

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

C.M., Appellant)
and) Docket Nos. 06-1525 & 06-1526
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Cincinnati, OH, Employer)
Issued: January 31, 2007
)

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 14, 2006 appellant filed a timely appeal from a May 23, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative and a June 12, 2006 merit decision finding that she did not sustain an emotional condition while in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition while in the performance of duty.

FACTUAL HISTORY

On October 11, 2005 appellant, then a 48-year-old social worker, filed a traumatic injury claim assigned number 09-2068658 alleging that on October 5, 2005 Michael Toner, a

supervisor, verbally attacked her in an abusive manner. She stated that he inappropriately reprimanded her, used derogatory language, shook a finger in her face and yelled at her.

On October 20, 2005 appellant filed a claim for an occupational disease assigned claim number 09-2065276. She alleged that on October 5, 2005 she first realized that her mitral valve prolapse *via* heart catheterization and cardiac arrest in February 1986 were exacerbated by work-related stress. Appellant stated that, as a result of the verbal altercation of October 5, 2005, she experienced escalated anxiety, chest pain, shortness of breath, light-headedness and a skin rash.

By letter dated November 1, 2005, the Office advised appellant to submit additional factual and medical evidence to establish her claim. In a letter of the same date, the Office requested that the employing establishment provide, among other things, a response to appellant's allegations.

Appellant submitted medical evidence covering the period March 17, 1987 through October 6, 2005 regarding her heart, emotional and back conditions. She requested leave from August 15, 2005 to August 14, 2006 under the Family Medical Leave Act. Appellant also submitted correspondence from Mr. Toner concerning her ability to work and an injury report regarding the October 5, 2005 incident.

In a November 4, 2005 letter, appellant contended that her heart attack in 1986 was caused by work-related stress. She stated that the staff continually filed grievances regarding labor problems at the employing establishment. Every day someone experienced a toxic and negative situation. Appellant noted that in 2004 and 2005 outside investigative teams interviewed a minimum of 50 employees which resulted in the termination of the head person of the employing establishment and fiscal head. There was a subsequent middle management shift and transition of employees including herself. Appellant stated that she consequently had anxiety, chest pains, shortness of breath, fearfulness and depression. She reiterated that on October 5, 2005 her supervisor lost control, verbally exploded and pointed his finger in her face. He had previously lost control and harassed her over a period of two to three months despite her requests to stop.

Appellant also alleged that she had employment-related post-traumatic stress disorder. She stated that her supervisor's administrative assistant was instructed to call her every morning to assure that she was at her desk, to probe her health status and to inquire about her attendance before a meeting. Appellant contended that she was reprimanded for whistle blowing and that she was removed from the position of director and banished to a broom closet that was renovated into an office. She was given the oldest computer as punishment and was unable to access to some programs. Appellant contended that the union president told her that her supervisor stated, "you're a pain in the ass."

Appellant alleged that, prior to the October 5, 2005 incident, Mr. Toner scolded her for not being in her chair at exactly 9:00 a.m. She addressed her physical limitations and need for medical accommodations. Appellant was reprimanded for taking a lunch break without assigning someone to cover even though an announcement was made to the staff. She stated that, on October 7, 2005, Mr. Toner called her to apologize for his outburst on October 5, 2005.

Jonena Jones, an employing establishment social worker, stated that on October 5, 2005, Mr. Toner used a tone of voice with appropriate concern when he advised appellant about the importance of informing him about a threatening telephone call she received from a veteran. She stated that, after Mr. Toner left work for the day, appellant voiced discontent about the conversation.

Demetria Wilburn, an employing establishment social worker, related that, on October 5, 2005, she observed Mr. Toner and appellant having a normal conversation. She did not hear what was being said as she walked by to enter her office.

In a November 4, 2005 narrative statement, Mr. Toner related that, on October 5, 2005, he reprimanded appellant in a normal tone of voice for failing to immediately notify him about a telephone call she received from a psychiatric patient who threatened to come to the employing establishment and kill several staff members. Instead of acknowledging her failure to timely inform him, appellant became argumentative and defended her actions. Mr. Toner related that on her second day off from work following the reprimand, he telephoned her at home to see how she was doing. He denied appellant's allegation that he yelled and screamed at her. Mr. Toner later learned that she incorrectly believed that his denial was an apology for the reprimand, as this conversation with her was an appropriate action for the situation. He also denied any finger pointing.

In an undated narrative statement, appellant alleged that Mr. Toner was still harassing her and wanted her to serve as his secretary despite her position as a social worker/therapist. She stated that she filed an unfair labor practice grievance. Appellant noted that no other social worker had been asked to serve as the supervisor's secretary. She submitted email messages dated November 18, 2005 regarding Mr. Toner's request that she serve as secretary due to a staff shortage during the holiday season. Mr. Toner's November 22, 2005 email message requested that appellant coordinate social work interventions as a patient was confused as to who had been assigned as his social worker. He noted that the patient had spoken to appellant who contended that this request constituted harassment because it did not apply to her.

By decision dated January 6, 2006, the Office denied appellant's claim, finding that she did not sustain an emotional condition while in the performance of duty. It found that her reprimand by Mr. Toner on October 5, 2005, disciplined for failing to be in her seat at 9:00 a.m. and assigned work duties by him did not constitute compensable factors of employment as she failed to establish error or abuse by Mr. Toner in handling these administrative matters. In addition, the evidence of record failed to establish that the employing establishment retaliated against appellant for whistle blowing, it demoted and reassigned her and gave her a smaller office and defective computer, that Mr. Toner's administrative assistant checked on her or that he harassed her over her medical restrictions or employment-related conditions.

On January 14, 2006 appellant requested a review of the written record by an Office hearing representative.

By letter dated February 21, 2006, the Office notified appellant that the evidence submitted in support of her traumatic injury claim was insufficient. It advised her to submit factual and medical evidence to establish her claim.

The Office received duplicate copies of Ms. Jones', Ms. Wilburn's and Mr. Toner's statements. In a February 14, 2006 narrative statement, Mr. Toner again denied that appellant was scolded on October 5, 2005. He stated that neither he nor anyone else used loud language, finger pointed, name called or used threatening behavior. Mr. Toner related that appellant was treated with respect even when she was given a verbal reprimand for problematic or unprofessional behavior. He reiterated that the verbal reprimand on October 5, 2005 was appropriate due to her bad judgment and the risk of danger to staff members.

In an October 5, 2005 report of contact, Larry L. Reeves, a police officer, stated that at no time on that date did Mr. Toner raise his voice or point his finger while talking to appellant.

An October 6, 2005 note from Dr. Peter Kotcher, an employing establishment physician, stated that on October 5, 2005 she received appellant's note indicating that a patient made homicidal threats while on the telephone with her. Dr. Kotcher noted that he had contact with the patient on October 4, 2005 and telephoned him again on October 5, 2005. He requested that the patient be taken into custody for a psychiatric evaluation. The patient telephoned Dr. Kotcher, vehemently denying that he made any threatening statements to appellant and that he had no intent of committing a violent act. He said that he was taken to the hospital by eight policemen and released at 2:30 a.m. Dr. Kotcher stated that, during his years of knowing the patient, he did not think or know him to be a violent man.

By decision dated March 27, 2006, the Office denied appellant's traumatic injury claim, finding that she did not sustain a physical condition while in the performance of duty. The factual evidence of record was insufficient to establish a verbal altercation on October 5, 2005 as alleged. The medical evidence of record failed to establish that appellant sustained a medical condition causally related to the October 5, 2005 incident.

On March 31, 2006 appellant requested reconsideration of the Office's March 27, 2006 decision.

In a March 8, 2006 letter, Mr. Toner admonished appellant for failing to follow leave procedures. She left the employing establishment prior to the end of her tour of duty without requesting leave on March 7, 2006. In a March 13, 2006 letter, Joseph L. Jones, union president, stated that on that date he witnessed appellant being interviewed by Mr. Toner. Mr. Jones questioned him about whether appellant left the employing establishment or just went to her car. Mr. Toner stated that she was observed going to her vehicle but not departing the property. On March 13, 2006 appellant filed an administrative grievance regarding the letter of admonishment. She stated that, due to her physical disability, it was standard procedure for her to take her personal belongings to her car, which was parked in the handicapped parking lot and drive it to the security parking lot for accessibility and safety reasons. Appellant alleged that she was bullied and interrogated as to whether she transported government documents, such as patient records to her car. The employing establishment denied her request for a list of coworkers who allegedly reported her.

In an April 21, 2006 statement, appellant alleged that John Scheper, a coworker, stated that he had observed Mr. Toner lose it, freak out, jump at everybody for no reason, make assumptions and administer punishment before facts were established. Appellant alleged that

she was instructed by Judy Pflaumer, an employing establishment nurse, and Dr. Karen Barnes, an employing establishment physician, to turn Mr. Toner in to the social work board immediately.

On June 6, 2006 the Office doubled appellant's claims into a master case file assigned number 09-20652676 since they involved the October 5, 2005 incident.

In a May 25, 2006 email message, Mr. Toner reiterated that appellant had always been treated with patience and respect and that management had tried to accommodate her. A May 25, 2006 email message from Helene Dreibelbis, an employing establishment employee, stated that the atmosphere during the March 13, 2006 meeting was professional in nature and appellant was not bullied or mistreated in any manner. In a May 25, 2006 email message, Mr. Gilligan related that he had worked with Mr. Toner from 1981 to 1990. He stated that, during his entire association with Mr. Toner, he was impressed with his professional skills and demeanor. Mr. Gilligan considered Mr. Toner to be a model of a consummate professional social worker. He was an honest and hardworking individual who performed his duties without bias or prejudice. Mr. Gilligan had not heard any type of complaint from anyone, patient or staff member about Mr. Toner's behavior. He stated that he never discussed Mr. Toner with appellant at any time. They only discussed expanding union coverage to professional and/or supervisory personnel.

By decision dated May 23, 2006, an Office hearing representative affirmed the denial of appellant's claims. The hearing representative found that the evidence of record failed to establish: that the employing establishment committed error or abuse in reprimanding appellant on October 5, 2005; that Mr. Toner had verbally abused appellant during this meeting; or that she was subjected to years of harassment at the employing establishment.

By decision dated June 12, 2006, the Office modified the March 27, 2006 decision to reflect that appellant was reprimanded by Mr. Toner on October 5, 2005. It found, however, that the incident did not constitute a compensable factor of employment as appellant failed to establish that Mr. Toner committed error or abuse in this administrative matter. The Office also found that the evidence of record failed to establish that appellant was verbally abused by Mr. Toner.

LEGAL PRECEDENT

A claimant 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 factors of her federal employment.¹ To establish that she sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder;

¹ *Pamela R. Rice*, 38 ECAB 838 (1987).

and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.²

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*,³ 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.⁴ 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.⁵ 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 and 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.⁶ 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.

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 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

Where the disability results from an employee's emotional reaction to his or 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.⁹ Generally,

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ 28 ECAB 125 (1976).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

⁶ *Lillian Cutler*, *supra* note 3.

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

⁸ *Id.*

⁹ *Lillian Cutler*, *supra* note 3.

actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.¹⁰ However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹¹

ANALYSIS

Appellant attributes her emotional condition to verbal abuse by Mr. Toner on October 5, 2005 when she was reprimanded for failing to report a telephone call she had received from a psychiatric patient who allegedly threatened to kill staff members. She contends that he used derogatory language, shook a finger in her face and yelled at her. Appellant also attributed her emotional condition to receiving a letter of admonishment from Mr. Toner for failing to follow leave procedures on March 7, 2006 before the end of her tour of duty. She alleged that she was bullied and interrogated during the meeting on March 13, 2006 regarding this disciplinary action and filed a grievance. The Board notes that the disciplinary actions involve an administrative function of appellant's supervisor and not the employee's regular or specially assigned work duties.¹² The filing of a grievance related to the issuance of the admonishment letter and meeting also involves an administrative matter.¹³ Dr. Kotcher stated that although he did not know the patient to be a violent person, he requested that the patient be taken into custody for a psychiatric evaluation based on appellant's report of homicidal threats. The patient was subsequently released. Mr. Toner denied verbally abusing appellant on October 5, 2005 when he discussed the matter with her. He stated that he reprimanded her in a normal tone of voice and believed that the reprimand was appropriate as she failed to immediately inform him about a threat to harm staff members. Mr. Toner noted that appellant was treated with respect when she was given prior verbal reprimands for problematic or unprofessional behavior. Ms. Jones stated that she observed Mr. Toner and appellant on that day. She noted that Mr. Toner used an appropriate tone of voice in reprimanding appellant. Officer Reeves, also present that day, stated that at no time did Mr. Toner raise his voice or point his finger while talking to appellant. Mr. Gilligan stated that he never discussed Mr. Toner with appellant. He only asked her about signing a petition to extend union representation to professional employees. Ms. Wilburn stated that on October 5, 2005 Mr. Toner and appellant were having a normal conversation even though she did not hear what they were saying. Although appellant alleged that Mr. Scheper had observed Mr. Toner on many occasions, she did not submit a statement from Mr. Scheper to support her allegations. Her allegations as to what he stated are not substantiated in the record.

Regarding the March 13, 2006 meeting, Ms. Dreibelbis stated that the atmosphere of the meeting was professional and appellant was not bullied or mistreated in any manner. Mr. Jones was present at the meeting but did not report any abusive behavior by Mr. Toner in interviewing appellant. Mr. Toner clarified that appellant was observed on March 7, 2006, going to her car

¹⁰ *Michael L. Malone*, 46 ECAB 957 (1995).

¹¹ *Charles D. Edwards*, 55 ECAB 258 (2004).

¹² 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).

¹³ *Diane C. Bernard*, 45 ECAB 223 (1993).

and not leaving the employing establishment's premises. Appellant explained that she did not leave the employing establishment but was following standard procedure in putting her belongings in her car. The record does not contain any evidence that Mr. Toner erred or acted abusively in issuing the admonishment letter.

Based on the statements of Mr. Toner, Dr. Kotcher, Ms. Jones, Officer Reeves, Mr. Gilligan and Ms. Dreibelbis, the Board finds that appellant has not established error or abuse on the part of the employing establishment in disciplining her for failing to report a threat or request leave.

Appellant further alleged years of harassment at the employing establishment. She stated that grievances were constantly filed by employees regarding labor problems. Appellant noted that outside investigations took place in 2004 and 2005 which resulted in the removal of certain personnel. However, there is no evidence to substantiate harassment in any such action. She stated that Mr. Toner harassed her for two to three months despite her request asking him to stop. Appellant contends that Mr. Toner instructed his administrative assistant to harass her by calling her every morning to make sure she was at her desk, probe her health status and inquire about her attendance before a meeting. She alleged that she was reprimanded for whistle blowing, removed from the position of director and her office was relocated and she was given a defective computer. Appellant related that Mr. Toner scolded her for not being in her chair at 9:00 a.m., for her physical limitations and need for medical accommodation and for taking a lunch break without assigning someone to cover for her. The Board notes that harassment and verbal abuse when shown to have occurred is considered a compensable factor of employment. However, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.¹⁴

Appellant did not provide evidence to substantiate her allegations that she was harassed by Mr. Toner's administrative assistant, improperly reprimanded for whistle blowing, for her physical limitations, failing to be at her desk at an appointed time or to provide coverage during her absence. Although appellant alleged that a union representative told her about a derogatory comment, she did not provide a statement from the representative to corroborate the statement. Similarly, appellant alleged that Ms. Pflaumer and Dr. Barnes advised her to turn Mr. Toner in to the social work board for harassment. Again, she did not provide statements from these individuals to substantiate her allegation of harassment. The Board finds that appellant has not established a factual basis for her perceptions of harassment by Mr. Toner as she did not provide any probative evidence that harassment occurred.¹⁵ Therefore, she did not establish a compensable employment factor with respect to harassment.¹⁶

¹⁴ *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).

¹⁵ *James E. Norris*, 52 ECAB 93 (2000).

¹⁶ See *Jamel A. White*, 54 ECAB 224 (2002).

Appellant alleged that she was asked to serve as Mr. Toner's secretary despite being a social worker and that no other social worker was asked to work in this position. An employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, outside the scope of coverage of the Act. This principle recognizes that a supervisor or manager, in general, must be allowed to perform their duties and that employees will at times dislike the actions taken.¹⁷ Furthermore, mere disagreement or dislike of a supervisory or management action will not be compensable without a showing through supporting evidence that the incidents or actions complained of were unreasonable.¹⁸ The evidence substantiates that Mr. Toner asked appellant to work as his secretary due to a staff shortage during the holiday season. He further asked her to coordinate social work interventions because a patient was confused as to who had been assigned as his social worker. As there is no evidence of record to substantiate appellant's allegations that Mr. Toner acted unreasonably in making these requests. The Board finds that she failed to establish a compensable factor of employment under the Act.

CONCLUSION

As appellant has not identified any compensable factors of her employment, the Board finds that she has failed to establish that she sustained an emotional condition while in the performance of duty.¹⁹

¹⁷ *Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁸ *Id.*

¹⁹ As appellant has not submitted the necessary evidence to substantiate a compensable factor of employment as the cause of her emotional condition, the medical evidence relating appellant's emotional condition need not be addressed. *Karen K. Levene*, 54 ECAB 671 (2003).

ORDER

IT IS HEREBY ORDERED THAT the June 12 and May 23, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 31, 2007
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