

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

SHELIA ARMSTRONG, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Dallas, TX, Employer**

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**Docket No. 04-1981
Issued: February 8, 2005**

Appearances:
Shelia Armstrong, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 5, 2004 appellant filed a timely appeal from a June 29, 2004 merit decision of the Office of Workers' Compensation Programs denying modification of a January 8, 2004 decision, which found that she did not sustain an emotional condition while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this emotional condition case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On October 16, 2003 appellant, then a 38-year-old dental assistant, filed an occupational disease claim alleging that on June 1, 2002 she first realized that her depression was caused by factors of her federal employment. Appellant alleged that she was forced to work overtime on

several occasions and was verbally harassed by a coworker. She informed her supervisor about these problems but nothing was done about them. Appellant explained that she delayed in filing her claim because she thought she could handle the problem but the situation was affecting her health.

By letter dated October 27, 2003, the Office requested that the employing establishment provide additional information regarding her claim. By letter of the same date, the Office advised appellant to submit additional factual and medical evidence supportive of her claim within 30 days. Appellant did not respond within the 30-day time period.

The employing establishment submitted a description of appellant's dental assistant position and a narrative statement from Margie Young, her supervisor, who stated that, before October 19, 2003, appellant informed her on two occasions that she had been spoken to in an accusatory manner for failing to perform certain tasks in an area where other employees might have overheard. She noted that the first time this happened, appellant asked her not to say anything or make a big deal out of it. The next time appellant mentioned the problem, Ms. Young confronted the employee who was hearing impaired and read lips. She advised him to make suggestions to appellant regarding the performance of her work tasks in a quiet manner or go to a private setting. Ms. Young offered appellant an opportunity to switch with a coworker who had the same job description but she refused. On October 19, 2003 appellant did not directly come to her to complain but, overheard her telling a coworker about an incident and she stopped to ask her about it. Ms. Young stated that she immediately switched appellant's assignment. She noted that later that morning she saw appellant laughing and talking and she appeared to be in high spirits. Ms. Young stated that appellant had never been made to work over her scheduled tour of duty. On one occasion, she came to relieve appellant about 3:55 p.m. so that she could go home but appellant told her that it was okay and that she could stay past 4:00 p.m. and she worked until 4:30 p.m. Ms. Young thanked appellant because she was needed elsewhere at that time and told her that she would be compensated for the time worked. She replied "no" in response to the Office's question as to whether there were any aspects of appellant's job that could be perceived as stressful. Ms. Young stated that part of appellant's job description required her to anticipate the dentist's needs for direct and indirect patient care in a timely manner and to prepare the work area for daily tasks. Appellant was also responsible for scheduling enough time to allow these tasks to be performed. Ms. Young indicated that appellant was reassigned to another work area on October 19, 2003 and that she was currently working in that area. She noted that she made a point to never ask appellant to help in her former assignment even when she had nothing to do. Ms. Young noted that the physical requirements of appellant's job included being able to sit, stand, bend, reach and/or lift less than 10 pounds and that appellant was also required to be able to read and write.

By decision dated January 8, 2004, the Office found the evidence of record insufficient to establish that appellant sustained an emotional condition while in the performance of duty. The Office found that appellant had failed to submit a statement identifying the incidents alleged to have arisen out of the performance of her duties.

On March 25, 2004 appellant requested reconsideration of the Office's decision. In a March 24, 2004 narrative statement, she reiterated that she was forced to work beyond her scheduled duty time, which ended at 4:00 p.m. Appellant stated that Ms. Young announced the

rotation of all seven dental assistants and that only three of them, including her, were involved in the rotation. She was told that the rotation was permanent and went to Ms. Young and Richard Shaw, a union vice president. Appellant alleged that, while working for Dr. William Currie, an employing establishment dentist, she worked over her scheduled tour of duty on several occasions and was relieved by Wanda Bailey. She alleged that she was never paid overtime. Appellant noted that it was difficult for her to communicate with Dr. Currie since they both had a hearing impairment. She stated that he wore a hearing aid while she read lips, which was difficult to do when wearing a face mask. Appellant alleged that she was verbally harassed by Dr. Currie, who stated that she was “not fit to assist a dog,” that she did not know anything and that he did not know why she was his assistant. She contended that Dr. Currie would stand behind her and look over her shoulder while she wrote an appointment slip for a patient. On October 2, 2003 Dr. Currie yelled loudly at her for making a mistake in his appointment book and pushed the book at her. She noted that he was so close to her that his saliva landed on her face and lips. Appellant reported this incident to Ms. Young who responded that she had spoken to Dr. Currie about the way he treated her. She also reported the incident to Deborah Antai-Otong, an employee support program coordinator, who summoned an employing establishment police officer to take a report of the incident. Appellant stated that after the incident involving Dr. Currie, she tried to work but she became ill and experienced a stiff neck, upset stomach, headache, and sleepless nights due to job stress, which caused her to seek medical treatment.

A copy of the police report described the October 2, 2003 incident and indicated that the case had been referred to a criminal investigator. Follow-up notes revealed that according to Ms. Young, the incident had been resolved as appellant had been moved to another work area. It was determined that Dr. Currie had a speech impediment that caused him to get close to the people with whom he spoke and that appellant had a hearing impairment.

Appellant submitted medical reports and treatment notes from her treating physicians and counselor regarding her emotional condition and ability to work.

A March 25, 2004 narrative statement from Dr. Patricia Daley, an employing establishment dentist, indicated that she observed Dr. Currie speaking to Dr. Victor Glenn, an employing establishment physician, about appellant who was working as his assistant at that time. Dr. Daley related that she told Dr. Glenn to speak to Dr. Currie about the things he said concerning appellant because they could be interpreted as racist towards people of color. She noted that Dr. Currie referred to appellant as an “Aunt Jemima” who “was not fit to make pancakes.” Dr. Daley stated that she was shocked by his speech and could not believe what she was hearing. She attributed it to his deafness and possible insensitivity to how repugnant such words were.

A February 23, 2004 letter from Donald Burrell, appellant’s union representative, requested that the employing establishment provide her with accommodations such as, a transfer from her previous dental assistant position under the Americans with Disabilities Act. In a February 24, 2004 letter, Dr. Garth R. Griffiths, acting chief of the dental department, advised appellant about the reasons the medical documentation she submitted was insufficient to support her request for a transfer. Appellant requested a lateral transfer from the dental department in a letter dated March 19, 2004. In a March 24, 2004 letter, she requested leave without pay for the period March 23 to 24, 2004 because her request for a transfer had been denied and she was

following her physician's order to not return to work in the dental department. Appellant submitted a list of witnesses, which included Roderick Harris, a desk clerk. She stated that Mr. Harris attempted to explain to Dr. Currie that he had made a mistake with his appointment book but Dr. Currie's assistant stated that appellant had made the mistake.

An unsigned and undated narrative statement, from an unidentified coworker, addressed a mandatory meeting on March 27, 2004 at which appellant's return to work on June 3, 2004 was announced and described the reaction of several coworkers.

By decision dated June 29, 2004, the Office denied modification of the January 8, 2004 decision.¹

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of his federal employment.² To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) 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.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 coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.⁴

In emotional condition cases, the Office 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

¹ On appeal appellant has submitted new evidence. The Board, however, may not review evidence for the first time on appeal that was not before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

² *Pamela R. Rice*, 38 ECAB 838 (1987).

³ See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

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

not deemed to be factors of employment and may not be considered.⁵ Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁶

ANALYSIS

Appellant attributed her emotional condition to being forced to work overtime and not receiving pay for this work. Regarding appellant's allegation that she was overworked, the Board has held that overwork may be a compensable factor of employment.⁷ However, as with all allegations, overwork must be established on a factual basis.⁸ In this case, appellant has submitted insufficient evidence to support her contention that she was required to work overtime and, therefore, this contention cannot be deemed a compensable factor of employment. Ms. Young, appellant's supervisor, denied that appellant was required to work overtime and explained that, on one occasion, she came to relieve appellant at 3:55 p.m. in order that she could go home. Appellant volunteered to work overtime until 4:30 p.m. Ms. Young thanked appellant and told her that she would be compensated for time worked. She stated that appellant's job was not stressful and noted her specific job requirements. Ms. Young related that, after the transfer, appellant was never asked to work in her former assignment even when she was available. As appellant's allegation is not supported by sufficient evidence, a compensable employment factor has not been established.

Appellant further attributed her emotional condition to verbal harassment and abuse by Dr. Currie, the dentist whom she assisted, the employing establishment's failure to respond to this harassment and to being watched by Dr. Currie while she performed her work duties. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.⁹ In *Kathleen D. Walker*,¹⁰ the Board held that the employee's unfounded perceptions did not constitute a compensable factor of employment. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. A claimant must substantiate such allegations with probative and reliable evidence.¹¹ Appellant did not submit any evidence to corroborate her allegation that Dr. Currie stated that she was "not fit to assist a dog." Further, Ms. Young provided that the first time appellant told her about being

⁵ *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

⁶ *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

⁷ *Sherry L. McFall*, 51 ECAB 436 (2000).

⁸ *Id.*

⁹ 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).

¹⁰ 42 ECAB 603, 608 (1991).

¹¹ *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).

verbally abused, she did not want her to take action and not to make a deal out of it. When appellant mentioned the problem a second time, Ms. Young handled the situation by approaching the offending employee and instructing him to speak in a quiet manner when speaking to appellant about the performance of her work duties or to talk to her in a private setting. She also immediately switched appellant's assignment on October 19, 2003 after she overheard her telling a coworker about an incident on that date. Dr. Daley indicated that she heard Dr. Currie refer to appellant as an "Aunt Jemima" who "was not fit to make pancakes" during a conversation with Dr. Glenn. However, these comments were not made in appellant's presence and were never raised by appellant in her allegations of verbal abuse. The record does not establish animosity by appellant's coworkers towards her return to work. The unsigned and undated narrative does not identify the coworker at the March 27, 2004 meeting. Further, the incident involving Dr. Currie and Mr. Thomas does not specifically relate to how Dr. Currie treated appellant. The employing establishment's police report described the October 2, 2003 incident but noted that the situation had been resolved by the transfer of appellant to another work area. It noted that Dr. Currie had a speech impediment which caused him to get close to the person with whom he was talking and that appellant had a hearing impairment. The Board finds that appellant has failed to establish that she was verbally harassed or abused by employing establishment personnel and, thus, she has failed to establish a compensable factor of her employment.

The monitoring of appellant's work activities by Dr. Currie¹² and the denial of appellant's request for leave without pay¹³ and a transfer¹⁴ involve administrative or personnel matters. However, the Board has found that an administrative or personnel matter may be considered an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹⁵ Appellant has not established that the employing establishment erred or acted abusively or unreasonably in monitoring her work activities and denying her request for leave without pay and a transfer. In addition, she has not submitted any evidence regarding whether the employing establishment's handling of these administrative or personnel matters violated its policies or was otherwise unreasonable. Without substantiated evidence of error or abuse on the part of the employing establishment in handling the above administrative matters, appellant has failed to establish a compensable factor of employment under the Act.¹⁶

CONCLUSION

The Board finds that as appellant has not identified any compensable employment factors, she has failed to establish that she sustained an emotional condition while in the performance of duty.

¹² *Daryl R. Davis*, 45 ECAB 907 (1994).

¹³ *Beverly Diffin*, 48 ECAB 125 (1996).

¹⁴ *Ernest J. Malagrida*, 51 ECAB 287, 289 (2000).

¹⁵ *Robert W. Johns*, 51 ECAB 137 (1999).

¹⁶ As no compensable work factors have been identified, it is not necessary to address the medical evidence. *Roger Williams*, 52 ECAB 468, 474 (2001).

ORDER

IT IS HEREBY ORDERED THAT the June 29 and January 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 8, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member