

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

V.L., Appellant)

and)

U.S. POSTAL SERVICE, GREENSBORO)
PROCESSING & DISTRIBUTION CENTER,)
Greensboro, NC, Employer)

**Docket No. 06-898
Issued: September 8, 2006**

Appearances:
V.L., *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 2, 2006 appellant filed a timely appeal from a January 18, 2006 decision of the Office of Workers' Compensation Programs affirming the denial of her emotional condition claim. Pursuant to 20 C.F.R. § 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty as alleged. On appeal, she contends that the employing establishment's action in transferring her to a different duty station was sufficient to establish her allegations as factual.

FACTUAL HISTORY

On February 17, 2004 appellant, then a 39-year-old mail processing clerk, filed a notice of occupational disease Form CA-2 claiming that she sustained major depression, stress, anger

and fear in the performance of duty on or before October 13, 2003. The Office assigned appellant's claim File No. 06-2107364. Appellant attributed her condition to working in an area for injured employees, where she was assigned following a September 1, 2001 right shoulder injury. She alleged that Richard Pumbo, a manager, deliberately struck her in the shoulder with a ladder. The Office accepted this injury under File No. 06-2042241.¹ This claim is not before the Board on the present appeal.

Appellant alleged that they were "always being watched and harassed." She contended that supervisors directed her to case mail beyond her limitation of four hours a day. On September 25, 2003 she told Tony Hairston, her supervisor, of her anxiety over working in the area and of her desire for different work duties. On October 13, 2003 she told Mr. Hairston that Mr. Pumbo had been staring her down and she became uncomfortable. Mr. Hairston allegedly stated that this was because Mr. Pumbo "hates women." Appellant spoke with Mr. Hairston again on October 21, 2003 about Mr. Pumbo coming into her work area to stare at her. After the October 17, 2003 suicide of a coworker appellant "broke down," felt sick while on her way to work and had suicidal thoughts. She stopped work on November 15, 2003 and did not return.²

In a March 1, 2004 letter, the Office advised appellant of the additional factual and medical evidence needed to establish her claim. It requested that she provide additional details about her September 25, 2003 conversation with Mr. Hairston and explain why Mr. Pumbo made her nervous. The Office also requested a report from her physician explaining how and why work factors would cause the claimed emotional condition. The Office also requested that the employing establishment comment on appellant's allegations. The Office specifically asked if there were any conflicts between appellant and her supervisors or coworkers.

Appellant submitted a March 12, 2004 statement. She asserted that her four hour a day limitation on casing mail due to her accepted shoulder injury caused resentment among her coworkers and that Jason Dechambeau, a manager, "continuously stood behind" her and spoke about casing mail. She reiterated that Mr. Pumbo intentionally pushed a ladder into her on September 1, 2001, injuring her right shoulder and necessitating two surgeries. Appellant stated that she felt afraid for her well being whenever Mr. Pumbo approached.

In a November 3, 2003 report, Dr. Vincent E. Paul, an attending Board-certified orthopedic surgeon, treated appellant for her accepted right shoulder injury.³ He related appellant's account of "people telling her she is being watched" at work and opined that "the suicide of a person with a similar work-related injury at work" was very stressful for her. He diagnosed work-related stress and excessive anxiety. Dr. Paul stated that she was doing well

¹ Appellant received compensation for intermittent absences from October 27, 2001 to November 4, 2003, followed by a schedule award.

² The employing establishment controverted the claim in a February 23, 2004 letter, on the grounds that appellant had not established any compensable factors of employment.

³ Appellant also submitted December 8, 2003, January 28 and March 4, 2004 nurse reports. As these reports were not signed or reviewed by a physician, they do not constitute probative medical evidence in this case. *Thomas L. Agee*, 56 ECAB _____ (Docket No. 05-335, issued April 19, 1985); *Richard F. Williams*, 55 ECAB _____ (Docket No. 03-1176, issued February 23, 2004); *Merton J. Sills*, 39 ECAB 572 (1988).

from her right shoulder surgery, capsular tightening and impingement with distal clavicle resection. Dr. Paul prescribed home exercises and medication for insomnia and anxiety. In a December 12, 2003 report, Dr. Brian A. Farah, an attending psychiatrist, opined that appellant's depression and suicidal ideation were related to pain from the accepted right shoulder injury and two subsequent surgeries. In a January 8, 2004 report, Dr. Thomas Gresalfi, an attending Board-certified psychiatrist, noted that appellant was hospitalized from December 8 to 12, 2003 due to suicidal ideation related to a "workers' comp[ensation] situation" and a "shoulder injury caused by a coworker." Dr. Gresalfi diagnosed major depressive disorder, single episode.

In a March 26, 2004 statement, Mr. Hairston asserted that on unspecified dates, appellant approached him with what he thought were passing comments on the work area and to request duties that would qualify her for a transfer. He acknowledged appellant's comments about Mr. Polumbo coming to her work area and that he asked appellant if Mr. Polumbo was supposed to be there stemming from the harassment charges she filed against him. Appellant replied that she "was waiting on the hearing." Mr. Hairston asserted that Mr. Polumbo "had quite a few problems with the females in [appellant's] section."

By decision dated April 16, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established as appellant failed to establish any compensable employment factors. It found that appellant's conversations with Mr. Hairston occurred as alleged but did not arise in the performance of duty and that her reactions were self-generated. Appellant did not establish administrative error or abuse.

In an April 21, 2004 letter, appellant requested an oral hearing before a representative of the Office Branch of Hearings and Review, later changed to a request for a review of the written record. She submitted additional evidence.⁴

In an August 6, 2004 statement, Linda Hough, a coworker, asserted that on several occasions in September and October 2003, she saw "forms of harassment" by Mr. Polumbo, Ponette Jackson and Jason Dechambeau in which they said things to appellant about working and standing over her shoulder.

In an August 12, 2004 statement, Karen M. Wilson, a coworker, asserted that during September and October 2003, Mr. Dechambeau watched workers in work area and would pretend to check mail in order to spy on them. He once "asked us why we was sitting there doing nothing. We told him we had just run out of mail" and had finished casing all mail in the section.

In a September 27, 2004 email message, Brenda Accoo, an employing establishment official, requested that Mr. Hairston and manager Patrick L. Taylor review the statements from Ms. Hough and Ms. Wilson. Ms. Accoo asked Mr. Hairston and Mr. Taylor to obtain responses from Mr. Polumbo, Ponette Jackson and Mr. Dechambeau.

⁴ Appellant also submitted notes dated from May 5 to October 13, 2004 from a nurse or nurse practitioner. As these reports were not signed or reviewed by a physician, they do not constitute probative medical evidence in this case. *Thomas L. Agee, supra* note 3; *Richard F. Williams, supra* note 3; *Merton J. Sills, supra* note 3.

In an October 11, 2004 email, Mr. Dechambeau confirmed that he had asked “employees why they are not working when they are being paid to do so.” He denied harassing any employees or pretending to check the mail in their section to spy on them. Mr. Dechambeau explained that he walked the entire building checking various containers of mail to ensure that it was processed. There are no statements of record from Ponette Jackson or Mr. Polumbo.

By decision dated and finalized November 24, 2004, the Office hearing representative affirmed the April 16, 2004 decision, finding that appellant failed to establish any compensable factors of employment. The hearing representative found that, while appellant established that supervisors checked on her work, this was an administrative matter not considered within the performance of her duties as no error or abuse was shown. The hearing representative found that appellant submitted insufficient evidence to establish that she worked in an environment with sick, angry or injured coworkers. The hearing representative further found that appellant’s reaction to her friend’s suicide was self-generated and not within the performance of duty. She failed to establish any error or abuse by the employing establishment in her coworker’s death.

In an October 28, 2005 letter, appellant requested reconsideration. She noted that the employing establishment offered her a new position at another duty station “[d]ue to the circumstances at” her date-of-injury duty station. She submitted additional evidence.

In a May 4, 2004 statement, Antoinetta Fulton, a coworker, stated that she witnessed Mr. Polumbo push appellant into a delivery bar code sorter machine on an unspecified date. Ms. Fulton alleged that on several occasions, Mr. Polumbo approached appellant’s workstation and glared or stared at her, once making a “somewhat sarcastic emotion with his face.” After appellant reported this to Mr. Hairston, Mr. Dechambeau and supervisor Deanette Jackson harassed or stood over her while she was working. On one occasion, Deanette Jackson instructed appellant to case mail beyond her four-hour restriction, then checked appellant’s clock rings.

Appellant also submitted a November 16, 2004 nurse’s report and a March 16, 2005 letter in which the employing establishment directed her to report for a fitness-for-duty examination to verify her request for permanent light duty.

By decision dated January 18, 2006, the Office denied modification of the November 24, 2004 decision. The Office found that the evidence did not establish harassment by employing establishment personnel or administrative error or abuse. Appellant did not establish that being asked to attend the fitness-for-duty examination was erroneous or abusive. The Office found that Ms. Fulton’s statement was vague and did not specify specific dates or incidents of the alleged harassment. The Office further found that a February 22, 2005 report from Dr. Gresalfi was irrelevant as appellant had not established any compensable factors of employment.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or

adversely affected by employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.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 Federal Employees' Compensation 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

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.⁹ 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.¹⁰

ANALYSIS

Appellant attributed her claimed emotional condition to several work factors which the Office found noncompensable. She described her frustration from working in a section with other injured employees, a dislike of her coworkers, perceived resentment of her medical limitations and her desire for different duties. However, an employee's dissatisfaction with the work environment or the desire for different duties is not compensable. The Board has held that

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ See *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004); *Norma L. Blank*, 43 ECAB 384 (1993).

¹⁰ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004); *Norma L. Blank*, *supra* note 9.

such a reaction is a self-generated frustration from not being permitted to work in a particular environment and is not compensable under the Act.¹¹

Appellant also attributed her condition to the manner in which managers supervised her work or discussed casing mail. However, an employee's dissatisfaction with the way a supervisor performs duties or exercises discretion in assigning work is not compensable absent error or abuse.¹² She submitted witness statements indicating that managers closely supervised her work. However, none of these statements specifies the dates of any of the incidents described. The statements are too vague to establish appellants' account of events as factual or administrative error or abuse. Mr. Dechambeau submitted an October 11, 2004 statement refuting appellant's allegations of excessive or improper supervision. He explained that his supervision of appellant was part of his plant-wide responsibilities to ensure a proper flow of mail. Therefore, appellant has not established a compensable employment factor in this regard.

Appellant also alleged that managers harassed and intimidated her by staring at her or standing close behind her. For harassment to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹³ Mere perceptions of harassment are not compensable under the Act.¹⁴ Appellant submitted witness statements indicating that on unspecified dates, managers stood over appellant's shoulder or came to her work section and looked or stared at her. As noted these statements are not specific as to the dates on which the alleged incidents occurred. Thus, they are too vague to corroborate any specific incidents of harassment. Consequently, these alleged incidents are not compensable.¹⁵

Appellant also attributed her condition, in part, to her fear of Mr. Polumbo. She alleged that he assaulted her on September 1, 2001, causing a right shoulder injury. The Office accepted a September 1, 2001 right shoulder injury under File No. 06-2042241, a claim not before the Board on the present appeal. On remand of the case, the Office shall undertake appropriate development to ascertain whether Mr. Polumbo assaulted appellant on September 1, 2001 and whether any assault was in the performance of duty. Following this and other such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

The Board notes a December 22, 2005 report from Dr. Gresalfi does not appear in the case record. On remand of the case, the Office shall obtain a copy of this report and associate it with the case record.

¹¹ *Peter D. Butt Jr.*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004).

¹² *Donney T. Drennon-Gala*, 56 ECAB ____ (Docket No. 04-2190, issued April 26, 2005); *Linda J. Edward-Delgado*, 55 ECAB ____ (Docket No. 03-823, issued March 25, 2004).

¹³ *Marlon Vera*, 54 ECAB 834 (2003).

¹⁴ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁵ See *Sherry L. McFall*, 51 ECAB 436 (2000); *Sherman Howard*, 51 ECAB 387 (2000); *Ernest J. Malagrida*, 51 ECAB 287 (2000).

CONCLUSION

The Board finds that appellant has not established as factual certain allegations pertaining to harassment and administrative error. The case is not in posture for a decision on whether appellant was assaulted by a supervisor, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 18, 2006 is affirmed in part, set aside in part and the case remanded for further development consistent with this decision.

Issued: September 8, 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