United States Department of Labor
Employees' Compensation Appeals Board

SHERRELL M. GATEWOOD, Appellant	)	
and	)	**Docket No. 06-924**
	)	**Issued: July 21, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, Employer	)	

Appearances:
Sherrell M. Gatewood, 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 March 14, 2006 appellant filed a timely appeal from a January 18, 2006 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim and a March 1, 2006 decision denying appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an emotional injury in the performance of duty; and (2) whether the Office properly denied her request for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 1, 2005 appellant, a 43-year-old mail handler, filed a claim for traumatic injury alleging that on November 9, 2005 she felt stress while in the performance of duty. In a narrative dated November 10, 2005, she claimed that on November 9, 2005 Chesley Kintz, a supervisor, yelled at her "to get over to the desk to work rewrap" and then shouted, "It's over

there." Appellant attempted to explain there was a tub of rewrap in front of her, but he yelled at her to move to another desk and work. She had recently returned to work on November 8, 2005 and had already had a run-in with him and noted that he was not her supervisor. Appellant stopped work on November 25, 2005.

In a narrative dated November 9, 2005, Carol Foster, a coworker stated that, during the morning of November 9, 2005, appellant had asked where the other employees were when Mr. Kintz entered that area and rudely interrupted their conversation. He loudly stated to appellant that she needed to be over at the rewrap desk, insinuating that appellant's questions prevented her from getting her work done. Ms. Foster stated that the supervisor was very unprofessional, had a bad attitude and that most employees had problems working with him. On December 2, 2005 Mr. Kintz stated that he was in the loose mail area to talk to his clerk and noticed that appellant was sitting and talking to a rehabilitation clerk and that no work was getting done. He then told her that she needed to go to the rewrap desk and work, she replied that she had been working and reached into a tub, presumably to get mail, but he again directed her to go to the rewrap table. Appellant then left. In a November 30, 2005 report, Dr. Linda Singh, a Board-certified internist, stated that appellant was totally disabled and could not work until released by a psychiatrist. She also submitted two treatment notes from Herman H. Lucke, PhD., a clinical psychologist, noting treatment on November 30 and December 2, 2005.

By letter dated December 12, 2005, the Office informed appellant of the evidence needed to support her claim and requested that she submit such evidence within 30 days.

In a letter dated December 3, 2005, Patty C. Zimmerman, a supervisor of distribution operations, stated that appellant called in sick on November 25, 2005 and reported that she would be out of work for a week. Appellant presented documentation of additional treatments on December 2 and 9, 2005. She did not indicate that she was under stress when she advised Ms. Zimmerman on November 22, 2005 that she had a medical appointment the next day. On December 6, 2005 Keith Thompson, a coworker, stated that he was working loose mail on November 9, 2005 but heard no raised voices.

In an attending physician's report dated December 9, 2005, Dr. Lucke stated that appellant had emotional symptoms that started on November 24, 2005 based on a November 9, 2005 incident. He diagnosed an emotional disturbance, a serious adjustment disorder and chronic depressive syndrome. Dr. Lucke stated that appellant was totally disabled from November 24, 2005 to January 24, 2006. Appellant also submitted a treatment note for December 9, 2005.

On December 27, 2005 the employing establishment controverted the claim. It noted that on November 9, 2005 a supervisor instructed appellant on two occasions to work at another table as no work was being done. The employing establishment noted that there was no evidence that Mr. Kintz was abusive in directing appellant to work at the appropriate table.

By decision dated January 18, 2006, the Office denied the claim, finding that appellant failed to establish the incident of November 9, 2005 as a compensable factor. The Office found that the evidence did not establish error or abuse on the part of Mr. Kintz.

On February 3, 2006 appellant requested reconsideration and submitted a January 25, 2006 report from Dr. Lucke. She stated that the only management official present on November 9, 2005 was Mr. Kintz, who was loud and rude and whose actions were not justifiable. Appellant contended that she needed no instructions and was already at her work area. She alleged that she was harassed because of her recent Equal Employment Opportunity (EEO) activity that included Mr. Kintz.

By decision dated March 1, 2006, the Office denied appellant's February 3, 2006 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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 Federal Employees' Compensation Act.[1] 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.[2]

Verbal abuse or threats of physical violence in the workplace are compensable under certain circumstances.[3] This, however, does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[4] Verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute compensable factors of employment.[5] A raised voice in the course of a conversation does not in itself warrant a finding of verbal abuse.[6] The Board must evaluate the reasonableness of the language given the circumstances surrounding the incident.

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

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[1] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott,* 52 ECAB 309 (2001); *Lillian Cutler,* 28 ECAB 125 (1976).

[2] *Gregorio E. Conde,* 52 ECAB 410 (2001).

[3] *Fred Faber,* 52 ECAB 107, 109 (2000).

[4] *Id*.

[5] *Marguerite J. Toland,* 52 ECAB 294, 298 (2001).

[6] *See Karen K. Levene,* 54 ECAB 671 (2003).

factors of employment and may not be considered.[7] 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.[8]

ANALYSIS -- ISSUE 1

Appellant attributed her emotional condition to verbal abuse by Mr. Kintz on November 9, 2005 when he directed her to work at a rewrap table. Mr. Kintz denied that he yelled at appellant on November 9, 2005 when he instructed her to return to work at her desk. Mr. Thompson, a coworker, stated that he was working in the area where the conversation took place on November 9, 2005 but heard no raised voices. Ms. Foster stated that Mr. Kintz acted in an aggressive manner at that time. Appellant characterized Mr. Kintz as unprofessional.

While Mr. Kintz may have raised his voice to appellant on November 9, 2005, his comments do not rise to the level of verbal abuse. The Board has generally held that being spoken to in a raised or harsh voice does not, of itself, constitute verbal abuse or harassment.[9] Complaints about the manner in which a supervisor performs his duties or the manner in which a supervisor exercises his discretion fall, as a rule, outside the scope of coverage provided by the Act.[10] This principle recognizes that a supervisor or manager in general must be allowed to perform his duties and employees will, at times, dislike the actions taken. Mere disagreement or dislike of a supervisory or managerial action will not be compensable, absent evidence of error or abuse.[11] The actions taken by the supervisor in this instance instructing appellant to return to her work desk are within his authority as a supervisor and, absent a finding of error or abuse, are not compensable. The statements of appellant and Ms. Foster do not identify any abusive comments made by Mr. Kintz on that date. Appellant, consequently, has not established that the statements by Mr. Kintz constituted verbal abuse.

Furthermore, to the extent that appellant attributes her stress to the manner in which Mr. Kintz assigned her work, the Board has held that the assignment of work is an administrative function of the employer and the manner in which a supervisor exercises his or her discretion falls outside the ambit of the Act. Absent evidence establishing error or abuse, a claimant's

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[7] *Dennis J. Balogh,* 52 ECAB 232 (2001).

[8] *Id*.

[9] *See Beverly R. Jones,* 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004).

[10] *Marguerite J. Toland, supra* note 5.

[11] *Id*.

disagreement or dislike of such a managerial action is not a compensable factor of employment.[12] The evidence does not establish that the supervisor erred or acted abusively in directing appellant's work.

As appellant has not submitted any evidence establishing error or abuse by the supervisor, she has not established a compensable employment factor as to these allegations. As no compensable work factors have been identified, it is unnecessary to address the medical evidence.[13]

LEGAL PRECEDENT -- ISSUE 2

The Act[14] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[15] The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[16]

ANALYSIS -- ISSUE 2

On February 3, 2006 appellant requested reconsideration contending that Mr. Kintz had acted improperly and harassed her on November 9, 2005. She noted that she had filed an EEO complaint involving him. Appellant also submitted a January 25, 2006 report from Dr. Lucke.

Appellant's allegations essentially repeat her contentions of harassment previously considered by the Office. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[17]

To the extent that her allegation of harassment may be considered a legal argument not previously considered by the Office, the Board has held that, while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color

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[12] *See Donny T. Drennon-Gala*, 56 ECAB ___ (Docket No. 04-2190, issued April 26, 2005).

[13] *Margaret S. Krzycki,* 43 ECAB 496 (1992).

[14] 5 U.S.C. §§ 8101-8193; *supra* note 1.

[15] 20 C.F.R. § 10.605.

[16] 20 C.F.R. § 10.606.

[17] *James W. Scott*, 55 ECAB ___ (Docket No. 04-498, issued July 6, 2004).

of validity.[18] Although appellant had not previously made an allegation of retaliation for EEO activity, the Board notes that she did not submit any evidence to support her contention. As such, the Board finds that this unsupported allegation has no reasonable color of validity.[19]

On January 25, 2006 Dr. Lucke stated that appellant sustained an adjustment disorder directly related to her employment on November 9, 2005. Since the Office properly found that appellant failed to establish a factor of employment as having occurred, evidence pertaining to her medical condition is not relevant. Thus, the report from Dr. Lucke dated January 25, 2006, although new evidence, is not relevant to the underlying issue of whether appellant has established compensable employment factors. The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her February 3, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant has not established a compensable factor of employment giving rise to her emotional condition. The Board further finds that the Office properly denied her request for merit review under 5 U.S.C. § 8128(a).

[18] *Vincent Holmes*, 53 ECAB 468 (2002).

[19] *See generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of the application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 1 and January 18, 2006 are affirmed.

Issued: July 21, 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