

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

ZENAIDA C. MACAOAY, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION NORTH ISLAND, San Diego, CA,
Employer**

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**Docket No. 04-1731
Issued: November 26, 2004**

Appearances:
Zenaida C. Macaoay, 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 June 29, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 10, 2003, which found that she did not sustain an emotional condition in the performance of duty. She also appealed a March 9, 2004 decision, 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.

ISSUES

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; and (2) whether the Office properly refused to reopen appellant's case for further review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 18, 2002 appellant, then a 51-year-old supply technician, submitted an occupational disease claim alleging that she experienced stress related to work, stating, “see attached affidavit. This has caused my stress, headaches, neck pain and shoulder.” She submitted an attending physician’s report dated November 1, 2002, in which Dr. Jose Candelario, a chiropractor, reported a history “while performing my job duties at work multiple incidents have created tension and difficulties to my neck, upper shoulders, arms and numbness to both my hands.” He diagnosed subluxation of the cervical and thoracic spine, cervical radiculitis, cervical sprain/strain and thoracic sprain/strain and checked the “yes” box indicating the conditions were employment-related, stating “objective findings correlated with job duties” and advised that appellant was totally disabled from October 31 to December 15, 2002. She also submitted information regarding the filing of claims under the Federal Employees’ Compensation Act¹ and an Office of Personnel Management Form 50. An affidavit was not attached.

By letter dated January 16, 2003, the Office informed appellant of the type evidence needed to support her claim, to include a detailed statement regarding the employment conditions or incidents which she believed contributed to her condition. Appellant thereafter submitted a California form report dated January 13, 2003, in which Dr. Candelario diagnosed tension headaches, cervicgia, cervical subluxation and cervical/cranial brachial syndrome. He advised that she could return to modified duty on January 13, 2003. Appellant also submitted x-rays performed January 29, 2003. The cervical spine was reported as demonstrating right antalgic list indicating muscle spasm and the thoracic spine was negative. Subluxation was not diagnosed.

By decision dated July 10, 2003, the Office denied the claim, finding that appellant failed to establish that she sustained an emotional condition in the performance of duty. The Office noted that she had not submitted the requested statement of alleged employment factors.

On February 19, 2004 appellant submitted an Office form requesting reconsideration and submitted additional medical evidence including a July 2, 2003 report in which Dr. Craig A. Brown, a Board-certified psychiatrist, diagnosed depression, anxiety and post-traumatic stress disorder. He stated that appellant attributed her symptoms to “workplace stress.” In a January 28, 2004 report, Dr. Candelario stated that appellant reported physical complaints from constant computer work and described an October 18, 2002 argument at work when she was “sexually harassed” after which she had headaches, eye pain and tingling in the lips and cheeks. He noted her report that even though the pain worsened, she continued to work until October 25, 2002. Dr. Candelario described his physical findings and treatment beginning on October 25, 2002. He concluded that appellant sustained “cumulative trauma injuries” to her head, neck, upper back and bilateral upper extremities due to repetitive use at work. Robert S. Horowitz, Ph.D. submitted a February 16, 2004 report in which he diagnosed post-traumatic stress disorder and occupational problems, stating that appellant reported “a series of harassing experiences involving another employee and her supervisor.”

¹ 5 U.S.C. §§ 8101-8193.

In a March 9, 2004 decision, the Office denied appellant's reconsideration request, finding that she did not establish a compensable factor of employment and the medical evidence was irrelevant and, therefore, insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish 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.²

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*,³ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Act. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under the Act.⁴ When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an 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 an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁵

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. 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. Rather, the issue is whether the claimant, under the Act, has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶

ANALYSIS -- ISSUE 1

Appellant alleged that her federal employment caused stress and other stress-related conditions and submitted medical evidence in support of her claim. However, she did not submit any detailed description of the employment factors that she believed caused her

² *Leslie C. Moore*, 52 ECAB 132 (2000).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁵ *Lillian Cutler*, *supra* note 3.

⁶ *James E. Norris*, 52 ECAB 93 (2000).

condition. By letter dated January 13, 2003, the Office informed appellant of the type of evidence needed to support her claim, to include a detailed statement regarding the employment conditions or incidents which she believed contributed to her condition. She submitted additional medical evidence but did not submit a statement or any description of the employment factors she believed caused or contributed to her condition. As appellant submitted no factual evidence identifying the employment factors or incidents alleged to have caused or contributed to her condition, she failed to establish a compensable factor of employment under the *Cutler*⁷ standard.

To the degree that appellant is generally alleging that she was harassed, her mere charges without further explanation or corroboration are insufficient to establish that any harassment did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act⁸ and appellant has submitted no evidence either describing specific incidents of harassment or evidence to support that she was, in fact, harassed. As she failed to substantiate whether such harassment or discrimination occurred or identify specific employment factors that she felt contributed to her condition, she failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of employment.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulation provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹⁰ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹¹ Section 10.608(b) provide that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹²

ANALYSIS -- ISSUE 2

In requesting reconsideration, appellant merely submitted an Office form in which she checked a box indicating that she wished reconsideration before the Office. She, therefore, did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of

⁷ *Lillian Cutler*, *supra* note 3.

⁸ See *James E. Norris*, *supra* note 6.

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.608(a).

¹¹ 20 C.F.R. § 10.608(b)(1) and (2).

¹² 20 C.F.R. § 10.608(b).

law or advance a relevant legal argument not previously considered by the Office.¹³ While she submitted additional medical evidence, the underlying issue in the instant case is not a medical issue, but whether appellant has established a compensable factor of employment. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Appellant, therefore, did not meet any of the necessary requirements to establish that she was entitled to a merit review.¹⁵

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of employment. The Board also finds that the Office properly denied appellant's request for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 9, 2004 and July 10, 2003 be affirmed.

Issued: November 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹³ 20 C.F.R. § 10.608(b)(1)(2).

¹⁴ *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁵ *See James E. Norris*, *supra* note 8.