

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

SHIRLEY A. BALLARD, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gary, IN, Employer**

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**Docket No. 04-810
Issued: July 28, 2004**

Appearances:
Shirley A. Ballard, 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 February 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 7, 2004, denying her claim for an emotional condition on the grounds that it was not sustained in the performance of duty and a September 25, 2003 decision, denying her request for a review of the written record as untimely.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment; and (2) whether the Branch of Hearings and Review properly denied appellant's request for a review of the written record as untimely.

¹ Appellant also timely appealed a November 26, 2003 decision denying her request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). However, as the Office issued a merit decision on January 7, 2004 it is unnecessary for the Board to address the nonmerit issue on appeal, as it is moot.

FACTUAL HISTORY

On June 24, 2001 appellant, then a 49-year-old supervisor of customer services, filed an occupational disease claim alleging that she developed an emotional condition due to the fact that her postal vehicle was vandalized, that her keys were taken and her house burglarized. She also attributed her condition to job harassment.

In a memorandum dated October 11, 2000, appellant noted that she had applied for the position of acting manager and disagreed with the selection of David Dew, a white male candidate from another facility for this position. She stated that the employing establishment did not allow her to advance and that the selected candidate did not meet the criteria for the position. Appellant also protested the direct order that she assume managerial responsibility of main stock. She stated that she had not received the necessary training for this duty and that this was a managerial duty. Appellant stated that she only received incomplete training of four hours before assuming this duty. She alleged that the employing establishment improperly promoted a less qualified applicant, Elaine Williams, to fill the acting manager position after Mr. Dew left. Appellant asserted that she had trained Ms. Williams and had previously acted as her supervisor. On March 22, 2001 appellant filed an Equal Employment Opportunity (EEO) complaint regarding these allegations asserting racial and sexual discrimination.

On April 27, 2001 unknown parties vandalized appellant's postal vehicle. She stated that Ms. Williams interviewed her on May 21, 2001 regarding this incident and intimated that disciplinary action against appellant might be forthcoming. Appellant stated that the vandals appropriated her purse along with her house keys. On April 27, 2001 the police noted that on that date appellant reported that an unknown suspect had broken the rear window of her government vehicle, accessed the truck and stolen both appellant's purse and that of a coworker. She stated that her husband's life was threatened when her home was consequentially burglarized. In a police report dated May 25, 2000, appellant described the burglary of her home on that date.

Ms. Williams responded to this allegation on September 7, 2001 and stated that appellant did not receive any discipline regarding the theft and that she was not subject to harassment.

Appellant also attributed her emotional condition to being charged with absence without leave (AWOL) June 7 and July 28, 2001 and to a discussion on June 8, 2001 during which, her supervisor, Ms. Williams, ordered her to report to work on the following day despite her assertion that she was ill. She noted that June 7, 2001 was her scheduled day off and that she left a note for Ms. Williams informing her of an emergency dental appointment. Ms. Williams telephoned appellant at home and again instructed her to report for work on June 7, 2001. Appellant received a letter of warning on June 18, 2001 due to failure to follow instructions, AWOL, absence without permission and unacceptable behavior. Ms. Williams stated that appellant was AWOL on June 7, 2001 that on June 6, 2001 she instructed appellant to report to work on June 7, 2001 and that appellant failed to do so. She also stated that on June 8, 2001 during a meeting she instructed appellant to report to work on June 9, 2001 and that appellant "became loud, obnoxious and offensive." Appellant reportedly stated that Ms. Williams was "a low down dirty person."

Appellant attributed her emotional condition to an interview on March 26, 2001 resulting from the failure of the window clerks to wear uniforms on March 10, 2001. She stated that her duties did not include the windows and that another supervisor was in charge of this area. Appellant received a letter of warning for unsatisfactory performance of duties on April 2, 2001 regarding this incident. On May 8, 2001 Mike Gaube, the postmaster, issued a letter of decision regarding the April 2, 2001 letter of warning regarding appellant's unsatisfactory performance of duty through the failure to monitor the uniform attire of the retail sales associates on March 10, 2001. Mr. Gaube sustained the proposed letter of warning. Appellant pursued this matter on May 19, 2001 and alleged that neither the window clerk who was not appropriately clad, nor her supervisor received any permanent discipline as a result of this incident.

In a statement dated June 18, 2001, appellant also attributed her emotional condition to harassment from Mr. Gaube noting that he scrutinized her work performance and activities. She stated that he incorrectly blamed her for the misdirection of checks and discussed her perceived performance deficits in a meeting on February 15, 2001. Appellant also asserted that on February 20, 2001 Mr. Gaube "verbally talked down to and insulted" her regarding mail that arrived late from the plant. She stated that Ms. Williams informed her that Mr. Gaube instructed that appellant receive discipline as a result of this incident. Ms. Williams declined to institute any discipline against appellant in regard to the February 20, 2001 incident. Appellant also noted that she received an email on May 25, 2001 questioning her failure to access advance clerk mail. She stated that this failure was due to system error.

Appellant submitted medical evidence in support of her claim, including a report dated July 25, 2001 from Dr. Darryl L. Fortson, a Board-certified family practitioner, attributing her diagnosed condition of work-related stress to the harassing behavior of her supervisor. He noted that appellant experienced a set back when her supervisor reprimanded her for failure to account for three hours of time. Dr. Fortson completed a form report on June 29, 2001 and attributed appellant's depression and stress reaction to her employment with a checkmark "yes." The Office requested additional factual and medical evidence by letter dated October 30, 2001. Appellant responded on November 25, 2001 and asserted that Ms. Williams' questions regarding the April 27, 2001 theft from her vehicle were intimidating as Ms. Williams did not inquire about appellant's well-being, but instead suggested that she acted negligently in parking the vehicle in a bad neighborhood. Appellant asserted that the employing establishment's disciplinary actions were in retaliation for her EEO activity. She stated that Mr. Gaube was unfairly attempting to prevent her from receiving her yearly salary increase due to the spurious disciplinary actions.

On August 8, 2001 the employing establishment reviewed the letter of warning for AWOL, disobeying a direct order and inappropriate conduct. The employing establishment rescinded the charge of AWOL due to subsequently submitted medical evidence. The employing establishment further found that the remainder of the letter of warning should be sustained.

In a decision dated August 23, 2001, the employing establishment reduced the "letter of warning, in lieu of a seven-day suspension" to a "letter of warning." The employing establishment found that Ms. Williams inappropriately issued appellant a direct order to report to work on June 7, 2001.

Mr. Gaube stated that appellant had sent a clerk to work the window that was not in uniform and that this was the cause of the discipline against appellant. He further stated that he felt that appellant did not take reasonable care in preventing the theft from her postal vehicle as she stated that she saw a person nearby, but still placed her purse in the trunk and left the vehicle.

Mr. Gaube responded to appellant's allegations on December 19, 2001 and stated that she was aware that clerks were required to wear proper uniforms as evidenced by her signature on a training record. He stated that Mr. Dew was selected based on his experience and the specific needs of the office. Mr. Gaube further stated that appellant's position description included the maintenance of main stock.

In his November 25, 2001 report, Dr. Fortson stated that appellant attributed her condition to racially motivated harassment. He diagnosed stress reaction and brief depressive reaction. Dr. Fortson stated that appellant's condition worsened with communications from her supervisors concerning adverse administrative actions against her.

By decision dated March 25, 2002, the Office found that appellant had established a compensable factor of employment in that the employing establishment determined that her supervisor improperly issued her a direct order to report to work on June 7, 2001 after appellant asserted that she was ill. The Office then determined that the medical evidence was not sufficient to establish appellant's claim.

Appellant requested an oral hearing on April 22, 2002. She submitted a report dated December 4, 2001 from Dr. Renee Y. Hill, a Board-certified psychiatrist, who diagnosed major depression and occupational problems. She stated that appellant's condition was secondary to harassment with apparent intent to intimidate her by her boss.

Ms. Williams completed a form and indicated that appellant was not required to carry \$250.00 in cash and jewelry in her purse. She stated, "[Appellant] stated that she saw a man on the steps when they placed their purses in the vehicle. Reasonable care was not given to their personal belongings." The employing establishment denied appellant's claim on April 5, 2002 noting that her total claim was for \$2,915.95 and finding it was not reasonable to have these items in her possession while performing street management. Appellant also appealed the denial of her claim for personal property loss in the theft from her postal vehicle. She alleged that she had exercised reasonable care and otherwise disagreed with the employing establishment's decision.

By decision dated December 9, 2002, the hearing representative remanded the claim for additional development of the medical evidence, including a statement of accepted facts listing the accepted employment factor and referral for a second opinion evaluation. The Office referred appellant and a statement of accepted facts to Dr. Dixon F. Spivy, a Board-certified psychiatrist, for a second opinion medical evaluation.

In a report dated May 27, 2003, Dr. Spivy found "no basis for a significant psychiatric diagnosis" and that the "specific factors in the statement of accepted facts contributed to appellant's emotional condition and disability." He noted that there was no medical reason for appellant to miss time from work and attributed her symptoms to "disappointments in life."

By decision dated June 17, 2003, the Office denied appellant's claim based on Dr. Spivy's report.

In a letter dated July 27, 2003, appellant requested a review of the written record. By decision dated September 25, 2003, the Branch of Hearings and Review denied appellant's request as untimely and determined that her claim could be addressed through the reconsideration process.

Appellant submitted a report dated July 21, 2003 from Dr. Hill stating, "[T]he provocation for the onset of psychiatric illness in [appellant] was absolutely the psychological stress of her having to cope with and work in an environment that demanded responsibility without authority and that tolerates demanding yet unhelpful managers."

Appellant, through her attorney, requested reconsideration on November 5, 2003. By decision dated November 26, 2003, the Office declined to reopen appellant's claim for consideration of the merits. She again requested reconsideration on December 8, 2003 and by decision dated January 7, 2004, the Office reviewed appellant's claim on the merits, but declined to modify the June 17, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty she 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.² Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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.³

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

² *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

³ *Id.*

⁴ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination 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. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁵

As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁶

In cases involving emotional conditions, when working conditions are alleged as factors causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensation 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.⁷ Perceptions and feelings alone are not compensable to establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence. Only when the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, should the Office consider the medical evidence of record to determine the causal relationship between the accepted factors and the diagnosed condition.⁸

ANALYSIS -- ISSUE 1

Appellant attributed her emotional condition to the denial of promotions, disciplinary actions, the assignment of responsibility of the main stamp stock, the denial of her claim for replacement of her property due to the theft from her postal vehicle and the investigation of whether she exercised due care in regard to her postal vehicle. Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, wrongly addressed leave, improperly assigned work duties and improperly conducted investigations, the Board finds that these allegations related to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act. Appellant has not established error or abuse in these allegations.

⁵ *Alice M. Washington*, 46 ECAB 382 (1994).

⁶ *Martha L. Watson*, 46 ECAB 407 (1995).

⁷ *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

⁸ *Id.*; *Fred Faber*, 52 ECAB 107, 110 (2000).

Appellant alleged that she experienced harassment, retaliation and discrimination through the above-mentioned incidents as well as due to alleged actions of Mr. Gaube and Ms. Williams, noting that Mr. Gaube scrutinized her work performance and activities. She stated that Mr. Gaube incorrectly blamed her for the misdirection of checks and discussed her perceived performance deficits in a meeting on February 15, 2001. Appellant also asserted that on February 20, 2001 Mr. Gaube “verbally talked down to and insulted” her regarding mail that arrived late from the plant. She stated that Ms. Williams informed her that Mr. Gaube instructed that appellant receive discipline as a result of this incident. Appellant also noted that she received an email on May 25, 2001 questioning her failure to access advance clerk mail. She stated that this failure was due to system error. Appellant stated that Mr. Gaube was unfairly attempting to prevent her from receiving her yearly salary increase due to the spurious disciplinary actions. She asserted that the employing establishment’s disciplinary actions were in retaliation for her EEO activity.

Mr. Gaube and Ms. Williams denied these allegations. As noted previously, 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. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence. Appellant has submitted no corroborating evidence supporting her allegations of statements made or actions taken. Therefore, she has not established that the alleged harassment, retaliation and discrimination actually occurred and has not substantiated these compensable factors of employment.

However, as found by the Office, appellant has established error or abuse in the June 18, 2001 letter of warning. Upon review, the employing establishment determined that Ms. Williams had improperly issued a direct order for appellant to report to work on a date upon which appellant alleged she required medical treatment resulting in increased discipline. As she has established error or abuse in this administrative action, she has established a compensable factor of employment. The medical evidence of record does not support that appellant’s emotional condition resulted from this accepted factor.

Appellant’s attending physician, Dr. Fortson, attributed her stress reaction and depression to racially motivated harassment on November 25, 2001. As she has not substantiated her allegation of harassment, this report does not address the causal relationship between appellant’s condition and an accepted employment factor and cannot meet her burden of proof.

Dr. Hill’s December 4, 2001 and July 21, 2003 reports also fail to attribute appellant’s emotional condition to her accepted employment factor. She attributed appellant’s condition to a demanding supervisor and harassment with the intent to intimidate. Appellant has not established these elements as compensable factors and, therefore, Dr. Hill’s opinions are not sufficient to meet appellant’s burden of proof.

The Office referred appellant and a statement of accepted facts to Dr. Spivy, who completed a report on May 27, 2003 finding that appellant had no current emotional condition and that the specific factors in the statement of accepted facts did not cause her emotional condition, but were due to life’s disappointments, thereby rendering it as self-generated. As this

report negates a causal relationship between appellant's employment factor and her emotional condition, it cannot support her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act,⁹ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁰

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days.¹¹ Even where the request for hearing or review of the written record is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.¹²

ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined that appellant's July 27, 2003 request for review of the written record was not timely filed as it was made more than 30 days after the issuance of the Office's June 17, 2003 decision. The Office, therefore, properly denied appellant's request for a review of the written record as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant review of the written record in this case. The Office determined that review of the written record was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a review of the written record as untimely and properly exercised its discretion in determining to deny her request for a review of the written record as she had other review options available.

CONCLUSION

The Board finds that appellant substantiated only one compensable factor of employment and has failed to submit the necessary rationalized medical evidence to establish that this factor caused or contributed to her diagnosed condition. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for review of the written record as untimely.

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2004 and September 25, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 28, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member