United States Department of Labor
Employees' Compensation Appeals Board

ANDREA DENMARK, Appellant	)	
and	)	**Docket No. 04-755**
	)	**Issued: July 28, 2004**
U.S. POSTAL SERVICE, HUDSON CITY STATION, Jersey City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 27, 2004 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative decision dated February 14, 2003 which affirmed the denial of her emotional condition claim and June 3 and October 15, 2003 nonmerit decisions by the Office denying her requests for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's nonmerit decisions denying appellant's requests for reconsideration.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office in its July 3 and October 15, 2003 decisions, properly denied appellant's request for merit review of her claim.

FACTUAL HISTORY

On November 16, 2001 appellant, then a 33-year-old city carrier, filed an occupational disease claim alleging that she sustained anxiety and depression due to factors of her federal employment. Appellant attributed her condition to an overburdened route and abuse by management at the employing establishment. She stopped work on November 5, 2001.

In a statement accompanying her claim, appellant related that she began experiencing anxiety and stress on October 20, 2001. She stated that the route that she "was awarded during the bidding process was overburdened as it was created by combining two previously separate routes into one." Appellant indicated that problems on her route led to conflicts with management and fear of discipline and loss of employment.

Maged Aziz, a manager at the employing establishment, submitted a letter dated November 8, 2001, controverting appellant's claim. He expressed his belief that appellant filed her claim as a result of receiving a letter of warning on October 30, 2001 and a suspension for seven days on November 5, 2001. Mr. Aziz related that management approved all of appellant's requests for assistance on her routes. He submitted employing establishment forms approving appellant's request for carrier assistance in October and November 2001. He further noted that he had scheduled an inspection of appellant's route on October 22, 2001 which was cancelled when she stayed home sick on the day of the scheduled inspection.[1]

In a statement dated December 3, 2001, appellant attributed her condition to her "inability to meet the unrealistic production standards for my daily duties set by my manager…." She stated:

> "On September 9, 2001 I started on a new route that was awarded to me during the bidding process as my old route was eliminated. While in training for this route it became clear that I would not be able to ever complete this route within an eight[-]hour period. The route consist[s] of driving [an] [employing establishment] vehicle in dangerous high traffic areas as well as sections of mail deliveries on foot."

Appellant related that she began working her new route on September 11, 2001 and that she had to use unauthorized overtime to complete the route. She stated that after management warned her about using overtime she requested carrier assistance. Appellant stated that the employing establishment granted her requests for assistance "but only after lengthy debates and arguments as to the necessity of assistance." She related: "During this period I found myself rushing through my route trying to finish in the allotted [] time, causing me to become distracted and having near mishaps with the [employing establishment] vehicle." She noted that a section

[1] The record contains a letter from management to appellant dated October 22, 2001, indicating that a special route inspection was scheduled for October 29, 2001. In a letter dated November 1, 2001, appellant requested a route inspection.

of the route had traffic problems and major construction projects which caused "extensive" delays. Appellant stated:

> "Management was aware that safe parking while performing duties on this section is very difficult. This section of the route is dangerous and frightening and with management's insistence that I 'start moving faster' my assigned duties were becoming overwhelming. I was afraid for my personal safety while performing my duties on this section of the route. By refusing to deal with the situation fairly management had created a highly stressful situation with me trying to perform my duties to the unrealistic time frames set by management."

Appellant further asserted that management "singled [her] out for discipline." She also indicated that she experienced stress due to an anthrax directive because it added to the time that it took for her to complete her route and increased her anxiety about her safety. Appellant related that she began to have disputes with management about orders to scan parcels and her pattern of collecting mail. She noted that Mr. Aziz agreed to a route inspection but then changed his mind "in retaliation for an [a]bsence." Appellant stated:

> "On November 5, 2001 the date I received the letter of suspension, I again had a confrontation with management in regard to the necessity of assistance. After much unnecessary haggling I was only given partial assistance. I became upset but started my duties anyway. While I was collecting mail, the [employing establishment] vehicle became disabled. Knowing that this was going to cause more problems with management with the need for more assistance, I began to experience extreme anxiety and shortness of breath."

Appellant stated that she left work on that date and sought medical treatment.[2]

Appellant filed grievances regarding her November 5, 2001 suspension and the October 30, 2001 letter of warning. A December 6, 2001 decision on the grievance of the suspension upheld the suspension and indicated that it would be removed from her record after one year if there were no similar episodes. A December 19, 2001 decision on the grievance concerning the letter of warning found that the October 30, 2001 letter of warning was issued for cause.

Mr. Aziz, in a letter dated December 17, 2001, related that appellant "could not meet the minimum requirement of the carrier's craft" even with assistance. He further noted that a May 21, 2001 route inspection showed that appellant's route took 7 hours 17 minutes.

In a form report dated December 27, 2001, Dr. Nimer Iskandarani, a Board-certified psychiatrist and appellant's attending physician, diagnosed severe, recurrent major depressive disorder and anxiety disorder.[3] He checked "yes" that the condition was caused or aggravated by

[2] In a note dated November 28, 2001, a licensed clinical social worker indicated that he began treating appellant on November 5, 2001.

[3] The record contains an unsigned psychiatric evaluation dated November 28, 2001.

employment and found that she was totally disabled from November 5, 2001 to February 5, 2002.

Dr. Iskandarani submitted substantially similar form reports dated February 1 and 26 and April 3, 2002. In a form report dated April 5, 2002, Dr. Iskandarani opined that appellant could resume limited-duty employment for four hours per day. Appellant returned to work on April 8, 2002.

By decision dated May 14, 2002, the Office denied appellant's claim on the grounds that she did not establish an injury as alleged. The Office found that appellant had not established any compensable factors of employment.

On May 27, 2002 appellant requested a hearing on her claim. At the hearing, held on December 19, 2002 appellant stated that she began experiencing stress and depression around October 28, 2001, because of difficulty completing her collections and dealing with traffic and delays caused by reconstruction on the highway. She further noted that her position required her to scan packages for another route and that she experienced stress and anxiety because she was unable to timely scan the packages as required.

In a fitness-for-duty examination dated September 17, 2002, Dr. Eric B. Gewolb, a Board-certified psychiatrist, diagnosed dysthymic disorder. He noted that appellant was unable to perform certain positions at the employing establishment but opined that this inability to function might not be due to her position but "rather a result of her illness, or perhaps a precipitating event." He discussed the history related by appellant of feeling "unable to accomplish her duties due to the demands of her route" and of feeling "unable to accomplish her route in the hours allotted due in part to overwhelming traffic throughout the day." Dr. Gewolb concluded that appellant had "been overwhelmed by the legitimate demands of her assignments."

On January 16, 2003 appellant submitted a copy of her Equal Employment Opportunity (EEO) complaint, which was accepted for investigation on March 25, 2002. She further submitted statements accompanying her EEO complaint. Appellant additionally submitted form reports from Dr. Iskandarani dated April to November 2002 and a medical report dated January 4, 2002 from Dr. Devendra Kurani, a Board-certified psychiatrist, who indicated that appellant was under his care for major depression and was unable to work until January 9, 2002.

In a medical report dated January 10, 2003, Dr. Iskandarani diagnosed recurrent, severe major depressive disorder and anxiety disorder. He opined that appellant could "not respond to pressures at work, which caused her anxiety, panic attacks and depression."

In a statement dated January 21, 2003, Mr. Aziz related that he ordered a route inspection for appellant but that he cancelled the inspection due to her absence from work. He again noted that management approved all of her requests for assistance on her route and that her route was calculated to take 7 hours and 17 minutes. Mr. Aziz stated that management gave appellant additional responsibilities so that she would have eight hours of work. He further indicated that appellant had the opportunity to bid on other routes which required only walking.

By decision dated February 14, 2003, the hearing representative affirmed the Office's May 14, 2002 decision after finding that appellant had not established any compensable factors of employment.

On May 23, 2003 appellant, through her representative, requested reconsideration of her claim. In support of her request, appellant submitted a medical report dated March 18, 2003 from Dr. Iskandarani, who found that she was disabled from employment. In a report dated May 13, 2003, Dr. Iskandarani attributed appellant's depression and anxiety to the employment conditions she described in her December 3, 2001 statement. He stated, "Her manager set production standards for her daily function beyond her ability to meet. These standards were unrealistic and [were] causing numerous troubles and stressors to [her]."[4]

By decision dated July 3, 2003, the Office denied appellant's request for merit review of her claim on the grounds that the evidence submitted was immaterial and thus insufficient to warrant review of the prior decision.

On September 18, 2003 appellant, through her attorney, again requested reconsideration of her claim. Appellant's attorney argued that she had experienced stress trying to complete her route within given time limitations. He also submitted a settlement agreement dated June 18, 2003 in which the employing establishment agreed to remove the discipline from her record and to complete a route inspection.

In a decision dated October 15, 2003, the Office denied appellant's request for reconsideration of the merits of her claim pursuant to section 8128(a).

LEGAL PRECEDENT1

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 Employee's 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 her employment duties, or has fear and anxiety regarding her ability to carry out her duties and the medical evidence establishes that the disability resulted from 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 her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.[8] The Board, in *Cutler*,

[4] Appellant further submitted progress notes and form reports from Dr. Iskandarani.

[5] 28 ECAB 125 (1976).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Anthony A. Zircon*, 44 ECAB 751, 754-55 (1993).

[8] *Lillian Cutler*, *supra* note 5 at 130.

then noted that other cases established that a disabling condition resulting from an employee's feelings of job insecurity was not sufficient to constitute a personal injury sustained while in the performance of duty. Similarly, if the employee is unhappy doing inside work, desires a different job, broods over the failure to be given the kind of work she desires or secure a promotion, such is not sufficient to constitute a personal injury sustained in the performance of duty.[9]

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 covered under the Act.[10] This includes matters involving the training or discipline of employees. However, the Board has held that 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.[11] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[12]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[13] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[14] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[15]

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.[16] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that

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[9] *Id.* at 131.

[10] *See Gregory N. Waite*, 46 ECAB 662 (1995); *Thomas D. McEwen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[11] *See William H. Fortner*, 49 ECAB 324 (1998).

[12] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[13] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[14] *See Parley A. Clement*, 48 ECAB 302 (1997).

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

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

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.[17]

ANALYSIS

Appellant attributed her condition, in part, to receiving a letter of warning on October 30, 2001 and a suspension for seven days on November 5, 2001. However, matters involving discipline are considered administrative in nature and are not compensable factors of employment.[18] As noted above, an administrative or personnel matter will be considered an employment factor only where the evidence discloses error or abuse on the part of the employing establishment.[19] In this case, appellant has not provided sufficient evidence to establish that the employing establishment erred in imposing disciplinary action. A grievance filed by appellant regarding her November 5, 2001 suspension was settled with the suspension upheld and a finding that it would be removed from her record after one year if there were no similar episodes. The mere fact that personnel actions are later modified or rescinded does not in and of itself establish error or abuse.[20] A decision dated December 19, 2001, upheld the letter of warning given to appellant on October 21, 2001 as issued with cause. Appellant has not submitted any corroborating evidence to support that the employing establishment either erred or acted abusively with regard to the above-noted disciplinary actions. Thus, appellant has not established that either incident represents a compensable factor of employment under the Act.

Appellant also asserted that she was "singled out" for discipline. She further alleged that management refused to perform a route inspection "in retaliation for an [a]bsence." However, for harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employing establishment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[21] In this case, appellant has provided no corroborating evidence, such as witness statements, to establish that she was harassed or discriminated against by management. Appellant filed grievances concerning the discipline she received by management; however, decisions on the grievances upheld the disciplinary actions of the employing establishment. Additionally, grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[22] Appellant further contended that her supervisor, Mr. Aziz, cancelled her route inspection in retaliation for her absence from work. Mr. Aziz submitted a statement dated November 8, 2001 in which he indicated that he cancelled a scheduled route inspection because appellant remained home sick on the date of the scheduled inspection. Appellant has not

[17] *Id.*

[18] *Roger Williams*, 52 ECAB 468 (2001).

[19] *See Dennis J. Balogh*, *supra* note 16.

[20] *Id*.

[21] *See James E. Norris*, *supra* note 15.

[22] *Id*.

submitted any evidence corroborating her contention that the route inspection was cancelled in retaliation for an absence rather than as a practical necessity. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.[23]

Appellant further alleged that she experienced stress due to her "inability to meet the unrealistic production standards" and "rushing through [her] route trying to finish" within the time allotted. She additionally attributed her stress to traffic problems on her route, difficulties parking, delays due to road construction and attempting to timely scan parcels. The Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable.[24] In this case, management did not dispute that appellant's job duties consisted of delivering mail on her route with an anticipated time for completion and acknowledged that she was unable to perform her duties in a timely manner without assistance. Mr. Aziz stated that appellant was unable, even with assistance, to meet the "minimum requirements" of her position. Under *Cutler*, where a claimed disability results from an employee's reaction to her regular or specially assigned duties or to an imposed employment requirement, the disability comes within coverage of the Act.[25] Therefore, appellant has established a compensable factor under the Act with respect to stress experienced in the performance of her duties as a letter carrier.

As appellant has substantiated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not address the medical evidence. The case, therefore, will be remanded to the Office for consideration of the medical evidence.[26] After such further development as it deems necessary, the Office shall issue an appropriate merit decision.[27]

CONCLUSION

The Board finds that the case is not in posture for decision. The Board finds that appellant has established a compensable factor of employment pertaining to her regularly assigned job duties. The case, therefore, must be remanded to the Office to address the medical evidence and determine whether it establishes that her emotional condition is causally related to the compensable factor of employment. After such further development as is deemed necessary, the Office should issue a *de novo* decision on appellant's claim.

[23] The Board notes that it is precluded from considering the June 18, 2003 settlement agreement as it has not been considered by the Office in a merit decision. *See* 5 U.S.C. § 501.2(c).

[24] *Trudy A. Scott*, 52 ECAB 309 (2001).

[25] *See also Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

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

[27] In view of the Board's disposition of the merits, the issue of whether the Office in its July 3 and October 15, 2003 decisions, properly denied appellant's request for reconsideration is moot.

ORDER

IT IS HEREBY ORDERED THAT the October 15, June 3 and February 14, 2003 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 28, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member