United States Department of Labor
Employees' Compensation Appeals Board

F.M., Appellant	)	
and	)	**Docket No. 07-92**
	)	**Issued: April 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 19, 2006 appellant filed a timely appeal from a June 21, 2006 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim and a July 25, 2006 nonmerit decision denying her request for reconsideration. Under 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 condition 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 April 12, 2006 appellant, then a 44-year-old letter carrier, filed an occupational disease claim alleging that the harassment she experienced under her supervisor, Maria Adorno caused or contributed to her emotional condition. She noted April 11, 2006 as the date she realized the causal relationship between her employment and her conditions. The employing

establishment controverted the claim. It noted that, on April 11, 2006, appellant was called into the office for discipline relating to her conduct at work, which was an administrative matter.

By letter dated April 20, 2006, the Office notified appellant that the information submitted was insufficient to establish her claim. It advised her to submit a description of employment-related conditions or incidents that she believed contributed to her illness; specific aspects of her employment that she considered to be detrimental to her health; a description of all practices or incidents affecting her condition; and a medical report describing symptoms, treatment and an explanation as to how the alleged work incidents or exposure contributed to her condition.

In an undated statement, appellant advised that her problems began when Ms. Adorno arrived at her station. She alleged that Ms. Adorno singled her out because of her handicapped foot whenever the mail volume was heavy and questioned her about her schedule. Appellant advised that, because of the harassment, her migraine condition, which was covered under the Family Medical Leave Act, increased in frequency from once every two months to twice every month and that she sought assistance from the Employee Assistance Program because of bad emotional feelings and thoughts. She indicated that she filed an Equal Employment Opportunity (EEO) grievance because of a February 13, 2006 situation where Ms. Adorno told her to "shut" her "mouth up," in violation of the Zero Tolerance Policy and the whole station heard. In a June 9, 2006 statement, appellant alleged that Ms. Adorno told her she was "sorry-stupid" and tried to upset her everyday by making ugly remarks to her. She stated that it was stressful to hold herself back from hitting Ms. Adorno.

The record contains work excuses dated April 11 and 18, 2006 from Dr. Angela Y. Nunnery and Dr. Madeline A. Hunt, both Board-certified family practitioners, and Dr. Allan Daniels, a Board-certified internist, advising that appellant was under their care for stress and anxiety and would be unable to return to work.[1] In an undated attending physician's report and an April 24, 2006 duty status report, Dr. Nunnery indicated that appellant was unable to work due to migraine headaches for the period April 11 to June 10, 2006.

In a May 18, 2006 statement, Ms. Adorno denied appellant's allegations. She described an incident whereby curtailed mail was left in appellant's case and appellant became loud and addressed her in a condescending manner. Ms. Adorno stated that she immediately informed appellant to report to the supervisor's office for a predisciplinary discussion about improper behavior on the workroom floor. She stated that once Ethel Ford, a union steward, arrived at the office, she began conducting the predisciplinary investigation but did not know the intercom was on. Ms. Adorno stated that appellant filed a claim against her for Zero Tolerance Policy because of that. A copy of a March 24, 2006 dispute resolution team decision indicated that appellant's grievance was remanded for a determination on whether a zero tolerance situation was evident.[2] Ms. Adorno additionally advised that she had little interaction with appellant in the short time she had been assigned to this work unit and always treated her with respect.

[1] In a June 5, 2006 work excuse slip, the physicians advised that appellant could return to work on June 26, 2006.

[2] The decision indicated that the above incident occurred on February 13, 2006.

By decision dated June 21, 2006, the Office denied appellant's claim, finding that she failed to substantiate her allegations of harassment.

On July 11, 2006 appellant requested reconsideration. Medical evidence concerning her left foot condition, for which she has a claim under Office file number 162049062, was submitted.

By decision dated July 25, 2006, the Office denied appellant's request for reconsideration. It found that appellant submitted no new relevant evidence to support her claim; had advanced no new legal contentions; and submitted no evidence showing that the Office erroneously applied or interpreted a point of law.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that appellant sustained an emotional condition in the performance of duty, she must submit: factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition, medical evidence establishing that she has an emotional or psychiatric disorder and rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[3] 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.[4]

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 illness has some connection with employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[5] 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 reduction-in-force or frustration from not being permitted to work in a particular environment or hold a particular position.[6]

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

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

[5] *Ronald J. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[6] *Id.*

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee. An administrative or personnel matter will be considered to be an employment factor, however, where the evidence discloses error or abuse on the part of the employing establishment.[7]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[8]

ANALYSIS -- ISSUE 1

Appellant made general allegations of harassment and a hostile work environment caused by her supervisor, Ms. Adorno. The perception of harassment or mistreatment is not sufficient to establish a compensable work factor. There must be probative and reliable evidence in support of the allegation.[9]

The evidence of record does not contain probative and reliable evidence sufficient to establish a factual basis for the allegations that appellant characterized as harassment or a hostile work environment. She alleged that she was harassed by Ms. Adorno, who made inappropriate and demeaning remarks. Appellant, however, failed to provide sufficient evidence or a description of specific incidents she believed constituted harassment.[10] She also mentioned specific incidents occurring on February 13 and April 11, 2006, which the employing establishment stated involved prediscipliinary discussions. Although, appellant noted filing an EEO complaint, there are no findings by the Equal Employment Opportunity Commission or other administrative agency on the issue.[11] Although the record contains a copy of a March 24, 2006 dispute resolution team decision regarding a charge of violation of the Zero Tolerance Policy for the February 13, 2006 incident, the decision specifically remanded the grievance for a determination on whether a zero tolerance situation was evident. Thus, appellant alleged harassment, without describing in detail specific incidents other than the February 13, 2006

[7] *James E. Norris*, 52 ECAB 93 (2000).

[8] *Id.*

[9] *See Beverly R. Jones*, 55 ECAB 411 (2004). In evaluating workers' compensation claims, the term harassment is synonymous with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers.

[10] *See Joel Parker, Sr.*, 43 ECAB 220 (1991). (The Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[11] Such evidence, while not determinative, may constitute substantial evidence regarding a compensable work factor. *See Walter Asberry, Jr.,* 36 ECAB 686 (1985).

incident. However, there is insufficient evidence that this incident which appellant asserted was harassment, rises to the level of a compensable employment factor.

To the extent that appellant is asserting her emotional condition was caused or aggravated by the predisciplinary discussions on February 13 and April 11, 2006, the Board has held that disciplinary actions concerning such matters as discussions or letters of warning for conduct pertain to actions taken in an administrative capacity and are not compensable unless the employee shows management acted unreasonably.[12] In this case, there is insufficient evidence of error or abuse in an administrative matter. Although Ms. Adorno noted that, the intercom unknowingly left on during the February 13, 2006 predisciplinary investigation, there is insufficient evidence to show that this rises to the level of error or abuse in an administrative matter. As noted above, appellant filed a complaint, in part, due to this but no final finding had been made on the matter and there is no other evidence of record sufficient to show that, under the circumstances, such an occurrence could be considered as unreasonable as to rise to the level of error or abuse. Therefore, these allegations are not deemed compensable employment factors.

Based on the evidence of record, appellant has not substantiated a compensable work factor. Since she has not established a compensable work factor, the Board will not address the medical evidence.[13]

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office.[14]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[15] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[16]

[12] *See Janice I. Moore*, 53 ECAB 777 (2002).

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

[14] 20 C.F.R. § 10.606(b)(2).

[15] *Donna L. Shahin*, 55 ECAB 192 (2003).

[16] 20 C.F.R. § 10.608.

ANALYSIS -- ISSUE 2

In appellant's request for reconsideration, she did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. She also did not submit relevant and pertinent new evidence not previously considered by the Office. The medical evidence pertaining to a foot condition is not relevant to the issue of whether she developed an emotional condition in the performance of duty. The Office was, therefore, not required to reopen the case for merit review. Accordingly, the Board finds that the Office properly denied appellant's request for merit review.

CONCLUSION

Appellant has not met her burden of proof in establishing that she developed an emotional condition in the performance of duty and that the Office properly denied appellant's request for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 25 and June 21 2006 are affirmed.

Issued: April 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board