United States Department of Labor
Employees' Compensation Appeals Board

JACKIE M. LINTON, Appellant	)	
and	)	**Docket No. 03-2291**
	)	**Issued: January 23, 2004**
U.S. POSTAL SERVICE, SEATTLE BULK MAIL CENTER, Seattle, WA, Employer	)	

Appearances:
Jackie M. Linton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 25, 2003 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs, dated October 3, 2002, June 3 and August 6 2003 and a decision dated September 15, 2003, which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of employment; (2) whether appellant met her burden of proof to establish that she was totally disabled for the periods May 28 to 30 and June 2 to 30, 2003; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On August 28, 2001 appellant, then a 43 year-old parcel post clerk, filed an occupational disease claim alleging that her depression, anxiety and stress were caused when management

would not let her work beyond two hours daily and that she feared retaliation. She did not stop work. Appellant contended that she had been denied 30 hours of work per week by Dave Gibbons and Jim Irvin, distribution operations managers, which caused financial hardship and was in retaliation for her previous Equal Employment Opportunity (EEO) activity. She further alleged that on July 31, 2001 she found out that Mr. Irvin was under investigation for referring to African Americans as niggers.

On August 30, 2001 the employing establishment stated that appellant was under physical restrictions based on a previous employment injury that occurred on July 25, 2000. Upon her return to work following 45 days of continuation of pay on September 20, 2000, she was on restrictions that could only be accommodated for 2 hours per day.[1] The employing establishment noted that, in November 2000, it had requested an updated medical report and when this was not forthcoming, scheduled appellant for a fitness-for-duty examination, which noted no objective findings. The employing establishment noted that appellant had a second-opinion examination on May 25, 2001 and that she was still working modified duty.

By letter dated September 19, 2001, the Office informed appellant of the evidence needed to support her claim. In response, she submitted an attending physician's report dated September 21, 2001, in which Dr. J. Daniel Wanwig, who practices internal medicine and psychiatry, diagnosed depression. Dr. Wanwig checked the "yes" box, indicating that the condition was employment related, stating "emotional distress." He further reported that appellant "feels she did not get the promotion she deserved," and she "feels she did not get correct work after an injury."

By decision dated October 26, 2001, the Office denied the claim, finding that, appellant failed to establish a compensable factor of employment.

On November 1, 2001 appellant requested a hearing and submitted additional evidence, which included information regarding her EEO complaints undated hearing testimony of Dr. Daniel Edward Fry, a psychologist, who testified regarding his treatment of appellant for depression from November 1998 until March 1999,[2] a settlement agreement dated August 30, 1995,[3] memoranda from Mr. Irvin to appellant regarding her job search and numerous

[1] The traumatic injury claim was adjudicated by the Office under file number A14-0353030. The instant claim was adjudicated under file number A14-2004184. The Board notes that appellant had a previous case before the Board, Docket No. 00-1030. In a decision dated March 5, 2001, the Board adopted an Office hearing representative decision dated December 18, 1999, denying that appellant sustained an emotional condition in the performance of duty. That claim was adjudicated under file number A14-0339400.

[2] Dr. Fry also advised that appellant had "chronic pain from injuries reportedly sustained at the [employing establishment]" with limited mobility, especially in the arms and shoulders and long-standing discrimination at work with reportedly lack of support from authorities to deal with same. He noted that appellant felt invisible and unheard and that her situation was hopeless. He opined that 90 percent of appellant's emotional condition was caused by the employing establishment.

[3] The agreement stated that appellant would prepare a draft of the duties she felt she could perform, meet with employing establishment management to compare and approve job duties, after which the information would be submitted to appellant's physician for approval. Once approved by the physician, a modified job offer would be prepared.

statements, in which she addressed unfair treatment at the employing establishment. Appellant also submitted an EEO decision dated January 30, 2002,[4] which held that the employing establishment violated the Rehabilitation Act by failing to accommodate appellant's disability or prove that to do so would cause undue hardship. The decision stated that the employing establishment was to make reasonable accommodations and to grant back pay for the period January 24 to February 6, 1996 and May 25 to June 15, 1996. At the March 28, 2002 hearing, appellant testified regarding the factors she believed caused her emotional condition.

In a decision dated October 3, 2002, an Office hearing representative found that appellant established one compensable factor of employment, that she was unfairly denied an opportunity to bid for a clerk position on December 8, 1995. The hearing representative found, however, that the medical evidence did not establish that appellant's condition was caused by the compensable employment factor and denied the claim.

Appellant requested reconsideration and submitted an April 2, 2000 report from Dr. Fry, who stated that when he first saw appellant in November 1998. Appellant reported that she was being discriminated against for previous on-the-job injuries and was being retaliated against due to EEO activity. He reiterated his previous diagnoses and treated appellant from February 1, 2002 to February 21, 2003, for a recurrence of depressive symptoms caused by her hours being reduced to two hours a day and for frustration and harassment at work. Dr. Fry stated that appellant reported that she had stopped taking her antidepressant medication because her supervisors made an issue of it, possibly causing her to be unable to work at machinery. She reported that every week management was harassing her in some way. Dr. Fry concluded that appellant's job produced 75 percent of her stress-related problems. Appellant also submitted an undated request from Jim Wilson regarding her work limitations, with an appended note dated April 26, 2002 from Dr. Fry and a note dated July 30, 2002 regarding a leave slip she submitted, with an appended note that she was upset that management was playing games again.

On May 28, 2003 appellant filed a Form CA-7 claim for compensation, for the period May 28 to 30, 2003.

In a decision dated June 3, 2003, the Office denied modification of the October 3, 2002 decision, finding that Dr. Fry did not address the compensable factor of employment.

On July 1, 2003 appellant filed a Form CA-7 claim for June 2 to 30, 2003. On July 10, 2003 appellant again requested reconsideration and submitted a July 11, 2003 report, in which Dr. Fry stated, "It is my understanding that the improper denial of the promotion was one of the causes of [appellant's] depression."

By decision dated August 6, 2003, the Office denied appellant's Form CA-7 disability finding claims, that because the emotional condition claim had been denied, she was not entitled to compensation for the periods of disability claimed. In a decision dated September 15, 2003, the Office stated that it was denying appellant's reconsideration request, finding Dr. Fry's report to be unrationalized and of little probative value.

[4] The decision submitted is the denial of a request for reconsideration filed by the employing establishment.

LEGAL PRECEDENT

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.[5]

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*,[6] 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.[7] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Federal Employees' Compensation Act.[8] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his 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 emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[9]

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.[10] 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.[11]

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[5] *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] 28 ECAB 125 (1976).

[7] 5 U.S.C. §§ 8101-8193.

[8] *See Robert W. Johns*, 51 ECAB 137 (1999).

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

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

[11] *Id.*

ANALYSIS

Appellant alleged that Mr. Irvin was being investigated for using a racial epithet. The use of an epithet, which is derogatory in nature, can constitute harassment and discrimination under the Federal Employees' Compensation Act.[12] For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced, which establishes that the incidents alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Federal Employees' Compensation Act.[13] In the instant case, there is no evidence in the record before the Board to establish that Mr. Irvin made a racial epithet, as alleged, directed at appellant or anyone. Appellant's allegation that Mr. Irvin was being investigated does not establish that he made the alleged remark. The Board, therefore, finds that appellant has not established a compensable factor of employment.

Appellant alleged that she was only allowed to work two hours per day. The Board notes that administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not generally covered under the Federal Employees' Compensation Act. However, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded. In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.[14] Thus, denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee's ability to perform his or her regular or specially assigned-work duties, but rather constitute his or her desire to work in a different position.[15] While changes in workdays and hours, positions, locations and changes in an employee's duty shift may constitute a compensable factor of employment arising in the performance of duty, a change in a duty shift does not arise as a compensable factor *per se.* The factual circumstances surrounding the employee's claim must be carefully examined to discern whether the alleged injury is being attributed to the inability to work his or her regular or specially assigned job duties due to a change in duty shift, *i.e.*, a compensable factor arising out of and in the course of employment or whether it is based on a claim, which is premised on the employee's frustration over not being permitted to work a particular shift or to hold a particular position.[16]

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[12] *Felix Flecha*, 52 ECAB 268 (2001).

[13] *James E. Norris*, 52 ECAB 93 (2000).

[14] *Id*.

[15] *Hasty P. Foreman*, 54 ECAB ____ (Docket No. 02-723, issued February 27, 2003); *see Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[16] *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003); *see Helen Allen*, 47 ECAB 141 (1995).

The Board finds that this case is not in posture for a decision regarding appellant's work schedule. The record before the Board does not permit an informed adjudication of the case. The record here contains a January 30, 2002 decision, in which the EEO Commission denied the employing establishment's request for reconsideration of a July 11, 2001 decision that found the employing establishment in violation of the Rehabilitation Act with regard to allegations made by appellant. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred. Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under EEO standards. Rather, the issue is whether the claimant has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[17] The July 11, 2001 EEO decision constitutes evidence on whether the employing establishment committed error and abuse in this administrative matter. The case will be remanded to the Office to obtain this decision, which should be available from the employing establishment. The Board has long held that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and that, as the Office is not a disinterested arbiter, the Office shares responsibility in the development of the evidence to see that justice is done,[18] particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[19]

The Board notes that appellant had a previous emotional condition claim adjudicated under file number A14-0339400. By decision dated March 5, 2001, the Board adopted a December 18, 1999 decision, of an Office hearing representative denying the claim.[20] The record in the instant case, contains no information regarding that claim. It is thus unclear if employment factors alleged by appellant to have caused her emotional condition in the instant claim were previously adjudicated by the Board. In response to appellant's allegations that the employing establishment limited her to two hours of work when she wanted to work eight hours, the employing establishment indicated that appellant was limited to two hours per day based on restrictions provided by her physician for a claim for a physical injury, adjudicated by the Office under file number A14-0353030.[21] It, therefore, appears that appellant has a claim for a physical condition that has been accepted by the Office as employment related. The record before the Board, however, contains no information regarding this claim. On remand the Office should consolidate the claims. After such further development as the Office deems necessary, the Office should issue a *de novo* decision on the merits of the instant claim.

[17] *James E. Norris, supra* note 13.

[18] *Jimmie A. Hammons*, 51 ECAB 219 (1999).

[19] *Marco A. Padilla*, 51 ECAB 202 (1999).

[20] *Supra* note 1.

[21] *Id.*

CONCLUSION

The case is not in posture for decision regarding whether appellant sustained an emotional condition causally related to factors of employment. The case will be remanded to the Office. In light of the Board's finding regarding the first issue, the issues of whether appellant established that she was totally disabled for the periods May 28 to 30 and June 2 to 30, 2003 and whether the Office properly denied her request for reconsideration are moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15, August 6 and June 3, 2003 and October 3, 2002 be set aside and the case remanded to the Office for further proceedings consistent with this opinion.

Issued: January 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member