

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

MARY J. SUMMERS, Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
El Monte, CA, Employer)

**Docket No. 04-704
Issued: September 29, 2004**

Appearances:
Mary J. Summers, pro se
Thomas G. Giblin, Esq., for the Director

Oral Argument September 9, 2004

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 20, 2004 appellant filed a timely appeal from the October 15, 2003 merit decision of the Office of Workers' Compensation Programs, which denied her claim that she sustained an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's decision.¹

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

¹ The Board has no jurisdiction to review the November 3, 1999 declaration of appellant's then-attorney, Bruce M. Stark, Esq., which appellant submitted on appeal, as this evidence was not before the Office at the time of its October 15, 2003 decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On July 22, 1997 appellant, then a 38-year-old tax auditor, filed a claim alleging that her emotional condition was a result of her federal employment. In a narrative statement to support her claim, she explained that she felt that the employing establishment had discriminated and retaliated against her for filing prior Equal Employment Opportunity (EEO) actions. She also felt that she was sexually harassed. Appellant further indicated that the employing establishment had committed error or abuse in certain administrative or personnel matters. While it is not practical for the purposes of this decision to repeat the details of all the incidents appellant described, appellant identified the following as noteworthy and representative of the kind of treatment she received: (1) supervisor Juan Rodriguez did not forward her paperwork in 1990 because he did not like her sister; (2) manager Carol Ng stated that she was advised to get rid of appellant because she filed too many EEO complaints; (3) supervisor Percy Dowd sexually harassed her, picked on her clothes, touched her inappropriately, told inspectors she had kidnapped him, made her submit to sex with him, intimidated her by sitting behind her in a 350-seat auditorium, and slandered her to everyone; (4) in 1995 auditor Susan Miner relayed to her that a man on the telephone had just described appellant as the ugliest woman in the whole world; (5) secretary Lucy Tandy hit her on the buttocks with a full envelope and inquired about the appropriateness of her clothing; (6) branch chief Judy Tanner erroneously wrote her up for disrupting an audit; and (7) she was no longer allowed to work on the fourth floor and was banished instead to the “dungeon” on the seventh floor. Appellant indicated that she pursued at least some of these charges through the EEO Commission. She stopped work completely in 1998.

On April 7, 2000 the employing establishment responded to appellant’s allegations by denying harassment, discrimination or any violation of agency policy, rules or regulations. On the matter of Ms. Tandy and the envelope, the employing establishment advised as follows:

“The agency does not have an employee named L. Tandy; however, agency records indicate there is an employee named L. Tandy. Assuming your question actually refers to L. Tandy, the agency believes that [appellant] and other members engaged in a lengthy discussion regarding having a dress code during a group meeting. The following day when [appellant] came to work in a very short skirt, Ms. Tandy tapped an empty business envelope against [appellant] (as if to get her attention) and jokingly commented about the lengthy discussion from the previous day. Ms. Tandy’s comment was something like, ‘What about yesterday’s big discussion? Just forget it.’”

In a decision dated July 21, 2000, the Office denied appellant’s claim for compensation on the grounds that the evidence was insufficient to establish that her condition arose out of and in the performance of her federal duties. Upon reviewing appellant’s allegations and the employing establishment’s response, the Office found that, while certain incidents were shown to have occurred, all but one involved administrative or personnel actions and could not be considered to have occurred in the performance of duty without compelling evidence that the employing establishment erred or acted abusively in administering these matters. As for tapping appellant with an empty envelope to get her attention, the Office found that this was not an

action that would reasonably give rise to an emotional condition, and there was no medical documentation to establish that it did in fact cause appellant's emotional condition.

On July 20, 2001 appellant requested reconsideration. She clarified her allegations and submitted a July 2, 2001 report from Dr. Samuel H. Albert, a Board-certified psychiatrist, who reported the history that appellant related to him. He described his evaluation of symptoms and his assessment of her current condition upon examination. Dr. Albert gave a principal diagnosis of major depressive disorder, severe and generalized anxiety disorder. He explained that each of the work-related events caused its own portion of the depressed emotions in appellant; the cumulative effect of all appellant's responses to these events was the cause of exacerbation of symptoms, condition and diagnosis. Dr. Albert reasoned that the factors that caused appellant's condition appeared to be historically accurate, the most significant being her supervisor's statements concerning her manner of dress, Mr. Dowd's sexual molestation of her on numerous occasions and the touching of her buttocks by Ms. Tandy:

“On March 4, 1996 [appellant] was standing at the file cabinet talking to Group Clerk Henry Williams; Group Secretary Lucy Tandy came by and struck or touched or tapped [her] with an envelope on [her] butt and stated ‘should we send you home or do you think it is professional, what you are wearing?’ [Appellant] reacted emotionally to this event. She was embarrassed and angry and then became anxious [and] severely depressed.

“This particular incident has greater weight in the development of [appellant's] conditions of depression and anxiety than most of the other events. The reasons do not relate to the degree of force used by Secretary L. Tandy. The reasons relate to the fact that the event occurred, and to the emotional reactions of [appellant].

“[Appellant] reacted to this particular event with a great deal of emotion. The incident was unexpected, humiliating, and occurred in the presence of other workers. [She] experienced anxiety at being rudely and openly chastised in front of other workers, about an issue of opinion as to appropriateness of dress at the time. [She] explained to me, ‘It was not the right of a secretary to question the clothing I was wearing, because that particular day no one in management had questioned the appropriateness of the clothing. I was just blind-sided by what she said. It was so unexpected that I felt destroyed. Later I felt tremendous anxiety. Still later I became horribly depressed.’

“This specific event contributed to the worsening and aggravation of [appellant's] conditions of depression and anxiety.”

Dr. Albert reported that it was his professional opinion, with great medical probability, that the weight of the medical evidence supported the conclusion that the events recited in the history section of his report did in fact cause and continued to cause appellant to experience her current diagnosis, which in turn caused temporary total disability.

Appellant also submitted declarations relating to her discrimination complaint against Mr. Dowd. Alice B. Parker, a retired tax auditor, described her personal experience with Mr. Dowd and stated that at various times she had seen appellant and another woman individually leave Mr. Dowd's office in tears and highly emotionally upset. Mr. Dowd admitted to having a sexual relationship with appellant on two occasions in 1992, when he was a fellow tax auditor, not her manager: "That was the end of our sexual relationship. There were no other times when we had sexual relations, especially not when I was her manager." Mr. Dowd painted a picture of events that was quite different from that given by appellant. The account given by Mr. Holland, a tax auditor, also differed significantly from that portrayed by appellant, particularly regarding her approach to Mr. Dowd.

In a decision dated September 10, 2001, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that appellant had submitted little in the way of actual evidence, and where there was new evidence, it generally supported only tangential or hearsay items, such as she was seen leaving Mr. Dowd's office in tears. The Office noted that appellant supported none of her central contentions with reliable and substantial evidence, and where there was some reasonably good evidence, such as the statements of Mr. Dowd and Mr. Holland, the evidence led to conclusions almost diametrically opposed to those of appellant.

On September 1, 2002 appellant again requested reconsideration. She argued, among other things, that she had met all of the criteria of sexual harassment. She also argued that she had met all the rules for establishing a hostile work environment.

In a decision dated October 15, 2003, the Office reviewed the merits of appellant's claim and found that she did not meet her burden of proof.²

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."⁴ "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. The employee must also establish an injury "arising out of

² Although the Office stated in its decision that it did not review the merits of appellant's case, the Director of the Office acknowledged on appeal that the decision constituted a merit review.

³ 5 U.S.C. § 8102(a).

⁴ This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

the employment.” To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.⁵

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 resulted from her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers’ compensation law because they are not found to have arisen out of employment, such as when disability results from 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.⁶

Workers’ compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.⁷ The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁸ Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.⁹ The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.¹⁰

⁵ See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

⁶ *Lillian Cutler*, 28 ECAB 125 (1976).

⁷ *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff’d on recon.*, 42 ECAB 566, 572-73 (1991).

⁸ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant’s allegations of unfair treatment to determine if the evidence corroborated such allegations).

⁹ *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

¹⁰ *Paul Trotman-Hall*, 45 ECAB 229 (1993) (Groom, M.E., concurring).

ANALYSIS

Appellant does not attribute her emotional condition to an inability to carry out the duties of her position; she advised that she was good at what she did and always had good appraisals. She attributes her emotional condition instead to harassment, retaliation, discrimination and improper administrative or personnel actions. She bears the burden of proof, however, and she cannot discharge that burden with allegations alone. She must support her charges with probative and reliable evidence. This is where her claim fails. Appellant submitted no witness statement or independent evidence to establish that Mr. Rodriguez did not forward her paperwork, and she offered no evidence to demonstrate that such an administrative action, if it occurred as alleged, would have constituted error or abuse. She submitted no evidence to corroborate her assertion concerning Ms. Ng and the charge that they were preparing to get rid of her for filing too many EEO complaints. She did submit a witness statement substantiating that she left Mr. Dowd's office in tears, but Ms. Parker witnessed nothing that occurred in the office, and so her statement is no proof of misconduct by Mr. Dowd. As for appellant's allegations that Mr. Dowd sexually harassed her, touched her inappropriately, made her submit to sex and so forth, she has produced no statement from a witness who can substantiate her charges. Indeed, one witness, Mr. Dowd himself, prepared a statement that characterized appellant as the sexual aggressor and him as the unwilling recipient of her advances. This characterization was further supported by the statement of Mr. Holland.

Such is the state of the evidence in this case. Appellant informed the Board that two people heard Ms. Miner's verbal attack regarding a comment made by someone on the telephone, but appellant was unable to produce a statement from either witness. She stated that Henry Williams witnessed the incident involving Ms. Tandy and the envelope, but she obtained no statement from this witness. She requested a memorandum on being assigned to work on the seventh floor, but she was unsuccessful and did not show how such an action, if it proved to be true, would constitute error or abuse. Although she sought redress from the EEO Commission, she produced no final decision or finding by that body upholding her charges of harassment, retaliation, discrimination or administrative error or abuse. For the most part, then, this case is one of allegations made and allegations denied. The evidence is simply insufficient to warrant a finding by this Board that appellant has met her burden of proof to establish that the implicated events occurred as alleged or that any established administrative or supervisory action was erroneous or abusive.

There is one incident, not of an administrative or personnel nature, that the Office accepted as factual, namely, that Ms. Tandy tapped appellant with an empty business envelope to get her attention. Appellant tells of a hostile and humiliating encounter with a full envelope hitting her on the buttocks with such force as to cause her to cry out in pain and to demand, "What's up with you?" The employing establishment gave an account that was decidedly unfrontational, with the secretary tapping appellant (no place in particular) with an empty envelope and jokingly commenting about the previous day's group discussion on a dress code. It is thus established as factual that Ms. Tandy tapped appellant with an envelope. What is not established is appellant's account of the force of the contact, the bulk of the envelope or the content and delivery of Ms. Tandy's remark. Nonetheless, a question arises whether the established incident caused an injury, that is, whether a causal connection exists between the established incident and appellant's diagnosed emotional condition.

Causal relationship is a medical issue,¹¹ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,¹² must be one of reasonable medical certainty,¹³ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹⁴

The July 2, 2001 report of Dr. Albert, appellant's psychiatrist, supports a causal relationship between the envelope incident and appellant's diagnosed emotional condition, but this report is of diminished probative or evidentiary value. Describing the incident as appellant related it to him, Dr. Albert stated that Ms. Tandy struck or touched or tapped appellant with an envelope on her buttocks and stated, "Should we send you home or do you think it is professional, what you are wearing?" It is not accepted as factual that Ms. Tandy tapped appellant on the buttocks, and the content of the reported remark is not confirmed by reliable evidence. This is important because the opinion of a physician supporting causal relationship must be based on a proper factual background, and in this case, Dr. Albert did not have before him the employing establishment's account of what happened that day or a proper understanding of what aspects of appellant's account could be accepted as factual based on the evidence produced in this case. Medical conclusions based on inaccurate or incomplete histories are of little probative value.¹⁵

Dr. Albert gave a principal diagnosis of major depressive disorder, severe and generalized anxiety disorder. He explained that each of the reported events caused its own portion of the depressed emotions in appellant. His primary rationale was that the factors reported appeared to be historically accurate. To the extent, then, that appellant's allegations are not established as factual, particularly the "most significant" allegations of supervisory misconduct, sexual molestation and being struck on the buttocks by an envelope, Dr. Albert's rationale stems from a faulty premise. Further, Dr. Albert reasoned that the incident contributed to appellant's diagnosed condition because the event occurred and appellant reacted. This does not sufficiently explain the psychological mechanism of injury in such a way that a lay adjudicator can conclude that the physician's reasoning appears to be sound, rational and logical. Dr. Albert stated that the incident was unexpected, humiliating and occurred in the presence of other workers, something that is, again, not established as factual, nor is it established that appellant was rudely and openly chastised in front of other workers about the appropriateness of her dress. Because the reasoning

¹¹ *Mary J. Briggs*, 37 ECAB 578 (1986).

¹² *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹³ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹⁴ *See William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁵ *See James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

that Dr. Albert does provide rests significantly on allegations that are not established as factual, the Board finds that his opinion has little probative value to establish causal relationship. The Board will therefore affirm the denial of appellant's claim.

CONCLUSION

Appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty. She has submitted insufficient evidence to establish as factual her allegations of harassment, retaliation, discrimination and administrative error or abuse. Though generally supportive of her claim, the medical opinion evidence is based on an improper factual background and is not sufficiently well reasoned to establish the critical element of causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 29, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member