

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

D.O., Appellant)
and) Docket No. 07-590
U.S. POSTAL SERVICE, POST OFFICE,) Issued: June 6, 2007
Chicago, IL, 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 December 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 25, 2006 merit decision denying her emotional condition claim. 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 sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On April 28, 2004 appellant, a 49-year-old customer service supervisor, filed a traumatic injury claim alleging that she sustained a stress-related injury on April 27, 2004, when one of her employees threatened her life by stating, "You're going down," and another employee took her picture without her consent. She alleged that both employees had been rude, disrespectful and obnoxious in the past and had acted in a threatening manner toward her.

This is the second time this case has been before the Board. By decision dated August 7, 2006, the Board set aside the Office's December 9, 2005 decision denying appellant's request for reconsideration as untimely and failing to establish clear evidence of error. The Board found that appellant's request was timely filed and remanded the case to the Office for review under the proper standard.¹ The findings of fact and conclusions of law are hereby incorporated by reference.

Appellant initially submitted several reports from her treating physicians. On April 29, 2004 Dr. Joseph R. Eraci, a treating physician, opined that appellant could not return to work because of fear. On May 13, 2004 Dr. John Ghesquiere, a treating physician, diagnosed "acute stress reaction to occupational stress." In a June 15, 2004 report, Virginia M. Stack, a licensed clinical professional counselor, opined that appellant suffered from post-traumatic stress disorder (PTSD) as a direct consequence of having been threatened while at work on April 27, 2004 by a mail carrier and by being photographed by another employee. In a June 29, 2004 attending physician's report, Dr. Ghesquiere noted that on April 27, 2004 appellant had been physically threatened by subordinates, and that another employee had photographed her on that day. He provided a diagnosis of acute stress disorder.

By decision dated August 5, 2004, the Office denied appellant's claim, finding that the evidence submitted was insufficient to establish that she had sustained an emotional condition in the performance of duty. Specifically, the Office determined that the evidence of record failed to demonstrate that the incidents occurred at the time, place and in the manner alleged.

On September 13, 2004 appellant requested reconsideration. In support of her request, she submitted a "Report of Unusual Occurrence" dated April 27, 2004 and signed by Theresa Crayton, customer service manager, who stated that, on that date, appellant reported to her that Juan Trevino had threatened her by saying to her, "You're going down." Appellant also reported that Sheville Goss took her picture twice without permission. She stated that she felt intimidated by these actions and that she left work despondent.

The record contains a statement from Mr. Trevino, who indicated that, on April 27, 2004, he overheard appellant call Ms. Goss a "mother-fuckin' bitch." He stated that he then told appellant that she "was going down." He stated, "I said that meaning the EEO case that I have against her."

In an April 27, 2004 statement, Ms. Goss indicated that she took appellant's picture for Kim Latiker's photo album. She also stated that as she walked away, she heard appellant call her a "mother-fucking bitch."

By decision dated December 6, 2004, the Office denied modification of its August 5, 2004 decision. On September 12, 2005 the Office reissued its December 6, 2004 decision.²

¹ Docket No. 06-1106 (issued August 7, 2006).

² In its August 7, 2006 decision, the Board found that the December 6, 2004 decision was effectively reissued when it was mailed to appellant on September 12, 2005, as the Office gave proper notice to appellant of its decision for the first time on that date. Docket No. 06-1106 (issued August 7, 2006).

On December 9, 2005 appellant requested reconsideration of the December 6, 2004 decision which was reissued on September 12, 2005.

In a letter dated November 20, 2005, appellant reiterated her allegations that the threats made by Mr. Trevino and the actions of Ms. Goss caused her acute PTSD. She denied allegations that she had verbally assaulted Ms. Goss and contended that Ms. Goss and Mr. Trevino had conspired to demean her character of professionalism. Appellant stated that Mr. Trevino's actions were a serious violation of the policies of the employing establishment and that she had filed an assault complaint with the Chicago police.

By decision dated March 3, 2006, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error. Appellant requested review by the Board.

On August 7, 2006 the Board found that appellant's December 9, 2005 request for reconsideration was timely filed and had been improperly reviewed under the "clear evidence of error standard." The Board remanded the case to the Office for review under the proper standard.

By decision dated October 25, 2006, the Office modified its August 5, 2004 decision to reflect that the work events alleged did, in fact, occur, namely that unauthorized pictures were taken, and that a coworker stated, "You're going down." However, the Office found that the accepted incidents were not compensable factors of employment.

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, a claimant 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.³

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 the 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.⁴ The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of appellant's work, or her fear and anxiety regarding her ability to carry out her duties.⁵ By contrast, there are

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

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Lillian Cutler*, 28 ECAB 125, 129 (1976).

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 a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.⁶ Moreover, although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Thus, the Board has held that reactions to actions taken in an administrative capacity are not compensable unless it is shown that the employing establishment erred or acted abusively in its administrative capacity.⁷

When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment, which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed factors of employment and may not be considered. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.⁸ When the matter asserted is a compensable factor of employment and the evidence of record establish the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence.⁹ As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim but rather must be corroborated by the evidence.¹⁰

Generally, 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.¹¹ 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.¹² An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.¹³ Likewise, an employee's dissatisfaction with perceived poor management is not compensable under the Act.¹⁴

⁶ *Id.*; see also *Peter D. Butt, Jr.*, 56 ECAB ____ (Docket No. 04-1255, issued October 13, 2004).

⁷ See *Charles D. Edwards*, 55 ECAB 528 (2000).

⁸ *Margaret S. Krzycki*, 43 ECAB 496 (1992).

⁹ See *Charles D. Edwards*, *supra* note 7.

¹⁰ *Charles E. McAndrews*, 55 ECAB 711 (2004); see also *Arthur F. Hougens*, 42 ECAB 455 (1991) and *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

¹¹ *Felix Flecha*, 52 ECAB 268 (2001).

¹² *James E. Norris*, 52 ECAB 93 (2000).

¹³ *Barbara J. Latham*, 53 ECAB 316 (2002).

¹⁴ *Id.*

With regard to emotional claims arising under the Act, the term harassment as applied by the Board is not the equivalent of harassment as defined or implemented by other agencies, such as the Equal Employment Opportunity Commission (EEOC), which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term harassment is synonymous, as generally defined, with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by co-employees or coworkers. Mere perceptions and feelings of harassment will not support an award of compensation.¹⁵

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. 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.¹⁶

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment.¹⁷ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.¹⁸

ANALYSIS

Appellant has alleged that harassment by co-workers, including subordinates, contributed to her claimed emotional condition. The Board finds that appellant has not established any compensable factors of employment under the Act.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by coworkers and supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.¹⁹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.²⁰ In the present case, appellant

¹⁵ *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁶ *James E. Norris*, *supra* note 12.

¹⁷ See *Charles D. Edwards*, *supra* note 7.

¹⁸ *Ronald K. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005). See also *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

¹⁹ See *Lori A. Facey*, 55 ECAB 217 (2004). See also *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

²⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

has not submitted sufficient evidence to establish her claim.²¹ She alleged that Ms. Goss and Mr. Trevino had conspired to demean her character of professionalism. Appellant alleged that both employees had been rude, disrespectful and obnoxious in the past, and had acted in a threatening manner toward her. Her allegations alone are insufficient to establish a factual basis for her claim.²² Appellant has submitted no evidence, such as witness statements, to corroborate her claims. General allegations that she was treated disrespectfully are insufficient to establish that harassment did, in fact, occur. Thus, the Board finds that appellant has not established a compensable employment factor under the Act with respect to these above-described allegations.

In the present case, appellant has not attributed her emotional condition to the performance of her regular duties or to any special work requirement arising from her employment duties under *Cutler*.²³ She did not implicate her workload as having caused or contributed to her emotional condition. Rather, appellant contended that she experienced severe stress as a result of being threatened by Mr. Trevino and photographed by Ms. Goss. In its October 25, 2006 decision, the Office accepted that the work events alleged did, in fact, occur, namely that unauthorized pictures were taken, and that a Mr. Trevino stated, “You’re going down.” However, the Office found that the accepted incidents were not compensable factors of employment. The Board concurs.

Ms. Goss stated that she took appellant’s picture for a coworker’s photo album. There is no evidence of record establishing that Ms. Goss posed any type of harm, or that she threatened appellant in any way, when she photographed her on the workroom floor. While Ms. Goss may have violated postal policy, her action did not rise to the level of abuse or harassment.

The Board also finds that the statement made by Mr. Trevino did not rise to the level of coverage under the Act. He stated that, on April 27, 2004, he told appellant that she “was going down,” after he overheard her call Ms. Goss a “mother-fuckin’ bitch.” Mr. Trevino explained that he was referring to the EEO case that was pending against appellant. There is no evidence of record indicating that he was not referring to the EEO case; nor is there any evidence supporting appellant’s contention that Mr. Trevino intended to harm her. While the Board has recognized the compensability of verbal abuse in certain situations, this does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.²⁴ While appellant may not have appreciated the manner and tone of Mr. Trevino’s remark, the Board finds that his statement did not constitute verbal abuse or harassment under the Act.²⁵

Appellant reported that she felt intimidated by the actions of Ms. Goss and Mr. Trevino, and that she left work despondent. However, under the circumstances of this case, the Board

²¹ 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).

²² *Charles E. McAndrews*, *supra* note 10.

²³ *Lillian Cutler*, *supra* note 5.

²⁴ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995).

²⁵ See *Denis M. Dupor*, 51 ECAB 482, 486 (2000).

finds that appellant's emotional reaction must be considered self-generated, in that it resulted from her perceptions regarding her subordinates' actions.²⁶

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.²⁷

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 6, 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

²⁶ See *David S. Lee*, 56 ECAB ____ (Docket No. 04-2133, issued June 20, 2005).

²⁷ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Margaret S. Krzycki*, *supra* note 8.