

**United States Department of Labor
Employees' Compensation Appeals Board**

ANGELA MIXON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 04-1064
Issued: August 9, 2004**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 15, 2004 appellant, through her attorney, filed a timely appeal from a February 18, 2004 merit decision of the Office of Workers' Compensation Programs which affirmed an April 29, 2003 merit decision denying that she sustained an employment-related injury. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether appellant established that her asthma condition was causally related to factors of employment.

FACTUAL HISTORY

On March 4, 2003 appellant, then a 48-year-old custodian, filed an occupational disease claim alleging that factors of her employment caused bronchial asthma and stress. She stated that she had worked in the stockroom for five months without incident and then was put on the

primary floor on February 25, 2003 where dust caused a respiratory attack and she stopped work. On her claim form, Damon Dupree, supervisor of maintenance operations, advised that appellant had been placed in the stockroom only until a limited-duty employee, who was off work for an injury, returned to work.

Appellant submitted a January 3, 2003 duty status report in which Dr. Ellen J. Gelles, Board-certified in internal medicine, provided restrictions to appellant's physical activity and advised that she needed frequent bathroom breaks. Appellant also submitted a number of medical reports signed by nurses or medical office staff dating from January 3 to February 19, 2003.¹ An authorization for medical attention form dated February 25, 2003, indicated that appellant had asthma and an employing establishment nurse, D. Darby, R.N., advised that appellant could return to work but should not sweep, dust or be exposed to fumes and should work inside only and avoid stressful conditions until she was evaluated further.

By letter dated March 25, 2003, the Office informed appellant of the type of evidence needed to support her claim, to include a description of the work conditions or incidents that she believed caused her illness and a medical report from her treating physician with an opinion as to whether the employment factors contributed to her condition.

Appellant submitted a report dated March 13, 2003 in which Dr. Donald M. Eicher, Board-certified in internal medicine and oncology, advised that she had undergone resection for colon cancer on January 31, 2002. In a statement dated April 22, 2003, appellant generally contended that she had been harassed at the Beechwood and Orange Avenue postal facilities² by Charlie Kirkman who had been a supervisor in 1998. She further stated that she had not been accommodated for an employment-related ankle injury and was moved from the stockroom and told to dust.

By decision dated April 29, 2003, the Office denied the claim, finding that appellant failed to establish that she sustained an injury in the course of her federal employment.

On May 5, 2003 appellant submitted an April 25, 2003 statement alleging that constant harassment and lack of communication by employing establishment management caused stress. She attached a letter from the employing establishment dated April 9, 2003 which advised appellant that, as she had been absent since April 1, 2003, she was considered absent without leave. The employing establishment requested that appellant call and, if ill, submit medical documentation to support her absence. Appellant also submitted reports dated March 24 and April 8, 2003 in which Dr. Karen L. McPeak, a Board-certified psychiatrist, advised that she was undergoing evaluation and could not work for the period March 1 to April 30, 2003.

¹ These reports noted that appellant needed frequent bathroom breaks and that she was incapacitated on February 1, 2003 following a procedure performed on January 31, 2003. Stress was diagnosed in a note dated February 6, 2003 and on February 19, 2003 a nurse advised that appellant could not work due to asthma.

² The record indicates that there were employing establishment facilities at 2200 and 2400 Orange Avenue.

On May 23, 2003 appellant, through counsel, requested a hearing and submitted medical records from the Cleveland Veterans Administration Medical Center.³ In a treatment note dated March 13, 2002, Dr. McPeak provided a history of major depression and that appellant was stressed at work. She stated that appellant had been off work for some time and was trying to deal with her diagnosed colon cancer. In a medical note dated May 21, 2002, Dr. Daniel R. Wolpaw, Board-certified in internal and emergency medicine, reported appellant's history of asthma, anxiety state, adjustment reaction, recurrence of depressive disorder and borderline personality.

By report dated February 19, 2003, Dr. Gelles, an internist advised that appellant was doing light-duty work and was being seen for left shoulder pain, fatigue, hypertension and elevated lipids. In a report dated March 1, 2003, Dr. Frew H. Gebreab, Board-certified in internal medicine, noted that appellant was seen for a complaint of wheezing "which she associated with her new working environment which is dusty." He diagnosed mild asthma, possibly extrinsic, with history of allergy and exacerbation at the workplace. Dr. Helen J. Hattab, a psychiatrist, provided a clinic note dated March 5, 2003 which provided a history that appellant was being harassed at work "by the guys" who made her work in dust which caused her to "lose it." Acute stress disorder and stress at work were diagnosed and appellant was hospitalized for 24 hours. Dr. Ana Martinez, a Board-certified psychiatrist, also furnished a treatment note dated March 5, 2003 in which she noted that appellant focused on her supervisors at work being unfair to her -- how the men got special treatment and the "women get spit on" and blamed the employing establishment for the loss of her house. In a treatment note dated March 6, 2003, Dr. Martinez noted that appellant had been having problems with management at work since her diagnosis of colon cancer and reported that the employing establishment was unwilling to provide reasonable accommodations which made her very angry and frustrated. Dr. Martinez diagnosed adjustment disorder with depression vs. major depressive disorder. Dr. Laura F. Steinberg, a resident physician, also completed a treatment note dated March 6, 2003 and agreed with Dr. Martinez' diagnosis. Dr. Steinberg also noted appellant's description of significant harassment and discrimination at work. She stated that appellant returned to work in August 2002 following cancer surgery, after which the level of harassment and discrimination from male employees increased, and appellant reported that she was told the only job available to her was to dust, and that if she did not do this she would have to go home. Dr. Steinberg related that appellant stated that she was very angry and frustrated because the employing establishment would not accommodate her.

In a treatment note dated March 20, 2003, Dr. McPeak stated that appellant was angry because she had been placed on light duty "due to all her medical issues. States they could only come up with dusting for her to do despite her having asthma and it being aggravated by dusting." In a report dated April 8, 2003, Dr. McPeak advised that appellant was in an anxious, depressed mood because she had to respond to an Office inquiry letter. Dr. McPeak identified the following stressful events, as reported by appellant: beginning in 1998, harassed by supervisor; attempted to remove her from employment when she was off work due to stress;

³ The medical reports also contained notes regarding appellant's treatment for colon cancer, for complaints following a nonemployment-related motor vehicle accident, podiatry visits and upper extremity pain, none of which are relevant to the instant claim.

disability of sun allergy which caused illness disregarded by supervisor; harassed daily because she filed an Equal Employment Opportunity (EEO) claim, supervisor fired; when on sick leave for colon cancer surgery, employing establishment denied insurance benefits resulting in \$35,000.00 in medical bills; threatened to be sent home if she did not dust, an activity that increased her asthma condition; current harassing telephone calls by coworker; current harassment by supervisors.

At the hearing, held on November 19, 2003 appellant testified that, after she returned to work following colon cancer surgery, her previous work was too hard and she needed light duty. She then transferred to the Orange Avenue facilities because the work at her former facility, Beechwood, was too hard for her. She stated that she was told to dust but could not because of a medical restriction which should have been accommodated. Appellant also testified that work was stressful because she had a “case” against another guy. She stated, however, that she had not filed an EEO Commission claim or grievance in that regard.

By decision dated February 18, 2004, an Office hearing representative denied appellant’s claim that she sustained employment-related stress, finding no compensable factors of employment. The hearing representative further found that the medical evidence of record did not establish that appellant’s asthma was employment related.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. In the case of *Lillian Cutler*,⁵ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees’ Compensation Act.⁶

There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁷ When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from his or her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee’s disability results from his or her emotional

⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁵ 28 ECAB 125 (1976).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *See Robert W. Johns*, 51 ECAB 137 (1999).

reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.⁸ As a general rule, a claimant's reaction to administrative or personnel matters falls outside the scope of the Act.⁹ However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹⁰

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence¹¹

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹² If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹³

ANALYSIS -- ISSUE 1

Appellant alleged that the fact that she was not accommodated for an ankle injury and was moved from the stockroom and asked to dust when she had asthma caused stress. She has also alleged that she was harassed by employing establishment management.

Regarding the transfer to the main floor where appellant alleges she was required to sweep and dust when she had asthma, the assignment of work is an administrative function and absent error and abuse is not compensable under the Act.¹⁴ Furthermore, the Board has long held that an employee's frustration from not being permitted to work in a particular environment is

⁸ *Lillian Cutler*, *supra* note 5.

⁹ *Roger Williams*, 52 ECAB 468 (2001).

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

¹¹ *James E. Norris*, 52 ECAB 93 (2000).

¹² *See Dennis J. Balogh*, *supra* note 10.

¹³ *Id.*

¹⁴ *Ernest St. Pierre*, 51 ECAB 623 (2000).

not compensable.¹⁵ The fear of future injury is not compensable.¹⁶ In the case at hand, the employing establishment advised that appellant was transferred from the stockroom because the regular employee had returned. While appellant related that this caused an asthma attack on February 25, 2003 when she stopped work, in a form report dated that day, an employing establishment nurse merely advised that appellant should not sweep or dust until further evaluation.

The Board notes that a nurse is not a “physician” under the Act and thus cannot render a medical opinion on the causal relationship between a given physical condition and implicated employment factors.¹⁷ The February 25, 2003 nurse report does not provide any physical findings or indicate that appellant had an “attack.” Rather, it shows that an employing establishment nurse recommended that appellant be accommodated in regard to avoidance of dust exposure rather than forcing her to work in a dusty environment. Moreover, in a duty status report dated January 3, 2003, while Dr. Gelles provided restrictions to appellant’s physical activity and advised that she needed frequent bathroom breaks,¹⁸ the physician made no restrictions regarding environmental concerns.

Appellant’s allegation that the employing establishment failed to make reasonable accommodations for her is not established as she did not show that the employing establishment acted unreasonably or abusively in this regard. Appellant mentions an ankle injury but does not explain how or why she was not accommodated for this. Regarding her asthma condition, as stated above, the employing establishment nurse recommended accommodations. Appellant, however, stopped work that day. The evidence of record does not establish that the employing agency failed to accommodate appellant.¹⁹

Regarding appellant’s general allegations that she was harassed by employing establishment management, the Board has held that an employee’s complaints concerning the manner in which a supervisor performs supervisory duties or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.²⁰ Similarly, a claim based on verbal altercations or a difficult relationship with a supervisor must be supported by the record.²¹ Appellant submitted no evidence to support that she was harassed by employing establishment management in this case. The Board therefore finds that she has not established a compensable factor of employment in this regard.

¹⁵ *Roy E. Shotwell, Jr.*, 51 ECAB 656 (2000).

¹⁶ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁷ *Vincent Holmes*, 53 ECAB ____ (Docket No. 00-2644, issued March 27, 2002); *Vicky L. Hannis*, 48 ECAB 538 (1997).

¹⁸ This was apparently due to appellant’s colon cancer surgery.

¹⁹ See *Diane C. Bernard*, 45 ECAB 223 (1993).

²⁰ *Marguerite J. Toland*, 52 ECAB 294 (2001).

²¹ *Bonnie Goodman*, 50 ECAB 139 (1998).

Appellant therefore failed to establish that she sustained an emotional condition in the performance of duty.²²

LEGAL PRECEDENT -- ISSUE 2

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²³

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.²⁴ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²⁵ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.²⁶

ANALYSIS -- ISSUE 2

In the instant case, while there is medical evidence documenting that appellant has a history of asthma, the medical evidence of record does not establish that it was caused or aggravated by her employment. The Board notes that appellant submitted a number of treatment notes signed by nurses. As noted earlier, a nurse is not a "physician" under the Act and thus cannot render a medical opinion on the causal relationship between a given physical condition and accepted employment factors.²⁷

²² As appellant failed to establish a compensable factor of employment, the Board need not address the medical evidence of record regarding her emotional condition claim. *Roger Williams, supra* note 9.

²³ *Solomon Polen*, 51 ECAB 341 (2000).

²⁴ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²⁵ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

²⁶ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

²⁷ *Vincent Holmes, supra* note 17.

The Board finds that the medical record in this case lacks a well-reasoned narrative from a physician who relates her asthma condition to specific employment factors. The only medical evidence relevant to whether appellant's asthma condition was employment related is the March 1, 2003 report in which Dr. Gebreab noted that appellant was seen with a complaint of wheezing which she attributed to working in a dusty environment. He diagnosed mild asthma, possibly extrinsic, with a history of allergy and exacerbation at the workplace. The Board finds this report insufficiently rationalized to establish appellant's claim that her asthma was employment related as Dr. Gebreab merely related a history of asthma exacerbated at work and did not describe specific employment factors that he thought contributed to her condition. Likewise, other physicians have not provided a well-reasoned discussion addressing how and why appellant's employment would have caused or aggravated her asthma. Appellant therefore failed to discharge her burden of proof to establish that her asthma was employment related.

CONCLUSION

The Board finds that appellant failed to establish that she sustained an emotional condition in the performance of duty. The Board further finds that appellant failed to establish that her asthma condition was employment related.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2004 is affirmed.

Issued: August 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member