

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

LUCILLE M. ESPOSITO-JOHNSON, Appellant)	
)	
and)	Docket No. 04-615
)	Issued: May 19, 2004
U.S. POSTAL SERVICE, POST OFFICE,)	
Ft. Myers, FL, Employer)	
)	

Appearances:
Dean Albrecht, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 5, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 26, 2003, which rejected her claim for an emotional condition on the grounds that she failed to implicate any compensable factors of her employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

FACTUAL HISTORY

On February 19, 2003 appellant, then a 49-year-old modified letter carrier, filed an occupational illness claim alleging that on November 15, 2002 she became aware that she had developed severe stress and depression, causally related to being given a direct order by her supervisor to case box mail, which consisted of prolonged standing, twisting, bending, stooping,

etc., against her physical restrictions. She stopped work on November 15, 2002 and did not return. On the reverse of the claim form appellant's supervisor indicated that appellant was paid 45 days of continuation of pay for a back injury also sustained on November 15, 2002 that, therefore, her pay continued until December 31, 2002 and that she did not report her emotional condition to her supervisor until February 28, 2003.¹

Appellant stated that, regarding the events of November 15, 2002, she was told that she was going to be sent to the Tice branch of the employing establishment to "box mail." She stated that she told her supervisor and manager that not only were they going against her job description, but they were going against her medical restrictions by requiring her to stand continuously for four hours and requiring twisting and bending. Additionally appellant claimed that boxing mail was a clerk's job and she was not a clerk. She claimed that Tom Hoerner ordered her to go to Tice. Appellant stated that she complied with the order, but that "after a little more than four hours, the pain that was radiating down both legs from her lower back became unbearable." She claimed that she stopped work, informed her supervisor, filled out forms and went to her physician, who gave her pills and recommended bed rest. Appellant claimed that she got stressed because her bills were unpaid, that her savings were wiped out and that she was in limbo and in constant pain. She stated that her psychiatrist told her that her stress was from the employing establishment.

In support of her claim, appellant provided a job offer agreement she had accepted and signed on July 17, 2001 which physically required intermittent sitting 2 to 4 hours per day, intermittent standing 2 to 4 hours per day, intermittent walking 2 to 4 hours per day and intermittent lifting not to exceed 10 pounds, 8 hours per day. The agreement noted that this assignment would remain within the physical restrictions furnished by her treating physician and that she was advised not to exceed these restrictions.

In a February 17, 2003 report, Dr. Brenda L. Keefer, a Board-certified psychiatrist, noted that she had been treating appellant since November 9, 1995 for a dysthymia disorder, also known as chronic depression and that she had been on medication for depression since 1995. She noted that appellant reported considerable stress and anxiety with her job, which became more intense during 2002. Dr. Keefer noted that appellant had been unable to work for several months and she opined that appellant did "have symptoms of depression that have been exacerbated by stress she has encountered at work."

¹ In an accompanying January 19, 2003 personal statement, appellant also claimed that, when she transferred to the current branch of the employing establishment, she was told that she was taking food from the table of children whose fathers worked in her office, that she could not wear earphones or listen to the radio while casing mail, that she was followed on her delivery routes by a supervisor, that she was cursed by the station manager for sliding down a hill and that she was given the hardest routes with the most mail. She claimed that she was made to work somewhere else by the union because she was taking the overtime away from them, that she was ridiculed by coworkers and yelled at by managers, that she was told she did not have the right to be a single parent after returning from maternity leave, that she was racially harassed and that she was not told that her mother was dying until after she finished her route. Appellant claimed that she had been hit on by coworkers and supervisors, that someone always said raunchy, stupid or sexist things to her and that everyone was prejudiced against her after she filed her back injury claim in 1999. However, no specific evidence regarding any of these allegations was submitted, nor did appellant relate her emotional condition to any of these claims.

In a February 27, 2003 statement, appellant's superior, Michael DeBrino, noted that on November 15, 2002 appellant was instructed to report to Tice to help out in the box section. He noted that the duties she would perform were not outside her medical restrictions and that at no time had she ever been instructed to work outside of her medical restrictions. Mr. DeBrino noted that on other occasions appellant had worked as a window clerk working within her restrictions, which included standing for extended periods, but that at no time did she indicate that this caused her any discomfort. He also noted that appellant had filed an Equal Employment Opportunity (EEO) complaint, arguing that she be allowed to skip lunch if she worked more than six hours straight, which he noted, would conflict with her medical restrictions. Mr. DeBrino noted that the claim appellant filed on November 15, 2002 was for a recurrence of a back injury and that she did not file her stress/depression complaint until February 19, 2003. He noted that at no time were they aware that she suffered from an alleged emotional condition.

By letters dated March 17, 2003, the Office requested further information from appellant and from the employing establishment regarding the implicated factors of employment and her medical history.

In response, appellant submitted a March 10, 2003 Form CA-20, attending physician's report from Dr. Keefer, which noted as history of injury that appellant was given a direct order to perform duties which were against her medical restrictions, noted that she had preexisting chronic depression, diagnosed dysthymia disorder and checked "yes" to the form question as to whether the condition found was caused or aggravated by an employment factor. She noted that appellant's preexisting mood disorder was "exacerbated by excessive work."

By letter dated March 24, 2003, the employing establishment controverted appellant's claim arguing that she was never asked to work outside of her restrictions and that there were no detrimental work factors that may have contributed to any extra demands. The employing establishment noted that it felt appellant's stress was self-induced and not in the performance of duty as she was reacting to instructions from her supervisor to report to another branch due to a personnel shortage.

In a letter dated March 20, 2003, Mr. DeBrino responded to appellant's allegations noting that on November 15, 2002 when she was instructed to report to the Tice branch to help out in the box section, she became very upset and questioned another employee as to why she had to go and not the other employee. The other employee then went to Mr. DeBrino and stated that she felt threatened by appellant and that she was harassing her. He noted that the work she was to perform at Tice was not outside her restrictions and at no time was she, nor was she ever, instructed to work outside her medical restrictions. Mr. DeBrino stated that there were no aspects of appellant's job that would be considered stressful, as she answered telephones, helped out on the window by doing lobby sweeps for customers who were picking up certified mail or parcels and occasionally cased mail. He noted that the only conflict appellant had with a supervisor was with her desire not to take lunch breaks when she worked more than six hours straight; however, he noted that there should be no reason for her to work six hours straight. Mr. DeBrino noted that appellant's actual duty on November 15, 2002 was casing box mail that was within her restrictions and should not have been a problem and he noted that if she worked more than her restrictions allowed, she did that of her own accord.

On March 24, 2003 the Office received two statements from a manager at the Tice branch and a supervisor at Tice. The manager, Robert Jackson, noted that on November 15, 2002 appellant came to help get the box mail cased up and she stated that she had some restrictions she needed to follow. He noted that she assured him that casing was no problem, but that weight restrictions and standing for long periods were problems. Mr. Jackson noted that he told appellant that they would help with lifting heavy objects and that she could sit down whenever she needed to. He noted that appellant went to the box section and started putting up the mail. Mr. Jackson stated that he then left, but that, when he returned he was told that appellant had gone to her physician, stating that boxing mail was doing work that was not within her restrictions and that she was hurt.

The supervisor, Delmer Shipley, noted that appellant worked in the box section from 8:00 a.m. until approximately 12:50 p.m., at which time she came to the supervisor's desk and stated that she was in too much pain to continue. He noted that he asked if she had injured herself and she told him that the work was not within her medical restrictions and that she was in pain and was going to see her physician. Mr. Shipley started to complete a Form CA-1 claim for traumatic injury, but appellant stopped because she stated that she was in too much pain to continue. Thereafter she left to seek medical treatment.

Appellant submitted a March 26, 2003 statement in which she complained about various aspects of her employment.² She alleged that November 15, 2002 was the straw that broke the camel's back or "blew [her] mind," when she was reinjured because her job description and work restrictions were "violated." Appellant claimed that from 8:15 a.m., until 12:15 p.m., she continually stood, stooped, twisted, bent, lifted and cased box mail. She claimed that she had to take a couple of breaks because her back and legs hurt, but that nothing helped the pain and she claimed that she was in such pain and was so stressed out that all she could do was cry. Appellant claimed that the employing establishment was either trying to kill her or fire her and she claimed that she developed stress due to real workplace harassment.

On March 31, 2003 the Office received a January 28, 2003 letter from the union president, Thomas Zeske, who noted that appellant claimed that her medical limitations were violated on November 15, 2002 and that she was injured again. Mr. Zeske noted that appellant developed a herniated disc in 1999 while working a business route and that since that time he had seen management harass her as well as try to give her work which was not only in violation of the union contract, but was in violation of her revised job description with medical restrictions. However, no specifics were provided.

On March 31, 2003 the Office received a February 11, 2003 reply from the manager of human resources, Terry Green, in response to the union president's allegations. He noted that

² Appellant complained that she herniated a disc in 1999, that since her first day at Cape Central she had been treated disrespectfully, that she was called "rehab" and had her job description changed and that she became the office "gofer" doing little things that no one wanted to do. She claimed that she was always telling Mr. DeBrino that the loads were too heavy and that her back hurt. Appellant indicated that Mr. DeBrino told her to call him if she could not do something. He advised her to ask for help if she could not do something. Appellant claimed that she had had to file several EEO complaints about management trying to work her over her restrictions. She claimed that she had reinjured her back three times since 1999.

appellant was asked to box mail which was within her medical limitations. Appellant's restrictions were noted as including intermittent bending/stooping for three hours per day, which was different from the earlier list of activities; however, there was no evidence that boxing mail on November 15, 2002 required three hours of intermittent bending and stooping. Her earlier medical limitations did not mention bending and stooping or any limitations thereon.

Appellant also submitted material relating to an earlier EEO claim for complaints of being treated differently on February 21, 2002. She later withdrew her complaint. Material regarding appellant receiving a January 7, 2002 letter of warning, which was later withdrawn, was also submitted.

Finally, appellant submitted a May 5, 2003 neuropsychiatric evaluation from Dr. Walter E. Afield, a Board-certified psychiatrist, who noted that at that time appellant presented with complaints of being under a great deal of stress, that she felt anxious and irritable and depressed, that she had migraine headaches, that she was nervous and that she recently had a nervous breakdown. Dr. Afield presented appellant's history as she presented it to him, noted that she had some chronic pain issues that were not being resolved and noted that she had some difficulties with temper control and he opined that she needed therapy and was not going to be able to return to the work force.

By decision dated September 26, 2003, the Office rejected appellant's emotional condition claim finding that she had not implicated a compensable factor of employment. The Office found that the employment factors appellant claimed were either not established as being factual or were not compensable.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴

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) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁵ Rationalized

³ 5 U.S.C. § 8101 *et seq.*

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

medical opinion evidence is medical evidence that 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. Such an 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 appellant.⁶

However, 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. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.⁷ Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of employment and does not come within the coverage of the Act.⁸ Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."⁹

When working conditions are alleged as factors in causing 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 When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. 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

⁶ *Id.*

⁷ *Donna Faye Cardwell*, *supra* note 5; *see also Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *Id.*

⁹ *See Joseph DeDonato*, 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

¹⁰ *See Barbara Bush*, 38 ECAB 710 (1987).

allegations with probative and reliable evidence.¹¹ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.¹² If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.¹³

Regarding administrative actions such as job assignments, the Board held in *Thomas D. McEuen*¹⁴ that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.¹⁵ Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

Regarding harassment, the Board has noted that it is well established that the actions of an employee's supervisor which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.¹⁶ However, in order for harassment to give rise to a compensable disability under the Act, there must be some evidence that such harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable.¹⁷ An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not 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.¹⁸

ANALYSIS

In this case appellant specifically identified the events of November 15, 2002 as causative in the development of her emotional condition. In certain statements appellant intimated that the instructions to her from her supervisor directing her to work in boxing mail at the Tice branch were causative, in part, of her stress condition. However, these instructions were an

¹¹ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹² *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

¹³ *See supra* note 5.

¹⁴ 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

¹⁵ *See Richard J. Dube*, 42 ECAB 916 (1991).

¹⁶ *Sylvester Blaze*, 42 ECAB 654 (1991).

¹⁷ *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991); *Ruthie M. Evans*, *supra* note 11.

¹⁸ *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

administrative prerogative and, absent evidence of error or abuse, they are not compensable, as appellant's reaction to administrative or personnel matters falls outside the scope of the Act and as appellant's desire to work in a different environment is not a compensable factor of employment.¹⁹ No evidence of administrative error or abuse was presented.

Further, appellant also intimated that this assignment was a form of harassment, however, no evidence that this routine administrative intervention involving personnel shortages was intended as harassment or actually constituted harassment, was presented. Therefore, appellant has not established that her assignment to the Tice branch was harassment under the Act.

Appellant additionally claimed that physically working for four hours casing box mail caused her emotional condition, but she did not explain how or why, as she filed a claim at that time for impairment due to a physical recurrence of her back condition and did not implicate the casing box mail duties as causative of an emotional condition until two months later. At that time she failed to identify specifically what duty or actions caused her emotional condition, as she stopped work alleging only physical pain and not emotional trauma at that time.

The Board, therefore, finds that appellant has failed to submit any specific, reliable, probative and substantial evidence in support of her allegations that the events of November 15, 2002 caused her emotional condition. Further, her supervisor contradicted her claims, noting that none of appellant's assigned duties were outside of her medical or job restrictions and noting that should she have difficulty in performing any of her tasks, she should request assistance from coworkers or supervisors. Appellant has the burden of establishing a factual basis for her allegations; however, the allegations in question are not supported by specific, reliable, probative and substantial evidence and have been refuted by statements from appellant's employer. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them. Therefore, the medical evidence of record need not be considered.²⁰

CONCLUSION

As appellant has failed to implicate any compensable factor of her federal employment as being causative of her emotional condition or of causing an aggravation or exacerbation of her preexisting emotional condition, she has not met her burden of proof to establish her claim. The medical evidence of record, therefore, need not be considered.

¹⁹ See *Brian H. Derrick*, 51 ECAB 417 (2000); *Carolyn S. Philpott*, 51 ECAB 175 (1999);

²⁰ Appellant claimed that she had a nervous breakdown in the Spring of 2003 while she was out of work on sick leave, such that factors of employment the preceding Fall played no obvious part in that or in her ongoing psychiatric complaints.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2003 is affirmed.

Issued: May 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member