

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

CYNTHIA O. COBHAM, Appellant)

and)

DEPARTMENT OF LABOR, OCCUPATIONAL)
SAFETY & HEALTH ADMINISTRATION,)
Braintree, MA, Employer)

**Docket No. 05-1367
Issued: January 20, 2006**

Appearances:
Cynthia O. Cobham, 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 June 7, 2005 appellant filed a timely appeal from a Office of Workers' Compensation Programs' decision dated June 7, 2004, denying her emotional condition claim, and a June 6, 2005 decision, denying her request for reconsideration.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the June 7, 2004 and June 6, 2005 decisions.

ISSUE

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty causally related to compensable factors of her employment; and (2) whether the Office properly denied her request for reconsideration under 5 U.S.C. § 8128.

¹ Appellant's appeal to the Board is post marked June 7, 2005. See 20 C.F.R. § 501.3(d)(3)(ii).

FACTUAL HISTORY

On April 17, 2003 appellant, then a 43-year-old clerk, filed an occupational disease claim alleging that on July 23, 2002 Brenda Gordon, the area director, called appellant into her office on the pretext of discussing a work assignment and then yelled at her. Ms. Gordon demanded more respect, saying appellant must perform the tasks assigned to her whether she liked it or not. Appellant's team leader and immediate supervisor, Henry Miller, was present. Appellant alleged that she feared for her safety and rose from her seat and attempted to leave but Ms. Gordon "charged" toward her and prevented her from leaving. She alleged that Ms. Gordon placed her hands on her shoulders and pressed downward in an attempt to make her sit down. Appellant refused to sit and was told that she was being insubordinate. Ms. Gordon moved away from the door and appellant left the room. Appellant also alleged an emotional reaction to receiving a letter of reprimand for the July 23, 2002 incident. She contended that Ms. Gordon and Mr. Miller had abused her mentally and physically since June 1999. Appellant alleged that she was unfairly denied leave and harassed about providing medical documentation for her use of leave.

In statements dated February 14 and May 28, 2003 and a July 23, 2002 letter of reprimand, Ms. Gordon stated that on July 23, 2002 she asked appellant to enter her office to discuss a previous work assignment and appellant became enraged, saying she did not need to be "micromanaged." She started to leave but Ms. Gordon told her the meeting was not concluded. Appellant called Ms. Gordon a "racist" and "slave driver." Ms. Gordon informed appellant that she had the right to assign work but appellant refused to take a seat and calm down. Ms. Gordon indicated that if she left the room without permission it would constitute an act of insubordination. In an effort to calm appellant and get her to sit down, Ms. Gordon lightly touched her elbow. Appellant told her in a loud and angry voice not to ever touch her. Ms. Gordon stepped back and, with Mr. Miller, attempted to calm appellant. Ms. Gordon denied that appellant was ever forcefully prohibited from leaving the office. On July 24, 2002 she issued a reprimand to appellant concerning her inappropriate behavior on July 23, 2002 and her failure to complete a work assignment. Ms. Gordon denied appellant's allegation that she or Mr. Miller had ever abused appellant. She stated that appellant requested annual and sick leave for illnesses but failed to provide acceptable medical documentation.

On February and April, 2003 Mr. Miller related that on July 23, 2002 he attended a counseling session with Ms. Gordon and appellant to discuss appellant's job performance. During the session, appellant began yelling at Ms. Gordon, calling her a "racist" and "slave driver." Appellant rose from her chair and began to leave. Ms. Gordon walked to the door and asked appellant to return to her chair and lightly touched appellant on her right elbow to get her to take a seat. Appellant yelled at Ms. Gordon to never touch her again and continued to call her a racist and slave driver. Ms. Gordon told appellant that she might face disciplinary action for insubordination if she left the office without permission. Mr. Miller indicated that he never witnessed any inappropriate action from Ms. Gordon during the meeting and, on the contrary, appellant verbally assaulted Ms. Gordon. He stated that Ms. Gordon never threatened appellant, impeded her departure from the office or physically forced her to sit down and that she acted in a professional manner at all times.

Appellant submitted medical evidence in support of her claim with diagnoses of adjustment disorder with anxiety and major depressive disorder.

By decision dated August 5, 2003, the Office denied appellant's claim on the grounds that her emotional condition was not causally related to a compensable factor of employment. Appellant requested an oral hearing that was held on March 23, 2004. On September 30, 2003 appellant alleged that the statements submitted by Ms. Gordon and Mr. Miller were not accurate.

By decision dated June 7, 2004, the Office hearing representative affirmed the August 5, 2003 decision.

Appellant requested reconsideration. She asserted that her medical records were not "taken seriously" by the Office and the hearing transcript did not accurately reflect her testimony.

By decision dated June 6, 2005, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² provides for the payment of compensation benefits for injuries sustained in the performance of duty. To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying compensable 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. In the case of *Lillian Cutler*,⁴ the Board explained that there are distinctions in the type of employment situations giving rise to a compensable emotional condition under the Act. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the coverage under the Act.⁵ When an employee experiences emotional distress in carrying out her employment 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 results from an emotional reaction to a special assignment or other requirement imposed by the

² 5 U.S.C. §§ 8101-8193.

³ *George C. Clark*, 56 ECAB ____ (Docket No. 04-1573, issued November 30, 2004).

⁴ 28 ECAB 125 (1976).

⁵ *George C. Clark*, *supra* note 2.

employing establishment or by the nature of her work.⁶ 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁷ Generally, actions of the employing establishment in administrative matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.⁸ However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.⁹

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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 If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹¹

ANALYSIS -- ISSUE 1

Appellant alleged that she had an emotional reaction to being counseled regarding her job performance, being denied leave and being asked to provide medical documentation for her absences. These allegations involve administrative or personnel actions that are not compensable under the Act absent evidence of error or abuse. The assignment of work duties, discussions regarding job performance, the granting or denying of leave requests and requests for medical documentation for leave usage are administrative functions that are not compensable absent error or abuse.¹² The Board has held that mere disagreement or dislike of a supervisory or management action will not be compensable without a showing, through supporting evidence, that the incidents or actions complained of were unreasonable.¹³ In this case, appellant did not provide sufficient evidence establishing that her supervisors erred or acted abusively in these administrative matters. Therefore, these allegations are not deemed compensable factors of employment.

⁶ *Lillian Cutler*, *supra* note 3.

⁷ *Id.*

⁸ *Michael L. Malone*, 46 ECAB 957 (1995).

⁹ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Id.*

¹² *Michael A. Salvato*, 53 ECAB 666 (2002); *Lorna R. Strong*, 45 ECAB 470 (1994).

¹³ *Janice I. Moore*, 53 ECAB 777 (2002).

Regarding appellant's allegation that Ms. Gordon verbally harassed her on July 23, 2002, to the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute a compensable employment factor.¹⁴ However, for harassment and discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁵ The Board has held that, while verbal abuse may constitute a compensable factor of employment, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.¹⁶ Appellant alleged that Ms. Gordon yelled at her on July 23, 2002, saying she must perform the tasks assigned to her whether she liked it or not. Ms. Gordon responded to appellant's allegations of verbal abuse by stating that it was appellant who became angry, saying she did not need to be "micromanaged" and calling Ms. Gordon a "racist" and "slave driver." Mr. Miller stated that he did not witness any verbal abuse from Ms. Gordon during the meeting and that she acted in a professional manner. The evidence regarding the July 23, 2002 incident does not establish that Ms. Gordon verbally harassed appellant. Therefore, this allegation is not found a compensable employment factor. Appellant also made a general allegation of mental and physical abuse by Ms. Gordon and Mr. Miller beginning in 1999. However, she failed to provide specific details such as dates, the individuals present and what occurred. Therefore, this general allegation of abuse does not constitute a compensable employment factor.

Appellant alleged that during the July 23, 2002 meeting she attempted to leave the room but Ms. Gordon charged toward her and prevented her from leaving by placing her hands on her shoulders and pressing downward in an attempt to make her sit down. Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award for compensation if the medical evidence establishes that the condition was thereby caused or aggravated.¹⁷ In *Alton L. White*, the Board found that the evidence established physical contact in the course of employment when a supervisor touched appellant's elbow to get his attention. The Board found that a medical question was presented as to whether this employment factor caused or aggravated an emotional condition, as alleged, and, if so, whether this condition resulted in disability for work.

In this case, Ms. Gordon acknowledged that when appellant became angry and began to leave before the meeting was concluded, she briefly touched appellant's elbow in an effort to get her to remain in the room. Mr. Miller also acknowledged that he saw Ms. Gordon lightly touch appellant on her right elbow. The Board finds that the touching incident on July 23, 2002 constitutes a compensable factor of employment. However, appellant's burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. As noted above, appellant must also submit rationalized

¹⁴ *Charles D. Edwards*, *supra* note 8.

¹⁵ *Donna J. DiBernardo*, 47 ECAB 700 (1996).

¹⁶ *See Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁷ 42 ECAB 666 (1991); *Helen Casillas*, 46 ECAB 1044 (1995).

medical evidence establishing that her claimed emotional condition is causally related to an accepted compensable employment factor.¹⁸ The reports from the physicians of record refer generally to appellant's work stress but do not specifically mention the touching incident on July 23, 2002.¹⁹ Therefore, the medical evidence is not sufficient to establish that appellant sustained an emotional condition causally related to the July 23, 2002 incident when Ms. Gordon touched her on the elbow.

Regarding appellant's allegation of an emotional reaction to the letter of reprimand concerning the July 23, 2002 incident with Ms. Gordon, disciplinary actions concerning an oral reprimand, discussion or letters of warning for conduct are not compensable unless the employee shows that management acted unreasonably.²⁰ The evidence of record does not establish that management acted unreasonably in issuing a letter of reprimand to appellant concerning her behavior at the July 23, 2002 meeting and her failure to complete an assignment. Therefore, appellant's allegation regarding the July 23, 2002 letter of reprimand is not deemed a compensable employment factor.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act²¹ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office;

¹⁸ *Brian E. Flescher*, 40 ECAB 532 (1989); *Ronald K. White*, 37 ECAB 176 (1985).

¹⁹ There are reports from a licensed clinical social worker which mention a touching incident. However, the Board notes that reports from a licensed clinical social worker are of no probative value on the issue of causal relationship under the Act. A “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). Lay individuals such as physician's assistants, nurse practitioners and social workers are not competent to render a medical opinion. See *Robert J. Krstyan*, 44 ECAB 227 (1992). Therefore, the reports from the licensed clinical social worker are not sufficient to establish that appellant sustained a work-related emotional condition.

²⁰ See *Janice I. Moore*, *supra* note 13.

²¹ 5 U.S.C. § 8128(a).

or (3) submitting relevant and pertinent evidence not previously considered by the Office.²² When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.²³

ANALYSIS -- ISSUE 2

In her request for reconsideration, appellant asserted that her medical records were not “taken seriously” by the Office and the hearing transcript did not accurately reflect her testimony. However, her allegation that the Office did not properly review the medical evidence lacks specificity. She did not provide specific details as to how the Office failed to properly review the medical evidence. Therefore, this allegation does not constitute new relevant and pertinent evidence. Regarding the hearing transcript, appellant did not specify the errors she alleged were contained in the transcript. Therefore, this allegation does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied her claim.

CONCLUSION

The Board finds that appellant failed to establish that her emotional condition was causally related to a compensable factor of employment. The Board further finds that the Office properly denied her request for reconsideration.

²² 20 C.F.R. § 10.606(b)(2).

²³ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 6, 2005 is affirmed. The June 7, 2004 decision is affirmed, as modified.

Issued: January 20, 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