United States Department of Labor
Employees' Compensation Appeals Board

DANETTE M. HOWEY, Appellant	)	
and	)	**Docket No. 06-485**
	)	**Issued: July 11, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On December 27, 2005 appellant filed a timely appeal from the January 19 and October 11, 2005 merit decisions 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 merits of appellant's claim.

ISSUE

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

FACTUAL HISTORY

On August 27, 2003 appellant, then a 46-year-old nurse, filed a claim alleging that she had stress related to unresolved work issues, an increased workload and feeling of harassment by supervisors: "Multiple stressors related to assignment of duties and workload were unresolved. EEO [Equal Employment Opportunity] complaints was (sic) filed and there was ongoing

harassment and retaliation by immediate supervisors. Symptoms include anxiety, depression, feeling of panic are overwhelming. Having difficulty sleeping. Difficulty concentrating on work and difficulty dealing with patients."

On a work capacity evaluation dated September 8, 2003, Dr. Randolph W. Pock, appellant's psychiatrist, reported that appellant was unable to perform her usual job:

> "In addition to her already very stressful responsibilities as RN [registered nurse] (certified in psychiatry), [appellant] found additional patients and responsibility assigned to her by her supervisors (*e.g.*, primary urgent case shift) to her original duties in medication clinic. She was refused permission to change her medication clinic to a more workable time and refused backup or supportive help (additional workers). Both immediate supervisors have been particularly unhelpful in this regard, despite supervisors awareness that yet other additional duties have been assigned during that clinic (again without backup)."

On September 23, 2003 the employing establishment stated that a nursing meeting was held on August 1, 2003 for the specific purpose of developing a more workable plan for the three medication clinics. The employing establishment acknowledged that increased demand, as evidenced by clinic numbers, had been verified and that clinic management had agreed that the time allotted to complete these duties was insufficient. The employing establishment added that readjustment of workload had been made, and continued to be worked on, at the time appellant filed her claim. The employing establishment then discussed accommodations made to reduce stress for appellant:

> "Approximately one year ago, [appellant's] mental health intake and assessment duties were decreased from six (6) assessments to four (4) per month. In February 2003, those intakes were restricted to patients who would be assigned to the Substance Abuse Treatment Program of Milieu Therapy Program. Therefore, her workload has decreased even more. At approximately the same time a number of cases she was managing were transferred to other Team members in Mental Health to further reduce her workload.
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> "In approximately February 2003, adjustments were made to allow [appellant] to increase her medication clinic time from one day to one and one-half days per week to manage the increased numbers of patients. Per her request, [she] relinquished her responsibilities as medical nurse coordinator to focus on clinical care. On May 19, 2003 [appellant's] immediate supervisor was changed from Ron Langer, LCW to Dr. H. Nagamoto, MD. On July 14, 2003 Nancy Keller assumed direct supervisory duties.
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> "In August [appellant] took time off. Upon her return to duty on August 28, 2003, [she] was removed from the responsibilities for the medication or antabuse clinic per her request and recommendations from her physician."

On October 24, 2003 Dr. Pock diagnosed anxiety not otherwise specified, rule out panic disorder. He also believed there was an underlying depression related to the sense of

helplessness she had finding a resolution of her work difficulties. "In my opinion," Dr. Pock reported, "the condition was caused by the employment activity described." He described appellant's complaints:

> "During my treatment of [appellant], she has described anxiety in the presence of the two supervisors noted above [Ron Langer and Joan Collins], particularly when given impossible assignments or clearly critical/negative response by them which has made it impossible for her to do her work. She states that she is able to function quite well when she is not given the scrutiny from these two individuals and particularly when she is not asked to work under them in medication clinic as she is trying to do other assigned duties simultaneously. Anxiety has interfered with her sleeping in that she experiences waking during the night. She finds herself struggling with intrusive thoughts at work about the 'harassment' that her two supervisors have been 'able to get away with.' As noted, she reported to me that she has filed an EEO complaint (discrimination based on job duties and MS). She also reported that she has been discriminated against by Ron Langer 'because I am not Jewish.'"

In a decision dated March 19, 2004, the Office denied appellant's claim for compensation. The Office found that she failed to establish a factual basis for her claim because the evidence submitted was insufficient to establish that the events occurred as alleged. The Office stated that she did not provide any details or dates of when the stressors occurred.

Appellant requested reconsideration. She submitted, among other things, minutes of the Nurse Medication Clinic meeting held on August 1, 2003, which stated in part:

> "Workload has continued to increase as the structure for the clinics have been defined and implemented.
>
> "Several issues identified which contributes to increased workload:
>
> 1. staff are placed in the position of doing some case management for this patients in addition to the circumscribe med clinic duties.
>
> 2. some difficulties in other areas can impact workload *i.e.*, inpatients being discharged without pillboxes and them patients show up in med clinics expecting to get their meds.
>
> 3. Difficulty in moving patients out of med clinics due to resistance from Teams.
>
> 4. Staff finding that they need to do more for patients regarding education than prescriber requests."

Appellant also submitted a December 11, 2004 statement from Dianne Gilmore, a coworker:

> "My office was across from the medication room on 3E which gave me the opportunity to hear and see the activities from that room. The room was left open for safety reasons. Many times [appellant] was not provided adequate time to complete one task before having to go do another task in another area. Many times the patients came in my office, angry and upset because the clinic was closed, which I in turn would go get [appellant] and make her aware that patients were waiting on 3E for their med boxes, blood pressure etc. It was noted that when other nurses covered the clinics when she was gone, *generally* there were two persons working these areas and for shorter times. [Appellant] came to my office several times and break down crying due to being overwhelmed and stressed, as she was doing several tasks at one time and was not given any help where as others were provided help. Many times she would break down emotionally and have to take time off from work."

In a decision dated January 19, 2005, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the claim remained deficient because appellant still provided no statement describing the specific work factors that she felt were responsible for her condition.

Appellant renewed her request for reconsideration. She submitted a March 8, 2005 statement explaining that she had submitted statements to her supervisors as early as 2002 about the increased workload the medication clinic was generating with no time allotted for such. She alleged that at no time was any consideration given to the other duties she was performing for the outpatient mental health clinic and how this impacted her overall workload. She added:

> "My duties in the medication clinic were stressful as I was expected to see medication clinic patients which could range from approximately 15 [to] 20 veterans per day either fill their pill boxes, give injections, do both, and have charting done on each before I went home. Also, included would be going to pharmacy to pick up medications, talking with physicians regarding veterans physical and psychiatric medications, any side effects, veterans medical and/or psychiatric assessment. During my medication clinic duties I was assigned every two weeks to work in Clozaril clinic, which meant I would have to close medication clinic for approximately 4 hours, I then would only have 4 hours in the day to take care of the 15 [to] 20 veterans I had in medication clinic. I have submitted a time line and incident with Ron Langer regarding this in my response dated and submitted on August 1, 2003. These duties that were assigned to me were not assigned to the other nurses in the medication clinic, they were not expected to do urgent care, Clozaril clinic, nor antabuse clinic during their hours in the medication clinic as I was. Having these responsibilities for more than a year was very stressful to me and led to my subsequent diagnosis of adjustment disorder with anxiety and the three weeks I was under my doctor's care and not able to work."

Appellant explained that her workload did not go down in February 2003:

> "In February 2003 I took myself off two of the six intake and assessment assignments to decrease and help with my workload, my supervisor only looked at my workload because I now was assigned as a primary clinician in the Milieu program, so my workload really did not go down. Which meant that I was assigned to work at least two shifts of 4 hours each every week in the day room. This is proof that workload was not being looked at and no adjustments were being reviewed at the time this claim was filed.
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> "The only reason I was allowed an extra ½ day for medication clinic in February 2003 was because approximately 5 patients went to the VA patient advocate stating that they had to wait all day to be seen in medication clinic and were angry because of this. Ron Langer then relented and gave me the extra ½ day. Although if you look at the figures that were submitted on September 23, 2003 I was still not allotted enough time to fulfill my duties in a reasonable time frame and subsequently continued to feel more and more stressed and anxious which led to the time off in August 2003."

On August 29, 2005 the employing establishment replied: "The agency does not deny that there has been a constant increase in workload over the last several years with a change in veteran eligibility status, which has been addressed and monitored through the leadership and management of the Medical Center, including the leadership and management of the Mental Health Clinics." The employing establishment stated that the increasing number of veterans requesting services was a nationwide phenomenon: "Leadership attempts to be proactive in identifying workload changes. However, there are instances when workload changes cannot be predicted. In these cases leadership and management meet with the staff to brainstorm and problem solve." The employing establishment noted, however, that it was appellant's responsibility to report her inability to complete her daily tasks to her supervisor and to participate in problem-solving the issues of increasing workload and perceived staff shortages. The employing establishment also stated that it was the prerogative of administrative and clinical management to make assignments to meet the needs of the organization and that appellant was assigned to the Medication Clinic in October 2001. As for the statement provided by Ms. Gilmore:

> "The agency has no record of an employee named Dianne Gilmore, LPN. It is unclear who this person is and what relationship she had with the Denver VA Medical Center and the mental health clinic. It is impossible to verify any statement made by this person without a record of her employment."

The employing establishment added that there was no overtime, deadlines or quotas in appellant's work, and that her assignments in the Mental Health Clinic were no different from the other staff. The employing establishment also observed that Dr. Pock did not address the changes made in appellant's workload and responsibilities to decrease her feelings of anxiety and stress.

In a decision dated October 11, 2005, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the employing establishment had provided strong and persuasive evidence to refute the factual sufficiency of appellant's allegations.

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.[1] 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."[2] "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 the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[3]

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.[4]

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.[5] 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

[1] 5 U.S.C. § 8102(a).

[2] 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).

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

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

[5] *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991), *reaff'd on recon.*, 41 ECAB 387 (1990).

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.[6] 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.[7] 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.[8]

ANALYSIS

To the extent that appellant attributes her emotional condition to actions of her immediate supervisors, to the extent that she believes they gave her impossible assignments and critical or negative responses, her claim is not one that is generally covered by workers' compensation. Although these things have some relationship to her federal employment, they involve administrative or personnel matters, which as a general rule fall outside the scope of the Act. As the employing establishment observed, it is the prerogative of administrative and clinical management to make assignments to meet the needs of the organization. An exception to the general rule exists where there is error or abuse or unreasonable conduct in an administrative or personnel matter, but in this case appellant has submitted no proof to establish that her claim falls within the exception. It is not enough for her to have feelings of harassment, retaliation or discrimination. It is not enough for her to allege such error or abuse. She must substantiate her allegations with probative and reliable evidence. There simply is no evidence in this case showing that harassment, retaliation or discrimination did in fact occur as alleged. Because appellant has failed to establish a factual basis for these allegations, they do not constitute a compensable factor of employment. That is, they provide no basis for the payment of workers' compensation.

Appellant also attributes her emotional condition to a change in workload. Here, the evidence supports that her workload increased. On August 29, 2005 the employing establishment acknowledged a constant increase in workload "over the last several years" with a change in veteran eligibility status and an increasing number of veterans requesting services nationwide. Although appellant might have been responsible for reporting her inability to complete her daily tasks to her supervisor and to participate in problem-solving the issues of increasing workload and perceived staff shortages, her claim is no less compensable for any alleged failure on her part. The Board has held that workload is a compensable factor of

[6] *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).

[7] *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).

[8] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

employment.[9] An increased workload, together with steps taken to ease appellant's workload, is well established in this case.

Because appellant has established a compensable factor of employment, the Office must base its decision on an analysis of the medical evidence. The Office found no compensable factors of employment and therefore did not analyze or develop the medical opinion evidence on causal relationship. The Board will remand the case to the Office for this purpose.[10] After such further development of the evidence as may be necessary, including a proper statement of accepted facts, the Office shall issue an appropriate final decision on appellant's claim for compensation.

CONCLUSION

The Board finds that this case is not in posture for decision. Because appellant has established a compensable factor of employment, the Office must analyze and further develop, as may be necessary, the medical opinion evidence on the issue of causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the October 11 and January 19, 2005 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Issued: July 11, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[9] *Phillip L. Barnes*, 55 ECAB ___ (Docket No. 02-1441, issued March 31, 2004); *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984).

[10] *Robert Bartlett*, 51 ECAB 664 (2000).