

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

G.B., Appellant)
and) Docket No. 06-826
U.S. POSTAL SERVICE, POST OFFICE,) Issued September 5, 2006
New Orleans, LA, Employer)

)

Appearances:

G.B., 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 3, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 5, 2006 which denied her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On October 14, 2004 appellant, then a 40-year-old custodian, filed a traumatic injury claim alleging that on October 12, 2004 she experienced mental stress after she was harassed and threatened by management and her coworkers. She stopped work on October 14, 2004 and did not return.

Appellant submitted an undated statement alleging that on October 12, 2004 Postal Inspector Chris Nugent harassed and intimidated her when he questioned her as to an alleged mail theft at the employing establishment. Postal Inspector Nugent indicated that appellant "would probably have to testify" about her knowledge of the alleged theft. Appellant alleged that coworkers harassed and questioned her about her knowledge of the mail theft and later gossiped about her. She felt intimidated, threatened and fearful of retaliation from her coworkers. Appellant requested to be transferred to another facility. Management initially agreed but then indicated that a transfer would not be necessary because the accused would "not be a problem." She was requested by Postal Inspector Nugent to testify in criminal proceedings against a coworker accused of stealing mail and claimed an emotional reaction to testifying at the criminal trial.

By letter dated October 26, 2004, the Office asked appellant to submit additional factual and medical information, including a detailed description of the employment factors or incidents that she believed contributed to her claimed illness.

Appellant submitted a CA-16 dated October 14, 2004, which noted that she was authorized to receive treatment for mental stress. A duty status report dated October 20, 2004 prepared by Dr. Michelle Hamilton, a clinical psychologist, advised that appellant was unable to perform her duties due to severe stress and debilitating anxiety at work. In a report dated October 27, 2004, she indicated that appellant presented distressed due to a high stress situation at the employing establishment. Dr. Hamilton noted increased symptoms of paranoia, anxiety and depression and opined that she was not able to perform her duties at that time. Appellant submitted a November 18, 2004 statement which noted that in November and December 2003 she worked tour three at the employing establishment and began to find mail in the women's bathroom, the workroom floor and in the basement under the stairwell. After each occurrence, she reported the incident to her supervisor and the postal police. Appellant believed she was being set up because she was the only employee finding mail in inappropriate places. After the accused coworker was taken off the workroom floor in March 2004, she felt intimidated because the other coworkers would question her about the incidents and joke about the situation. Appellant informed her supervisors of the incidents with the coworkers and she was assured that she was safe and that the accused did not know her identity. She had been previously hospitalized in 1988 for depression. Appellant indicated that her stress level rose when Postal Inspector Nugent called her into his office on October 12, 2004 and informed her that she would have to testify at the trial.

In a November 30, 2004 decision, the Office denied appellant's claim finding that the claimed emotional condition did not arise in the performance of duty.

By letter dated March 30, 2005, appellant requested reconsideration and submitted an attending physician's report from Dr. Hamilton dated October 20, 2004. Dr. Hamilton diagnosed schizoaffective disorder exacerbated by stress on the job. She noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and indicated that she was under severe stress and became paranoid and was totally disabled. Also submitted was a duty status form dated November 24, 2004, prepared by Dr. Hamilton, which found that appellant totally disabled due to stress and anxiety at work. In a report dated February 10, 2005, she diagnosed extreme anxiety, paranoia and depression. Dr. Hamilton noted that, in the fall of

2004, appellant discovered a coworker was stealing mail and found herself in the position of being one of the only people who knew this was taking place. Appellant believed she was being set up as the prime suspect and, after her coworker was arrested, feared retribution from coworkers which caused additional stress. This incident greatly exacerbated her paranoia and she became depressed, anxious, confused, afraid to go to work, had trouble sleeping and became isolated from her family. Dr. Hamilton indicated that appellant's symptoms culminated when she was told that she would have to testify against her peer in federal court. This increased her fear of retribution, she became increasingly distressed and less able to function and had to stop work. A work status report dated March 11, 2005 noted that appellant could work modified duty, eight hours per day. Also submitted were two notices of traumatic injury forms dated October 14, 2004 prepared by Johnnie Robinson, Jr., supervisor of maintenance operations. Mr. Robinson noted that the employing establishment controverted the claim.

By decision dated April 19, 2005, the Office denied appellant's request for reconsideration on the grounds that she had neither raised a substantive legal question nor included new or relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

In an undated letter, appellant requested reconsideration and submitted a copy of the union contract. Also submitted was a statement from Samuel Perry dated March 15, 2005, who indicated that he accompanied appellant to a meeting with Postal Inspector Nugent, who advised that appellant would probably not have to testify against the accused. Later appellant was informed that she would have to testify and became nervous. A statement from a coworker Stephanie Johnson, dated March 20, 2005, noted that appellant witnessed a coworker bringing mail into her work area and was fearful for her life after she was asked to testify as to the incident. A statement from Kimberly Herring, dated November 26, 2005, noted that both she and appellant testified against the accused in the mail theft case. During the trial, she witnessed appellant become extremely upset at the trial and for several weeks thereafter. An article dated August 23, 2005 noted that a former postal worker was sentenced in mail theft incidents. Appellant submitted a report from Dr. David Burkart, a licensed psychologist with a specialty in counseling, dated November 28, 2005. Dr. Burkart noted that appellant reported witnessing a coworker stealing mail at work and advised that testifying in court regarding this situation was highly traumatic.

An electromyogram (EMG) dated December 9, 2005 revealed no abnormalities.

The employing establishment submitted an electronic mail from Postal Inspector Nugent dated June 7, 2005. He advised that appellant was at the U.S. Attorney's office on May 21, 2005 from 10:30 a.m. to 6:30 p.m. preparing to testify. Postal Inspector Nugent indicated that on May 23, 2005 she testified at the trial of her coworker.

In a merit decision dated January 5, 2006, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹

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*,² the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.³ 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 under the Act.⁴ When an employee experiences emotional stress 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 an in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.⁵ 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 under the Act. 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. 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.⁶

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.⁷ If a claimant does implicate a factor of

¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

² 28 ECAB 125 (1976).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁵ *Lillian Cutler*, *supra* note 2.

⁶ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, *supra* note 2.

⁷ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

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

Appellant alleged that on October 12, 2004 Postal Inspector Nugent generally harassed and intimidated her when he questioned her regarding an alleged mail theft at the employing establishment and the possibility that she would have to testify about her knowledge of the alleged theft. She further alleged that coworkers of the accused harassed her about her knowledge of the mail theft and later gossiped about appellant and she felt intimidated, threatened and fearful of retaliation from the coworkers. To the extent that incidents alleged as constituting harassment by a supervisor and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.⁹ However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.¹⁰

Appellant has not submitted sufficient evidence to establish that she was harassed by Postal Inspector Nugent or her coworkers.¹¹ She alleged that coworkers made statements and engaged in actions which she believed constituted harassment. However, appellant provided no corroborating evidence, such as witness statements, to establish that such statements actually were made or that the actions actually occurred.¹² A statement from Mr. Perry dated March 15, 2005 indicated that he accompanied her to a meeting where she was advised that she would probably not have to testify against the accused. Mr. Perry indicated that appellant was later informed that she would have to testify and became nervous. His statement does not establish that Postal Inspector Nugent harassed or intimidated her; rather, it confirmed that Postal Inspector Nugent discussed the possibility of appellant testifying at trial. Also submitted was a statement from Ms. Johnson dated March 20, 2005, who noted that appellant witnessed a coworker bringing mail into her work area and became fearful after she was asked to testify against him. However, she appears to be repeating the history of events as reported by appellant. Ms. Johnson did not describe witnessing any incidents of alleged harassment by supervisors or coworkers. A statement from Ms. Herring dated November 26, 2005 noted that appellant testified against the accused in the mail theft case and indicated that appellant was upset during the trial. This statement does not support appellant's contention that Postal Inspector Nugent or her coworkers harassed or intimidated her. The employing establishment submitted an electronic

⁸ *Id.*

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹² *Id.*

mail from Postal Inspector Nugent dated June 7, 2005. Postal Inspector Nugent advised that appellant was at the U.S. Attorney's office on May 21, 2005 from 10:30 a.m. to 6:30 p.m., preparing to testify and, on May 23, 2005 from 12:00 p.m. to 6:00 p.m., appellant testified at the trial of her coworker. The factual evidence fails to support appellant's claim that she was harassed by either the postal inspector or her coworkers.¹³ She has not established a compensable employment factor under the Act with respect to the alleged harassment.

Appellant also alleged that coworkers questioned her about her knowledge of the mail theft and gossiped about her. She felt intimidated, threatened and fearful of retaliation by her coworkers. As noted appellant did not submit evidence or witness statements in support of her allegations and there is no evidence of record to support retaliation or threats by any coworkers. General allegations of harassment are not sufficient.¹⁴ In this case, appellant has not submitted sufficient evidence to establish disparate treatment by her coworkers.¹⁵ Although she alleged that her coworkers engaged in actions which she believed constituted harassment, she provided no evidence to establish her allegations.¹⁶ Additionally, the employing establishment refuted such allegations. Appellant has not established a compensable employment factor under the Act with respect to the claimed harassment. To the extent that she generally alleged a verbal or physical threat by coworkers, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹⁷ The Board finds that the evidence of record does not reveal that appellant's coworkers made any threats. She has not established how coworkers' comments or actions rose to the level of verbal abuse or otherwise fell within coverage of the Act.

Other allegations by appellant relate to administrative or personnel actions. In *Thomas D. McEuen*,¹⁸ the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing

¹³ See *Michael A. Deas*, 53 ECAB 208 (2001).

¹⁴ See *Paul Trotman-Hall*, 45 ECAB 229 (1993).

¹⁵ See *Joel Parker, Sr.*, *supra* note 11.

¹⁶ See *William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

¹⁷ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹⁸ See *Thomas D. McEuen*, *supra* note 6.

establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁹

Appellant alleged that management refused to transfer her to another facility for her safety and protection after she testified at trial about the mail theft. The Board finds that this allegation relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.²⁰ The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties but constitute a desire to work in a different position.²¹ Appellant has not established a compensable employment factor under the Act in this respect. The employing establishment denied her allegation. Appellant has presented insufficient evidence to support that the employing establishment erred or acted abusively in denying her request to transfer. Thus she has not established administrative error or abuse and this allegation is not compensable under the Act.

Appellant also alleged that she was asked to testify in a criminal proceeding against the coworker accused of stealing mail and had an emotional reaction to testifying at the trial. The Board finds that she has established a compensable factor of employment.²² The record reflects that appellant had first hand knowledge of the mail theft as she was the employee who found the stolen mail in the workplace. During the period preceding the May 23, 2005 criminal trial, appellant furnished information and assisted in securing evidence pertaining to the mail theft. The Board finds that her cooperation with Postal Inspector Nugent's investigation and participation in the criminal proceedings was anticipated and expected by her employer as she was an eyewitness and discovered the stolen mail.²³ The Board finds that appellant's participation in the May 23, 2005 criminal trial and associated activities, constitutes a specially-assigned work duty arising out of the course of her federal employment.²⁴

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. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric

¹⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

²⁰ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

²¹ *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

²² See *Larry J. Thomas*, 44 ECAB 291 (1992) (where the Board found that appellant's participation and testimony in an administrative matter conducted by another agency constituted a factor of employment as they were specially assigned tasks).

²³ See *George Patrick Semonco*, 50 ECAB 552 (1999) (where the Board found a compensable factor of employment when appellant was requested by the postmaster and U.S. District attorney to testify at the sentencing phase of proceedings against a coworker, the Board noted that, although he was not required to testify his cooperation and presence in court was anticipated and expected by his employer).

²⁴ See *Lillian Cutler*, *supra* note 2

disorder and that such disorder is causally related to the accepted compensable employment factor.²⁵

Appellant submitted a report of Dr. Hamilton, a clinical psychologist,²⁶ who diagnosed extreme anxiety, paranoia and depression which developed after she discovered a coworker was stealing mail. Dr. Hamilton noted that this incident greatly exacerbated her paranoia and indicated that the symptoms culminated when she was told that she would have to testify against him in federal court. This increased her fear of retribution, she became increasingly distressed. Although Dr. Hamilton's reports do not contain sufficient rationale explaining how the accepted employment factor caused or contributed to appellant's emotional condition, the reports are generally supportive of her claim and are sufficient to require further development of the case record by the Office.²⁷

On remand, the Office should refer appellant, together with the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and rationalized medical opinion regarding whether her emotional condition is causally related to or aggravated by the accepted factor of her federal employment. After such further medical development as is deemed necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

²⁵ See *William P. George*, *supra* note 16.

²⁶ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician). The Board notes that appellant also submitted reports from Dr. Burkart who is also a psychologist; however, he is not a clinical psychologist and is, therefore, not considered a physician under the Act.

²⁷ See *John J. Carbone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with the opinion of the Board.

Issued: September 5, 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