United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 08-1021**
	)	**Issued: September 18, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Stayton, OR, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 2, 2007, denying her claim for an emotional condition and a February 7, 2008 nonmerit decision of the Branch of Hearings and Review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment; and (2) whether the Branch of Hearings and Review properly found that appellant had abandoned her request for an oral hearing.

FACTUAL HISTORY

On January 8, 2007 appellant, then a 51-year-old postmaster, filed a occupational disease alleging that she developed acute adjustment disorder and stress due to factors of her federal

employment. She first became aware of her condition on October 16, 2006 when an employee reported that on October 14, 2006 Kelly Henderson stated that she wanted to kill appellant and that she would not be convicted if she did so. Ms. Henderson stated that she wanted to make appellant suffer. The employee noted that a month earlier Ms. Henderson had stated that she wanted to put a .357 between appellant's eyes and kill her. Appellant placed Ms. Henderson on administrative leave.

In her narrative statement, appellant described her job requirements. She again described the threats of Ms. Henderson and stated that her condition escalated when Ms. Henderson was released to return to work on October 27, 2006 as a psychiatric evaluation deemed her "no risk." Appellant was not provided any more information regarding Ms. Henderson. She requested a permanent transfer which was denied, but offered a temporary change. Appellant met with her supervisor on November 9, 2006 and, when asked, recommended that Ms. Henderson be terminated. Her supervisor refused this disciplinary suggestion and agreed to a two-week suspension for Ms. Henderson. Appellant listed additional actions by Ms. Henderson, including an incident in which she almost struck a coworker, Joshua Cubertson, with her personal vehicle on November 7, 2006. She requested additional clarification from her supervisor on November 30, 2006 and did not feel that she received an adequate response. On December 20, 2006 appellant met with Ms. Henderson's union representative regarding removing her psychiatric evaluation from her record. She received an Equal Employment Opportunity (EEO) complaint from Ms. Henderson on December 21, 2006. Appellant requested a transfer on December 21, 2006 which was denied. She also submitted medical evidence diagnosing adjustment disorder with mixed anxiety and depressed mood and post-traumatic stress disorder.

Appellant's supervisor, David Boos, noted that many post offices the size of appellant's did not have a supervisor and that she was aware of her job duties prior to accepting it. He stated that he had many conversations with appellant regarding Ms. Henderson's return to work and that he offered to move appellant temporarily to another office. Mr. Boos stated that the two-week suspension was appropriate for Ms. Henderson's first offense and that Ms. Henderson denied making any threats of violence.

In a letter dated February 9, 2007, the Office requested additional factual evidence from appellant regarding her claim. Appellant submitted a detailed narrative statement explaining how she learned of Ms. Henderson's threats from another employee. She stated that on April 25, 2006 Ms. Henderson had stated that "Before I quit, I will find a way to get even." Appellant noted that Ms. Henderson had posted articles regarding postal shootings at the time clock on two occasions. Mr. Boos directed appellant to return Ms. Henderson to work on October 27, 2006 and had advised that Ms. Henderson was "no risk." Appellant also submitted an EEO complaint, copy of the employing establishment's policy on violent or threatening behavior and statements from Mr. Cubertson, and Susan Herrman, witnesses to Ms. Henderson's statements made on October 14, 2006. In a statement dated October 16, 2006, Mr. Cubertson stated that in the prior month Ms. Henderson threatened to "get her .357 handgun and put it between [appellant's] eyes." He noted that on October 14, 2006 Ms. Henderson stated that if she was going to kill appellant she would not use scissors, but would make her suffer. When Ms. Herrman remonstrated her, Ms. Henderson stated, "I have thought about it. I could probably get off." Ms. Herrman completed a statement on October 16, 2006 and stated that Ms. Henderson was

talking about murdering appellant, but that she did not take it seriously. She acknowledged that the statements were shocking and that Ms. Henderson "did go over the line."

By decision dated July 2, 2007, the Office denied appellant's claim. It found appellant had failed to substantiate a compensable factor of employment.

On July 10, 2007 appellant requested an oral hearing. She also provided written notice of her change of address in Salem, Oregon. Appellant stated that she had not moved, but that the street name had changed. In a letter dated December 13, 2007 and addressed to her at a different street name, the Branch of Hearings and Review informed her that her oral hearing was scheduled for January 23, 2008 at 3:15 p.m. at the Edith Green-Wendell Wyatt Federal Building.

By decision dated February 7, 2008, the Branch of Hearings and Review found that appellant had abandoned her requested oral hearing as she failed to appear and failed to contact the Office either before or after the scheduled date of the hearing to explain her failure to appear.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law does not apply to each and every injury or illness that is somehow related 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 worker's compensation. Where the disability results from an employee's emotional reaction to her regular of specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] 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.[2]

The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute her desire to work in a different position.[3]

Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned work duties, do not fall with the coverage of the Act.[4] While an administrative or personnel matter will be considered an employment factor where the evidence discloses error abuse on the part of the employing establishment, mere perceptions are insufficient. In determining whether the employing establishment erred or acted abusively, the Board determines whether the employing

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen,* 41 ECAB 387, 390-91 (1990), *reaff'd on recon.,* 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[3] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[4] *James E. Norris*, 52 ECAB 93, 100 (2000).

establishment acted reasonably.[5] Investigations, which are an administrative function of the employing establishment, that do not involve an employee's regular or specially assigned employment duties are not considered to be an employment factor where the evidence does not disclose error or abuse on the part of the employing establishment.[6] Reactions to disciplinary matters such as letters of warning and inquiries regarding conduct pertain to actions taken in an administrative capacity and are not compensable until it is established that the employing establishment erred or acted abusively in such capacity.[7]

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.[8] 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.[9]

ANALYSIS -- ISSUE 1

Appellant attributed her emotional condition to threats made by Ms. Henderson. In support of her claim, she submitted statements from Mr. Cubertson and Ms. Herrman substantiating that Ms. Henderson stated that she would kill appellant and wanted her to suffer. Ms. Henderson believed that she could escape prosecution. The Board has recognized the compensability of physical threats and verbal abuse in certain circumstances.[10] In such cases, the Board has reviewed the evidence of record to determine whether the allegations of the claimant are substantiated by reliable and probative evidence. In this case, appellant has submitted reliable and probative evidence. Both Mr. Cubertson and Ms. Herrman submitted witness statements confirming that Ms. Henderson discussed murdering appellant. Both witnesses felt that this conversation was inappropriate, although Ms. Herrman did not believe that Ms. Henderson intended to carry out any threat. Mr. Boos and the employing establishment conducted an investigation and determined that a two-week suspension was necessary to discipline Ms. Henderson due to her violation of the employing establishment policy against

[5] *Bonnie Goodman*, 50 ECAB 139, 143-44 (1998).

[6] *Beverly A. Spencer*, 55 ECAB 501, 510 (2004).

[7] *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

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

[9] *Id.*

[10] *See J.F.*, 59 ECAB ___ (Docket No. 07-308, issued January 25, 2008) (the employee did not establish as factual that coworkers threatened to kill him); *Leroy Thomas, III*, 46 ECAB 946, 954 (1995) (the employee did not establish as factual that a supervisor threatened to kill him); *Alton L. White*, 42 ECAB 666, 669-70 (1991) (the employee established physical contact by his supervisor as a compensable factor).

threats and violence.[11] The Boards finds that appellant has substantiated that threats were made by Ms. Henderson.

Appellant attributed her emotional condition to the denial of the employing establishment of her requests for transfers following the threats of Ms. Henderson to her return to work. Mr. Boos noted that appellant was offered a temporary transfer, which she refused. As noted, the denial of a transfer is not a compensable factor under the Act. Therefore, the fact that the employing establishment did not grant appellant's requests for transfers is not an accepted employment factor.

Appellant also attributed her emotional condition to the disciplinary measures which Mr. Boos approved for Ms. Henderson and to the failure of the employing establishment to provide her with detailed information regarding Ms. Henderson's psychiatric evaluation. As noted, she must establish error or abuse on the part of the employing establishment in the handling of disciplinary actions and investigations. Appellant has submitted insufficient evidence to substantiate that Ms. Henderson should have been more stringently disciplined or that the employing establishment failed to adequately investigate the remarks made by Ms. Henderson or her mental status before allowing her to return to work. Therefore, she has not submitted evidence establishing error or abuse on the part of the employing establishment in regard to these matters.

As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found that there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[12] After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.[13]

CONCLUSION

The Board finds that this case is in posture for decision. Appellant has substantiated a compensable factor of employment necessitating review of the medical evidence by the Office. On remand, the Office will consider the medical evidence and issue a *de novo* decision with appropriate appeal rights to appellant's appropriate address of record.

[11] Although Mr. Boos noted that Ms. Henderson denied making the threatening statements, he apparently did not accord this denial weight.

[12] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

[13] Due to this decision on the merits of appellant's claim, it is not necessary for the Board to address the Branch of Hearings and Review decision regarding appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2008 and July 2, 2007 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: September 18, 2008
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