thought to contribute to the risk of heart disease and stroke. Dr. Davidson, however, did not attribute appellant's strokes to stress, but rather to her hypertension, transient ischemic attacks and a coagulation disorder, which he characterized as "personal health conditions." This report lends no support to appellant's claim for an employment-related cerebral vascular condition. In a December 13, 2002 report, Dr. Bell stated that appellant's job "contributed significantly to problems she has had recovering from her CVA as well as continued stress and anxiety." This report is insufficient to establish appellant's claim for the reasons that it contains no rationale[11] and it does not cite any specific compensable factors of appellant's employment. Appellant has not met her burden of proof.

CONCLUSION -- ISSUE 1

Although the Board finds that appellant has substantiated some compensable factors of employment, the medical evidence is insufficient to establish her claim for compensation.

[10] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[11] Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant did not submit any new evidence with her May 5, 2003 request for reconsideration. She merely reiterated allegations previously advanced and already considered by the Office. Her request for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. The Office properly denied appellant's request for reconsideration without a review of the merits of her claim.

CONCLUSION -- ISSUE 2

Appellant's request for reconsideration did not meet the criteria of the Office's regulations and the Office properly refused to reopen appellant's case for further review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the May 21 and January 24, 2003 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: August 11, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member