United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 06-1263**
	)	**Issued: May 3, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

Appearances:
Gregory A. Hall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 20, 2006 merit decision concerning the rescission of the Office's acceptance of her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly rescinded its acceptance of appellant's emotional condition claim.

FACTUAL HISTORY

On November 17, 2003 appellant, then 44-year-old postal worker, filed an occupational disease claim alleging that she sustained an emotional condition due to various incidents and conditions at work. She stopped work on November 17, 2003.[1]

In a January 14, 2004 statement, appellant alleged that after Lloyd Wilkinson, the Denver postmaster, arrived in 2002 she was improperly stripped of all her work duties, transferred to a different work location and placed on a schedule that caused her "great personal hardship." She claimed that she was placed in a "do-nothing job" and that she spent her shift "on display" as an example to her coworkers to not become disabled. Appellant asserted that management openly discussed her private medical information regarding her foot injury and work restrictions and that several managers, including Mr. Wilkinson, Elaine Bullock and Julie Joy Rodriguez, used "derogatory language" to refer to her disabling condition, including referring to her as "flat on my back on a stretcher."[2] She alleged that on several occasions management wrongly accused her of refusing to provide updated medical evidence and asked her to go to her physicians to change her work restrictions in order to accommodate the employing establishment's needs.

Appellant claimed that on March 6, 2003 she received an involuntary reassignment to the Capitol Hill Annex. When she complained to management that the reassignment was discriminatory and in violation of union rules, she was told that she could quit if she did not like the position. Appellant asserted that she was the only employee at the Capitol Hill Annex who worked a 10:00 a.m. to 7:00 p.m. shift with a rotating day off and that no other employee was required to take a one-hour lunch. She claimed that Pat Mitchell, a supervisor, refused to change her work schedule and that Mr. Wilkinson refused to authorize her request for a transfer to another position despite the fact that she was qualified for the position. Appellant alleged that her new job at the Capitol Hill Annex had "absolutely no responsibilities" and that Mr. Mitchell intimidated her by ignoring her, "talking down" to her, looking away whenever she saw him and "blowing" her off when she wished to discuss work matters.

At some point after October 13, 2003, Mr. Mitchell told her that he did not care that she was doing nothing and that other managers failed to respond to her concerns that she had nothing to do. Appellant alleged that her work schedule was intended to disrupt her home life in an attempt to get her to quit. She asserted that, in late October 2003, Mr. Mitchell allowed her to work a better schedule while another employee was away, but that on November 5, 2003 Joelle Roybal, management's step two grievance designee, contacted Mr. Mitchell and told him to stop her from performing the job. Appellant claimed that she was instructed to sit down and "not do anything" except answer the telephone, but that the telephone seldom rang. She asserted that "within five minutes" Mr. Mitchell called her into his office and told her to not even answer the telephone.

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[1] The Office had previously accepted that appellant sustained employment-related bilateral plantar fascial fibromatosis in 1995.

[2] Appellant alleged that Ms. Rodriguez used derogatory language when discussing her condition with her union representative.

Appellant alleged that on November 5, 2003 she asked Mr. Mitchell for written verification that he had instructed her to not do anything. She claimed that Mr. Mitchell became very angry and asked in an intimidating manner, "Do you think that I would deny that I instructed you to do nothing?" and that on a later date he asked, "Should I even allow this woman in the building with restrictions like that?" when he was talking to someone else about her work restrictions. Appellant asserted that on November 6, 2003 Danny Savantes, a manager, told her that his request to have her fill a position in his office was denied by Mr. Wilkinson. She claimed that Mr. Mitchell directed one of his supervisors, Jim Davey, to tell her to leave the workroom floor and that Mr. Davey stated: "I have been instructed to tell you that you are not to be on the workroom floor, you are to stay in that office." Appellant stated: "Clearly management was torturing me by forcing me [to] stay in a small room doing nothing all day. Now I was not to speak to anyone and no one was to speak to me."

Appellant submitted numerous reports from attending physicians who indicated that she suffered from depression and anxiety. Several physicians indicated that appellant reported that she was humiliated by the fact that she was not given anything to do at work.

In May 2004, the Office accepted that appellant sustained employment-related depression, anxiety and stress disorder. Regarding the accepted employment factors, "The work area provided by the employer was a small room with a [tele]phone. You were instructed to stay in the room and answer the [tele]phone, which seldom rang. Later, [Mr.] Mitchell called you into his office and told you not to answer the [tele]phone." A statement of accepted facts dated May 17, 2004 indicated that the following work factors were accepted: "Management forced the claimant to stay in a small room doing nothing all day," "[o]n March 22, 2003 the claimant was assigned to Capitol Hill Annex where she had no responsibilities," "[t]he claimant was instructed to not do anything except answer the telephone, which seldom rang" and "[Mr.] Mitchell called the claimant into his office and told her to not even answer the [tele]phone."

On June 14, 2004 the Office noted that the employing establishment had not been given an opportunity to respond to the allegations appellant made in connection with her emotional condition claim and that it would be given an opportunity to do so. In a June 24, 2004 letter, an employing establishment official relayed comments that were made by various managers in response to appellant's allegations. Mr. Wilkinson denied that there was anything improper about appellant's transfer to the Capitol Hill Annex or her work schedule there. Appellant was given administrative duties to perform at the Capitol Hill Annex and that she was never told to do nothing or placed on display. Mr. Wilkinson indicated that, for a brief period of one day, the station master asked appellant to wait in her supervisor's office until telephone calls could be made to clarify whether she could perform her administrative duties.[3]

Mr. Wilkinson, Ms. Bullock and Ms. Rodriguez denied that they openly discussed appellant's private medical information. Ms. Bullock acknowledged that she referred to appellant being flat on her back on a stretcher but indicated that she meant nothing derogatory by the statement; only that she had never seen an employee with such severe work restrictions. Ms. Rodriguez denied that she used derogatory language when discussing appellant's condition

[3] This was done after appellant submitted a medical restriction form that indicated that she could not lift, stand, walk, climb, kneel, bend, stoop, twist, push or pull.

with her union representative. Mr. Mitchell indicated that he placed appellant on the 10:00 a.m. to 7:00 p.m. schedule because he needed someone to support the evening supervisor and that working this shift did not violate management's contract with the union. He denied that he ignored appellant, talked down to her or told her to do nothing.

Mr. Mitchell indicated that when he allowed appellant to take over the work schedule of a coworker who was away, she told him that she could perform the work duties. He indicated that after Ms. Roybal apprised him that appellant had very stringent work restrictions he asked appellant, for her own safety, to wait in an office for part of one day while he obtained clarification regarding her work restrictions. Mr. Mitchell indicated that her office measured 10 feet by 20 feet. Appellant's duties at the Capitol Hill Annex included making address changes, checking forwarded mail, answering telephones, preparing registrars and express mail and checking improperly sorted and sent mail.

In a June 28, 2004 statement, Mr. Mitchell stated that he removed appellant from the position that she took over from a coworker after he learned that appellant's work restrictions prevented her from performing the position. He noted that two other employees also worked the 10:00 a.m. to 7:00 p.m. shift. Mr. Mitchell asserted that after he was apprised of appellant's work restrictions, he asked her to not perform her assigned duties for a brief period while he sought clarification regarding her ability to work. He indicated that appellant spent an hour or so in his office while he sought clarification and that she spent the rest of the day and the next day in another office as he had not yet received clarification. Mr. Mitchell indicated that appellant was not placed "on display" in this office as it was away from the workroom floor.

In a September 29, 2004 letter, the Office advised appellant of its proposal to rescind its prior acceptance of her emotional condition claim. The Office described each of appellant's claimed employment factors and made reference to Board precedent to explain why none of them had been established as actual employment factors. The Office made reference to the employing establishment's comments in connection with this discussion. It noted that these comments showed that management had not subjected appellant to harassment or discrimination or committed error or abuse with respect to such administrative matters as transfers or work schedules or assignments. The Office stated that it was not unreasonable to have appellant wait briefly in an office while clarification was obtained regarding her ability to work and, therefore, the employing establishment did not commit error or abuse with respect to this administrative matter.

In an October 27, 2004 letter, appellant alleged that between March and November 2003 she was forced "to sit and do nothing" and was "mocked and ostracized" by coworkers. In an October 25, 2004 statement, Brenda Montoya, a coworker, indicated that she felt it was improper for appellant to be transferred to the Capitol Hill Annex. She asserted that a manager took away appellant's duties and forced her to sit in a room and do nothing unless her physician changed her work restrictions. Ms. Montoya indicated that appellant pleaded with managers to give her work duties but they ignored her. In an October 25, 2004 statement, Linda Temple, a coworker and union official, indicated that Mr. Mitchell stated to her that he was not happy about appellant coming to the Capitol Hill Annex due to her work restrictions. She asserted that appellant's reassignment was improper and that appellant complained that her duties were taken away from her and she was told to sit in an office and do nothing for several weeks.

In a February 22, 2005 decision, the Office rescinded its acceptance of appellant's emotional condition claim. The Office described each of appellant's claimed employment factors, as well as the employing establishment's responses to these allegations and made reference to Board precedent to explain why none of them had been established as actual employment factors. The Office indicated that the statements of Ms. Montoya and Ms. Temple did not serve to establish appellant's claims. It determined that the evidence of record did not show that management had subjected appellant to harassment or discrimination or committed error or abuse with respect to such administrative matters as transfers or work schedules or assignments. The Office found that because this analysis had shown that appellant had not established any compensable employment factors it was appropriate to rescind its prior acceptance of appellant's emotional condition claim.

In its February 22, 2005 decision, the Office indicated that appellant's claims that she was improperly transferred to the Capitol Hill Annex, that she was given an improper work schedule and that she was not given any work duties to perform all related to administrative functions of management and would not be considered employment factors in the absence of error or abuse by the employing establishment. The Office determined that appellant did not submit sufficient evidence to show that errors occurred with respect to her transfer or work schedules or assignments. It indicated that several supervisors, including Mr. Wilkinson and Mr. Mitchell, denied that any error or abuse occurred with respect to these matters. The Office stated that management countered appellant's claims of being placed in a "do-nothing job" by describing various administrative duties that she performed.

The Office indicated in its February 22, 2005 decision that Mr. Wilkinson and other supervisors, including Mr. Mitchell, Ms. Bullock and Ms. Rodriguez, denied that they openly discussed appellant's private medical information, subjected her to derogatory language, ignored her or talked down to her. It noted that Ms. Bullock acknowledge that she referred to appellant being flat on her back on a stretcher but the statement only meant to indicate that she had never seen an employee with such severe work restrictions. The Office noted that harassment and discrimination had to be established by substantive evidence, but that appellant did not submit such evidence and the statements of management officials tended to show that the claimed harassment and discrimination did not occur.

The Office further indicated in its February 22, 2005 decision that Mr. Wilkinson did not commit error or abuse when he failed to chose appellant for a particular position and that Mr. Mitchell also did not commit error or abuse when he removed her from a position which she took over from another employee. Mr. Mitchell stated that he took such action after being advised by another employing establishment official of appellant's stringent work restrictions. He asked appellant not to perform her assigned duties for a brief period while he sought clarification regarding her ability to work and that she spent a brief period in an office while he sought such clarification. The Office determined that Mr. Mitchell acted reasonably in carrying out this administrative function which related to the management of work assignments.

Appellant requested an oral hearing before an Office hearing representative. At the November 15, 2005 hearing, she provided additional details regarding her allegations that managers and coworkers committed harassment and discrimination and that management committed error and abuse with respect to various administrative matters, including work

assignments and transfer and leave requests. She claimed that the Office did not adequately consider the statements of her coworkers.

Appellant submitted documents pertaining to a grievance she filed in connection with her allegation that she was given no work to do as a form of harassment. In a January 10, 2006 letter, appellant's attorney provided additional argument in support of her claim. The employing establishment submitted a December 21, 2005 letter, which again challenged her allegations. It noted that the work restrictions of Ms. Montoya were much less restrictive than those of appellant and indicated that each employee's ability to work should be judged on its own merits.

In a decision dated and finalized January 20, 2006, the Office hearing representative affirmed the February 22, 2005 decision. She indicated that the Office had provided sufficient rationale for its determination that appellant had not established any compensable employment factors and, therefore, properly supported the rescission of its prior acceptance of her emotional condition claim.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[4] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[5] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[6]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that, its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[7]

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 Act. On the other hand, the

[4] 5 U.S.C. § 8128.

[5] *John W. Graves*, 52 ECAB 160, 161 (2000).

[6] *See* 20 C.F.R. § 10.610.

[7] *John W. Graves*, *supra* note 5.

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] An employee 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.[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] When an employee does not establish any compensable employment factors, the Office need not consider the medical evidence of record.[11]

Although the handling of job transfers, the management of work assignments and schedules and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] However, the Board has also found that 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. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13]

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[14] 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.[15]

ANALYSIS

The Office accepted in May 2004 that appellant sustained employment-related depression, anxiety and stress disorder. In connection with this acceptance, the Office determined that appellant established several employment factors, including the following: "Management forced the claimant to stay in a small room doing nothing all day," "[o]n March 22, 2003 the claimant was assigned to Capitol Hill Annex where she had no

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

[9] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[10] *Id.*

[11] *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[12] *Id.*

[13] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

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

[15] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

responsibilities," "[t]he claimant was instructed to not do anything except answer the [tele]phone, which seldom rang," and "[Mr.] Mitchell called the claimant into his office and told her to not even answer the [tele]phone." The Office reopened the case, noting that it accepted the claim based on appellant's allegations only without providing an opportunity for the employing establishment to comment on her assertions.

The Board finds that the Office provided an extensive discussion of why it determined that appellant had not established any compensable employment factors and provided sufficient support for its finding that there was an adequate basis to rescind its prior acceptance of appellant's emotional condition claim. The Board has carefully reviewed the Office's analysis of appellant's allegations regarding employment factors and finds that the Office properly described the relevant Board precedent and properly interpreted and applied the evidence of record to that precedent.[16]

In its February 22, 2005 decision to rescind its prior acceptance of appellant's emotional condition claim, the Office described each of appellant's claimed employment factors, as well as the employing establishment's responses to these allegations and made reference to Board precedent to explain why none of them had been established as actual employment factors. It determined that the evidence of record did not show that management had subjected appellant to harassment or discrimination or committed error or abuse with respect to such administrative matters as transfers or work schedules or assignments. The Office indicated that the evidence and argument submitted by appellant, including the statements of Ms. Montoya and Ms. Temple did not serve to establish appellant's claims.

The Office discussed appellant's claims that she was improperly transferred to the Capitol Hill Annex, that she was given an improper work schedule, that she was wrongly denied a transfer to another job and that she was not given any work duties to perform. It correctly discussed Board precedent which showed that such administrative duties would not be considered employment factors in the absence of error or abuse by the employing establishment.[17] The Office properly determined that appellant did not submit sufficient evidence to show that wrongdoing occurred with respect to these matters, particularly since management statements countered a number of her claims.[18] The Office also properly found that Mr. Mitchell, a supervisor, did not commit error or abuse when he removed appellant from a position which she took over from another employee, asked her not to perform her assigned duties for a brief period while he sought clarification regarding her ability to work and had her

[16] As noted above, to establish an emotional condition claim, a claimant must establish compensable employment factors and present medical evidence showing that one or more of those factors contributed to the claimed condition. When an employee does not establish any compensable employment factors, the Office need not consider the medical evidence of record. *See supra* notes 8 through 11 and accompanying text.

[17] *See supra* notes 12 and 13 and accompanying text regarding the evaluation of administrative matters as employment factors.

[18] For example, management countered appellant's claims of being placed in a "do-nothing job" by describing various administrative duties that she performed. Ms. Montoya and Ms. Temple indicated in their statements that appellant was not given any job duties. However, these statements are of limited probative value in that they appear to be based on appellant's complaints rather than any direct observance of her work situation over time.

spend a brief period in an office while he sought such clarification.[19] The Office noted that Mr. Mitchell had testified that he only took such action after being advised by another employing establishment official of appellant's stringent work restrictions and that he acted out of concern for appellant's safety.[20] Therefore, the Office properly determined that Mr. Mitchell acted reasonably in handling this administrative matter.

The Office indicated that harassment and discrimination had to be established by substantive evidence, but that appellant did not submit such evidence and the statements of management officials tended to show that the claimed harassment and discrimination did not occur.[21] These supervisors testified that they did not openly discuss appellant's private medical information, subject her to derogatory language, ignore her or talk down to her. The Office noted that Ms. Bullock admitted that she referred to appellant being flat on her back on a stretcher but indicated that she meant nothing derogatory by the statement and only meant to indicate that she had never seen an employee with such severe work restrictions. The Office properly found that such a comment was not abusive and would not rise to the level of harassment.[22]

For these reasons, the Office provided a clear explanation of the rationale for its rescission of its prior acceptance of appellant's emotional condition claim.[23]

CONCLUSION

The Board finds that the Office properly rescinded its prior acceptance of appellant's emotional condition claim.

[19] The Office noted that the facts it had previously accepted regarding this series of events was not accurate.

[20] It appears that appellant spent a day or two in the room and that she was not placed "on display" as alleged as the room was not near the workroom floor. She described the room as small, but Mr. Mitchell indicated that it was 10 feet by 20 feet.

[21] *See supra* notes 14 and 15 and accompanying text regarding the evaluation of harassment and discrimination as employment factors.

[22] The Board has recognized the compensability of 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. *See Mary A. Sisneros*, 46 ECAB 155, 163-64 (1994); *David W. Shirey*, 42 ECAB 783, 795-96 (1991). The Office properly noted that because appellant had not established any employment factors it was not necessary to examine the medical evidence of record.

[23] *See supra* note 7 and accompanying text.

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 20, 2006 decision is affirmed.

Issued: May 3, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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