

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

ROCHELL TATE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Racine, WI, Employer**

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**Docket No. 05-1694
Issued: April 18, 2006**

Appearances:
Rochell Tate, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2005 appellant filed a timely appeal from a March 24, 2005 merit decision of the Office of Workers' Compensation Programs' hearing representative which affirmed as modified a September 22, 2004 decision which found that she did not establish an injury due to factors of her federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this issue.

ISSUE

The issue is whether appellant has established that her asthma condition was sustained in the performance of duty.

FACTUAL HISTORY

On August 9, 2004 appellant a 40-year-old clerk, filed a traumatic injury claim alleging that on July 8, 2004 she had stress-induced asthma.

In a letter dated August 17, 2004, the Office informed appellant that her traumatic injury claim had been received, but no statement was provided. The Office informed her that the evidence was insufficient to support her claim as no medical condition had been diagnosed with respect to the alleged July 8, 2004 injury and provided her a questionnaire to complete. Appellant was given 30 days to provide the requested information.

On August 20, 2004 the Office received an August 13, 2004 controversion to appellant's asthma/stress claim from the employing establishment on the grounds that she was not at work on July 8, 2004 and that appellant held two jobs. The employing establishment noted that appellant had filed an occupational disease claim against her other employer regarding her asthma condition.

On August 27, 2003 the Office received appellant's completed questionnaire. She informed her supervisor of her asthma condition on the date of the injury, but was not provided with a CA-1 or CA-7 and had to request the form from personnel. Appellant noted that she "was at the four mile post office" and was harassed and questioned by her supervisor regarding medical documentation. She noted that she had informed her supervisor that he was stressing her out and to please stop.

On September 16, 2004 the Office received a July 28, 2004 report and progress notes dated July 7 and September 2, 2004, from Kathryn A. Aalto, licensed clinical social worker, and a July 24, 2004 report and progress notes dated July 7 to September 8, 2004, a September 8, 2004 prescription for chiropractic care and disability notes dated July 7 and September 8, 2004 and an August 23, 2004 report from Dr. Ronald G. Rubin, a treating Board-certified psychiatrist.

By decision dated September 22, 2004, the Office denied appellant's claim on the grounds that fact of injury had not been established.

On October 18, 2004 appellant requested a review of the written record and submitted an October 8, 2004 attending physician's report (Form CA-20), by Dr. Rubin in support of her request.

On October 28, 2004 the Office received an October 8, 2004 note from Dr. Rubin. Appellant was released to return to work effective October 13, 2004 with restrictions on dust and a limit of 35-pounds lifting.

On March 1, 2005 the Office received January 7, 2005 investigative and supporting exhibits with regards to a November 30, 2004 traumatic injury claim.

By decision dated March 24, 2005, the Office hearing representative affirmed the September 22, 2004 decision as modified. The hearing representative found the evidence sufficient to establish the medical diagnosis of asthma, but insufficient to support that appellant established a compensable factor of employment. She found that appellant failed to establish any harassment on the part of her supervisor and no compensable factor of employment had been established.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.² An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and the subsequent course of action.³ An employee has not met her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁴ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁵ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁶

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 an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

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.⁹ Unsubstantiated allegations of harassment or discrimination are

¹ 5 U.S.C. § 8101 *et seq.*

² *Barbara R. Middleton*, 56 ECAB ____ (Docket No. 05-1026, issued July 22, 2005); *Bobbie F. Cowart*, 55 ECAB ____ (Docket No. 04-1416, issued September 30, 2004).

³ *Barbara R. Middleton*, 56 ECAB ____ (Docket No. 05-1026, issued July 22, 2005).

⁴ *Betty J. Smith*, 54 ECAB 174 (2002).

⁵ *Deborah S. Stein*, 56 ECAB ____ (Docket No. 04-750, issued April 26, 2005)

⁶ *Allen C. Hundley*, 53 ECAB 551 (2002).

⁷ 5 U.S.C. §§ 8101-8193; *Vitaliy Y. Matviiv*, 57 ECAB ____ (Docket No. 05-1328, issued October 26, 2005); *Judy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *David Apgar*, 57 ECAB ____ (Docket No. 05-1249, issued October 13, 2005). *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁹ *Donna M. Schmiedeknecht*, 56 ECAB ____ (Docket No. 05-494, issued September 2, 2005)

not determinative of whether such harassment or discrimination occurred.¹⁰ Claimant must establish a factual basis for her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹¹ The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting her allegations with probative and reliable evidence.¹² The primary reason for requiring factual evidence from the claimant in support of 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.¹³

ANALYSIS

Appellant alleged that on July 8, 2004 she sustained a stress-induced asthma attack due to harassment by her supervisor regarding medical documentation. The Office hearing representative denied appellant's claim on the grounds that she did not establish the occurrence of the employment incident as alleged.

In response to an Office questionnaire, appellant stated that she was harassed by her supervisor at "the four mile post office." She alleged that the harassment occurred when her supervisor questioned her medical documentation and she requested him to stop as he was stressing her out. Appellant alleged that she was harassed by her supervisor. The Board has held that an employee's complaints concerning the manner in which a supervisor performs supervisory duties or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage provided by the Act.¹⁴ Similarly, a claim based on verbal altercations or a difficult relationship with a supervisor must be supported by the evidence of record.¹⁵ Appellant submitted no evidence to support that she was harassed by her supervisor as alleged. The Board, therefore, finds that she has not established a compensable factor of employment in this regard.

Appellant, therefore, failed to establish that her asthma condition arose in the performance of duty as a consequence of her interaction with her supervisor on July 8, 2004.¹⁶

¹⁰ See *Ronald K. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005); *Michael Ewanichak*, 48 ECAB 364 (1997).

¹¹ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Parley A. Clement*, 48 ECAB 302 (1997).

¹² See *David C. Lindsey, Jr.*, 56 ECAB ____ (Docket No. 04-1828, issued January 19, 2005); *James E. Norris*, 52 ECAB 93 (2000).

¹³ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

¹⁴ *Marguerite J. Toland*, 52 ECAB 294 (2001).

¹⁵ *Bonnie Goodman*, 50 ECAB 139 (1998).

¹⁶ Until a claimant establishes a compensable employment factor, it is premature to consider whether medical evidence establishes that a compensable employment factor caused an injury. See *David Cuellar*, 56 ECAB ____ (Docket No. 05-429, issued July 18, 2005); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

CONCLUSION

The Board finds that appellant failed to establish that her asthma condition was sustained in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2005 is affirmed.

Issued: April 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board