

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

TINA D. FRANCIS, Appellant)	
)	
and)	Docket No. 04-965
)	Issued: December 16, 2004
DEPARTMENT OF AGRICULTURE,)	
FOREST SERVICE, Vallejo, CA, Employer)	

Appearances: *Case Submitted on the Record*
Tina D. Francis, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 3, 2003 denying that she sustained an employment-related emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On September 9, 2002 appellant, then a 40-year-old accounting technician supervisor, filed an occupational disease claim alleging that she sustained an emotional condition due to various incidents and conditions at work. In a statement dated September 4, 2002, she alleged that her work environment was "hostile and toxic" and that her work unit "had a lot of history." She began supervising five employees about a year and a half earlier and that they collectively

“went through intervention and mediation for anguish and structure problems.” Appellant claimed that, after one of the employees left, the other four either filed complaints or were uncooperative on a daily basis. She became involved in an investigation concerning Valerie Franco, a subordinate who filed a complaint, and had just finished a complaint investigation concerning Angela Haynes, a subordinate who was often absent from the office. Appellant claimed that the complaints of these employees were without merit.

Appellant asserted that Nellie Aquino, a subordinate, filed a stress complaint that was denied and that on August 21, 2002 Ms. Aquino refused to cooperate with a work request she made. She alleged that Claudine Shine, a subordinate, had attendance and conduct problems and that Dottie Taitiano, a coworker outside her unit, verbally assaulted her regarding a work request. Appellant constantly had to defend herself against wrongful allegations, defamation of character and verbal abuse and that employees outside her work unit insulted her and were “demeaning in their work ethics.”¹ She alleged that she did not have support from management to adequately write up offending subordinates.

In a statement dated September 17, 2002, appellant alleged that her subordinates were “extremely angry, resentful, medically challenged, and have extreme low morale.” She claimed that her eyeglasses were stolen off her desk and that an employee wrongly transferred her voice mail message to another employee’s telephone. Appellant alleged that employees wrongly accused her of pointing fingers in theirs faces, cursing, falsifying time sheets and barging into their offices. She claimed that she did not receive support from Susan Millsap and other higher level employees to help supervise her subordinates. Appellant alleged that Ms. Millsap did not respond to her emails, did not speak to her and failed to give positive feedback on her performance. She was fearful of Ms. Franco and that Ms. Millsap and others did not adequately respond to this concern.

In a statement dated October 2, 2002, appellant claimed that she had an unusually heavy workload due to the fact that Lisa Lynch left the work unit, Ms. Haynes was on maternity leave, and Ms. Franco was absent for extended periods. She also indicated that meeting audit deadlines, producing year-end reports, and dealing with staff-related problems helped to create a stressful workload. In a statement dated October 8, 2002, appellant asserted that she often worked 9 to 11 hours per day.

In an August 22, 2002 report, an attending physician with an illegible signature indicated that appellant reported experiencing stress at work and provided a diagnosis of “stress.” In a report dated August 28, 2002, Dr. James V. Dubusc, an attending Board-certified internist, noted that appellant reported working in a “hostile work environment” and diagnosed “stress.” In a report dated September 9, 2002, Dr. Chie Okuda, an attending physician, also indicated that

¹ Appellant later submitted a list in which she briefly identified instances between December 2000 and September 2002 in which subordinates yelled at her, filed complaints, made accusations against her, or displayed emotional distress. For example, one entry reads, “Valerie Franco disruptive incident -- calling people freaks and crazy --- February 29, 2001.” Other typical entries read, “Nellie Aquino refused work -- accused me of barging in her office -- August 21, 2002” and “Dottie Tatiano yelled and screamed about work in front of others -- September 21, 2002.”

appellant reported working in a “hostile work environment” and diagnosed an adjustment disorder.²

The record contains memoranda dated May 21 and 28, 2002 in which appellant discussed her dealings with Ms. Franco. Appellant alleged that Ms. Franco had been confrontational and argumentative since they started working together. She claimed that on May 17, 2002 Ms. Franco was in a highly emotional state and became verbally abusive when they discussed her leave usage. Appellant alleged that Ms. Franco mumbled about receiving a disciplinary letter of caution and asked what was wrong with her. She asserted that Joe Franco, Ms. Franco’s husband and a coworker, improperly contacted higher level officials and defamed her character. Appellant also submitted numerous copies of email messages and diary entries from 2001 and 2002. In a number of these documents, she made brief references to conflicts with her subordinates and other employees.

In a September 15, 2002 statement, Ms. Millsap noted that appellant had advised her since December 2000 that she felt her work unit was “out of hand and that the people were unmanageable.” Ms. Millsap indicated that employing establishment staff assisted appellant for numerous hours to help her perform her supervisory duties. She stated that appellant advised management that she feared for her personal safety due to an incident at work on May 17, 2002 with a subordinate and her spouse. Ms. Millsap noted that management offered appellant another position but she ultimately turned down the offer. She asserted that appellant advised her of being capable of handling her supervisory duties. Ms. Millsap indicated that appellant was responsible for ensuring that her subordinates met work deadlines and noted that, due to a shortage of personnel, she was provided with two employees to help with completing the work.

By decision dated October 30, 2002, the Office denied appellant’s claim on the grounds that she did not establish any compensable employment factors.

Appellant submitted additional statements which detailed the causes of her claimed emotional condition. On July 18, 2003 she alleged that Ms. Franco made a false allegation that she pushed her and that she felt threatened by Ms. Franco because she had brought a gun to work, left suicide notes at her desk, cried and had emotional outbursts for no apparent reason. She alleged that Ms. Franco stated that “[Ms. Millsap] could rip off her head and shit down her neck.” On July 29, 2003 appellant provided further details about the May 17, 2002 incident with Ms. Franco and alleged that Ms. Aquino, Ms. Lynch and others repeatedly complained to her about overwork, communication problems, and the lack of promotions.

In reports dated in September and October 2002, Dr. Claudia Viazzoli, an attending clinical psychologist, provided a history of appellant’s complaints of conflicts with coworkers, lack of support from superiors, and stress from fulfilling her supervisory duties. She diagnosed an adjustment disorder with mixed emotions, multiple somatic complaints, and histrionic features. In a report dated December 4, 2002, Dr. Walter A. Watman, an attending clinical psychologist, noted that appellant reported working in a “hostile work environment” where her

² Dr. Okuda is not listed in the directories of medical specialties.

superiors did nothing to remedy the problems. Dr. Watman concluded that appellant sustained a mild adjustment disorder with mixed features of anxiety and dysphoria due to industrial factors.³

Appellant requested a hearing before an Office hearing representative and that several witnesses be subpoenaed to appear at the July 29, 2003 hearing.

By decision dated and finalized December 3, 2002, the Office hearing representative affirmed the October 30, 2002 decision and denied appellant's request to subpoena several witnesses. The hearing representative found that appellant did not show that the information sought from the witnesses would be pertinent or that it could not be obtained by means other than the issuance of subpoenas.

LEGAL PRECEDENT

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 his 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.⁴ 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.⁵

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 employment factors.⁶ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁷

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.⁸ If a claimant does implicate a factor of

³ Dr. Watman indicated that, regardless of whether appellant's work environment met the definition of "hostile," her emotional condition clearly was related to industrial factors.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁷ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁸ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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.⁹

ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of incidents and conditions at work. By decision dated October 30, 2002, the Office denied appellant's emotional condition claim on the grounds that she did not establish a compensable employment factor. By decision dated and finalized December 3, 2003, an Office hearing representative affirmed the October 30, 2002 decision. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that harassment by coworkers, including subordinates and members of other work units, contributed to her claimed emotional condition. To the extent that disputes and incidents alleged as constituting harassment are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.¹⁰ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹¹

Appellant claimed that she worked in a "hostile" and "toxic" work environment and that her subordinates and other coworkers constantly harassed her by making abusive statements, lodging false accusations against her, and filing frivolous complaints. For example, she claimed that, on August 21, 2002, Ms. Aquino refused to cooperate with a work request and accused her of barging into her office; that, on September 21, 2002, Ms. Taitiano verbally assaulted her regarding a work request; that subordinates wrongly accused her of pointing her finger at them; that her eyeglasses were stolen off her desk as a form of harassment; and that an employee wrongly transferred her voice mail message to another employee's telephone. She alleged that on February 29, 2001 Ms. Franco called coworkers "freaks and crazy" and that on May 17, 2002 she was in a highly emotional state and became verbally abusive when they discussed her leave usage.

In the present case, the employing establishment denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that she was harassed by her coworkers, as alleged.¹² Appellant said that coworkers made statements and engaged in actions which she believed constituted harassment, but she provided no evidence, such as

⁹ *Id.*

¹⁰ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹¹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹² *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

witness statements, to establish that the statements actually were made or that the actions actually occurred.¹³ With particular regard to Ms. Franco, appellant claimed that she committed harassing actions which led her to believe that she posed a threat to her health. She claimed that Ms. Franco had a history which included bringing a gun to work, leaving suicide notes at her desk, and having outbursts for no apparent reason and that she made a threatening remark about Ms. Millsap, a supervisor. However, appellant did not submit any evidence to substantiate these allegations.¹⁴ The Board finds that appellant has not established a compensable employment factor under the Act with respect to these allegations.

Appellant alleged that higher level employing establishment officials, particularly Ms. Millsap, failed to adequately address her concerns about problems with subordinates and to provide her with adequate resources to carry out the mission of her work unit. The Board finds that these allegations relate to administrative or personnel matters unrelated to her regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁵ Although the provision of support for supervisors and the handling of concerns raised by supervisors are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹⁶ However, the Board has also found that 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁷ Appellant has not submitted evidence showing that the employing establishment committed error or abuse with regard to these matters. Ms. Millsap testified that the employing establishment considered appellant's concerns and offered various means to alleviate them, including providing her with additional employees and offering her a transfer to another work unit. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

The Board has held that emotional reactions to situations in which an employee is trying to meet her regularly assigned position requirements are compensable.¹⁸ In *Antal*, a tax examiner filed a claim alleging that his emotional condition was caused by the pressures of trying to meet the production standards of his job and the Board, citing the principles of *Cutler*, found that the claimant was entitled to compensation. In *Kennedy*, the Board, also citing the principles of

¹³ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹⁴ Moreover, appellant's description of Ms. Franco's alleged actions is vague and it is unclear whether all of these activities were alleged to have happened while the two worked together. Appellant also suggested that she felt threatened by Ms. Franco's husband, but she did not factually support this allegation. She submitted numerous emails and diary entries in which she made brief mentions of some of the alleged acts of harassment, but these documents were not supported by other evidence.

¹⁵ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁶ *Id.*

¹⁷ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁸ See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

Cutler, listed employment factors which would be covered under the Act, including an unusually heavy workload and imposition of unreasonable deadlines.

The evidence of record, including a statement by Ms. Millsap, supports that appellant's supervisory duties included the responsibility of ensuring that various documents, including accounting updates and year-end reports, were produced in an accurate and timely manner. The employing establishment has acknowledged that at times appellant's work unit was understaffed such that employee transfers were necessary to complete work tasks. The record also supports that appellant was required to deal with a number of verbal and formal complaints lodged by subordinates, including her involvement as a witness in several complaint investigations. Appellant has claimed that stress related to these regular and specially assigned duties caused her emotional condition. Given that these duties were part of her job requirements, the Board finds that she has established compensable employment factors.

In the present case, appellant has established employment factors with respect to the above-described work duties, including her responsibilities concerning the production of reports and the handling of employee complaints. As appellant has established compensable employment factors, the Office must base its decision on an analysis of the medical evidence. The Office found there were no compensable employment factors and did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.¹⁹ After such further development as deemed necessary, the Office should issue an appropriate decision on this claim.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained an emotional condition in the performance of duty. Appellant has established employment factors as described above and the case is remanded to the Office to analyze and develop the medical evidence, as it deems necessary, and to determine whether appellant sustained an emotional condition due to the accepted employment factors. The Board further finds that the Office properly denied appellant's subpoena request.²⁰

¹⁹ See *Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

²⁰ The Board also finds that, in her December 3, 2003 decision, the Office hearing representative properly denied appellant's request to subpoena witnesses for the oral hearing. Section 8126 of the Act provides that the Secretary of Labor may "issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." 5 U.S.C. § 8126. Section 10.619 of the Code of Federal Regulations provides that a claimant may request a subpoena as part of the hearings process but that the decision to grant or deny the request is within the discretion of the Office hearing representative. The claimant's request must explain why the testimony is directly relevant to the issues at hand and why a subpoena is the best method to obtain such evidence considering the other possible means of obtaining it. 20 C.F.R. § 10.619. The Office hearing representative did not abuse her discretion in denying appellant's subpoena request in that she explained that appellant did not show that the information sought from the witnesses would be pertinent or that it could not be obtained by means other than the issuance of subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2003 is affirmed in part regarding denial of subpoenas set aside and the case remanded to the Office for proceedings consistent with this decision of the Board, including the issuance of an appropriate decision.

Issued: December 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member