United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
and	)	**Docket No. 07-947**
	)	**Issued: September 11, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Tulsa, OK, Employer	)	

Appearances:
C.B. Weiser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2007 appellant filed a timely appeal from a November 16, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration and a September 7, 2006 decision denying her emotional condition claim. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained an emotional condition in the performance of duty causally related to her federal employment; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On July 27, 2006 appellant, then a 55-year-old supervisor, filed a traumatic injury claim alleging that she sustained psychological trauma on July 10, 2006 when she was attacked by

Barry Burke, a supervisor, and John Ferrante, the station manager. She alleged that management created an unsafe and hostile environment. Appellant stopped work on July 10, 2006. It is unclear whether she returned to work.

On August 7, 2006 the Office notified appellant that the evidence submitted was not sufficient to establish her claim. It requested a detailed description as to how her injury occurred; a statement from any persons who witnessed her injury or had immediate knowledge of it or other documentation which supported her claim; a statement regarding the immediate effects of the injury and what she did thereafter; a statement of whether she sustained any other injury on or off-duty; and a medical report which described symptoms, treatment and an explanation as to how the alleged work incidents or exposure contributed to her condition.

Appellant responded with a detailed account of the July 10, 2006 incident. She stated that she was attending a staff meeting in Mr. Ferrante's office when Mr. Burke began to scream and yell at her in a threatening voice. Appellant alleged that Mr. Burke threw an overtime tracking report at her and that it hit her left hand. She feared for her life due to Mr. Burke's history of irate and uncontrollable behavior in staff meetings and on the workroom floor. Appellant noted that Mr. Burke's behavior had been reported to the Crisis Intervention Team but nothing was done. She got up to leave the room and told Mr. Ferrante that she was calling Richard Schweitzer with the Crisis Intervention Team. Appellant indicated that Mr. Ferrante did not address Mr. Burke's behavior or stop him from attacking her. When she left, Mr. Ferrante came out of his office and yelled at her to hang up the telephone and to come back into his office. Appellant alleged that Mr. Ferrante's yelling created a hostile work environment. She alleged that she was so fearful and scared that she could not move. Appellant stated that she felt she had no choice but to return to her manager's office. She stated that Dale Wells, a clerk, came to see if she was okay.

Appellant alleged that she was not properly trained and described situations with Mr. Ferrante concerning the correction of clock ring errors and counting mail. She alleged that Mr. Burke would not give her any assistance in running her zone. Appellant stated that she was blamed for causing the carriers in Zone 12 to work after dark. She indicated that she was providing witness statements from Mr. Wells and Kathy Davis and Tiffany O'Donnell, coworkers regarding Mr. Burke's behavior towards women at the station. Statements from Mr. Wells and Ms. O'Donnell were not of record. In an undated statement Ms. Davis generally discussed Mr. Burke's behavior. She noted that during an April 12, 2006 meeting with Bill Schemleck, the station manager, and Ms. O'Donnell, Mr. Schemleck stated that Mr. Burke "has a problem with women."

In a September 6, 2006 report, Dr. Mark A. Kelley, a Board-certified psychiatrist, noted the history of injury and advised that appellant's acute stress disorder had turned into a post-traumatic stress disorder. He opined that appellant was totally disabled from any employment activity.

In an August 2, 2006 statement, Greg Rowland, manager, controverted appellant's claim. He indicated that an enclosed statement from Mr. Ferrante provided a different account of the July 10, 2006 events. Mr. Ferrante's statement was not of record.

By decision dated September 7, 2006, the Office denied appellant's claim. It found that the evidence submitted was insufficient to establish that the event(s) occurred as alleged and that there was no medical evidence that provides a diagnosis which could be connected to the claimed events.

On September 11, 2006 appellant requested reconsideration and indicated that she was submitting relevant evidence. She resubmitted her response to the Office's questions Dr. Kelley's September 6, 2006 report and Ms. Davis' statement. Appellant also submitted new evidence, consisting of undated statements from Mr. Wells and Ms. O'Donnell.

In a September 21, 2006 statement, Mr. Ferrante disputed appellant's allegations and account of the events of July 10, 2006.

By decision dated November 16, 2006, the Office denied reconsideration. It found that appellant's letter neither raised substantive legal questions nor included new and relevant evidence to warrant a review of its prior decision. On appeal, her attorney argued that appellant established a compensable factor of employment.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that an emotional condition arose in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[1]

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 his 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 his work or his fear and anxiety regarding his ability to carry out his work duties.[2] 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.[3] An employee's emotional reaction to an administrative or personnel matter is generally not covered

[1] *D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006).

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

[3] *Id.*

by workers' compensation. The Board has held, however, that error or abuse by the employing establishment in an administrative or personnel matter may afford coverage.[4]

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. 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.[5]

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.[6] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[7] The primary reason for requiring factual evidence from the claimant in support of her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[8]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty. She related her stress disorder to harassment by her supervisors on July 10, 2006 and to general job stress.

Appellant's general allegations of job stress are insufficient to establish a compensable employment factor. She cited an example of not being properly trained with respect to certain

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[4] *Margreate Lublin*, 44 ECAB 945 (1993). *See generally Thomas D. McEuen*, 42 ECAB 566 (1991), *reaffirming Thomas D. McEuen*, 41 ECAB 387 (1990).

[5] *A.K.*, 58 ECAB ___ (Docket No. 06-626, issued October 17, 2006); *C.S.*, 58 ECAB ___ (Docket No. 06-1583, issued November 6, 2006); *T.G.*, 58 ECAB ___ (Docket No. 06-1411, issued November 28, 2006); *D.L.*, *supra* note 1.

[6] *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).

[7] *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).

[8] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

tasks concerning clock rings and counting mail.[9] Appellant further alleged that she had no assistance in running her zone. The Board has held that stress or anxiety over an employee's normal or specially assigned work duties may constitute a compensable factor of employment.[10] However, in the present case, appellant has not provided sufficient information to establish a compensable employment factor. She alleged that she was not properly trained in certain matters and had no assistance in "running her zone." However, appellant did not submit sufficient evidence to corroborate her allegations. She did not provide any details regarding her assigned duties with respect to the clock rings, the mail counts or what work she was required to perform in her zone. As noted, appellant bears the burden of proving that she developed an emotional condition as a result of a compensable employment factor. This burden includes the submission of detailed factual evidence and explanation concerning the incidents or assignments she believes constituted a compensable employment factor.[11] Appellant has presented only vague allegations of general job stress and stress from being assigned to various tasks. She has not submitted sufficient evidence to establish these allegations as compensable factors.[12]

Appellant asserted that her supervisors created a hostile work environment for her on July 10, 2006 by verbally and physically abusing her. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[13] 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.[14] Appellant alleged that Mr. Burke yelled at her and threw an overtime tracking report at her during a July 10, 2006 meeting. There is no evidence of record establishing that the incident occurred as alleged or that Mr. Burke posed any threat to appellant. While appellant may have felt intimated by Mr. Burke, she provided no corroborating evidence, such as witness statements, sufficient to establish that any statements were actually made or that the actions actually occurred.[15] The statement of Ms. Davis did not address the July 10, 2006 incident. Rather, she generally reformed to a statement made by Mr. Schemleck on April 12, 2006. Her allegations

[9] The Board notes that matters pertaining to training are considered an administrative function of the employer. An administrative matter will be considered an employment factor only where the evidence discloses error or abuse by the employing establishment. *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995). In the present case, there is insufficient evidence to show error or abuse by the employing establishment with regard to any training afforded appellant.

[10] *See Thomas D. McEuen*, *supra* note 4; *Lillian Cutler*, *supra* note 2.

[11] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[12] *See, e.g. George Tseko*, 40 ECAB 948 (1989).

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

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

[15] *See William P. George*, 43 ECAB 1159, 1167 (1992).

alone are insufficient to establish a factual basis for her claim.[16] Appellant has not established her allegations of harassment pertaining to Mr. Burke.

The Board also finds that Mr. Ferrante's alleged yelling at appellant to hang up the telephone and return to his office does not rise to the level of coverage under the Act. The employing establishment contested appellant's version of events. Although appellant advised that she was submitting witness statements which would corroborate her version of the incident with Mr. Ferrante, such statements were not of record at the time the Office rendered its September 7, 2006 decision. 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.[17] Based on the evidence of record the Board finds that Mr. Ferrante's remarks, did not constitute verbal abuse or harassment under the Act.[18]

Appellant reported that she felt intimidated by the actions of Mr. Burke and Mr. Ferrante and felt that she was in a hostile work environment. However, under the circumstances of this case, the Board finds that appellant's emotional reaction must be considered self-generated, in that it resulted from her perceptions regarding her supervisor's actions.[19]

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.[20]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[21] the Office regulation provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[22] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[23] When a claimant fails to meet one of the above

[16] *Charles E. McAndrews, supra* note 6; *see also Arthur F. Hougens, supra* note 6 and *Ruthie M. Evans, supra* note 6 (in each case, the Board looked beyond the claimant's allegations to determine whether or not the evidence established such allegations).

[17] *See Leroy Thomas, III,* 46 ECAB 946, 954 (1995).

[18] *See Denis M. Dupor*, 51 ECAB 482, 486 (2000).

[19] *See David S. Lee*, 56 ECAB ___ (Docket No. 04-2133, issued June 20, 2005).

[20] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Margaret S. Krzycki*, 43 ECAB 496 (1992).

[21] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.

[22] 20 C.F.R. § 10.606(b)(2).

[23] *Id*. at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[24]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof.[25] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[26] If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[27]

ANALYSIS -- ISSUE 2

In its merit decision dated September 7, 2006, the Office denied appellant's claim for compensation on the grounds that no compensable work factor was established. The Office found, in part, that the evidence submitted was insufficient to establish that the event(s) occurred as alleged. In its November 16, 2006 decision denying appellant's request for reconsideration, the Office determined that the evidence submitted was irrelevant and thus insufficient to warrant a merit review of her claim.

In support of her reconsideration request, appellant neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[28]

With regard to the submission of new and relevant evidence, appellant submitted copies of previously submitted evidence comprised of her responses to the Office's questions, Dr. Kelley's September 6, 2006 medical report and Ms. Davis' statement.

Appellant also submitted statements from Mr. Wells and Ms. O'Donnell. While the Office indicated that, the evidence submitted was irrelevant, the Board finds that these statements constitute relevant new evidence on the issue of whether appellant established a compensable work factor. As this evidence was not previously of record and pertains directly to the relevant issue, it is sufficient to reopen her case for further review of the merits. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge her burden of proof. The claimant

[24] *Id*. at § 10.608(b).

[25] *Donald T. Pippin*, 53 ECAB 631 (2003).

[26] *Id.*

[27] *See Annette Louise*, 53 ECAB 783 (2003).

[28] 20 C.F.R. § 10.608(b)(2)(i) and (ii).

need only submit evidence that is relevant and pertinent and not previously considered.[29] The Office improperly denied appellant's request for review of the merits of the claim. The case will be remanded to the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she developed an emotional condition in the performance of duty. The Board also finds that the Office improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2006 is affirmed. The decision dated November 16, 2006 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 11, 2007
Washington, DC

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

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

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

[29] *Donald T. Pippin*, *supra* note 25; *Sydney W. Anderson*, 53 ECAB 347 (2002).