

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

L.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Birmingham, AL, Employer)

**Docket No. 09-1033
Issued: December 2, 2009**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 10, 2009 appellant filed a timely appeal from a February 3, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a July 31, 2008 merit decision. The Board also has jurisdiction over a December 15, 2008 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 21, 2008 appellant, a 56-year-old postal worker, filed an occupational disease claim (Form CA-2) alleging that she suffered severe stress disorder as a result of her federal

employment. She alleged that she was “violated by people over [her]” though she could not recall any specific events or dates. Appellant first realized that her condition was caused or aggravated by her employment in May 2006. In a subsequent note dated April 21, 2008, she alleged that her supervisors threatened her, hollered and cursed at her and snatched things out of her hand. Appellant alleged that she was “scolded by [her] managers.” She also alleged that she developed stress, depression and fear of the postal system. In separate statements, all three of these individuals denied appellant’s allegations. The employing establishment controverted appellant’s claim.

Appellant submitted reports signed by Dr. John B. Black, a Board-certified diagnostic radiologist, and Dr. Anthony W. Cheng, a Board-certified internist.

By decision dated July 31, 2008, the Office denied appellant’s claim because the evidence of record was insufficient to demonstrate that employment factors caused her condition.

On August 18, 2008 appellant requested review of the written record.

In an August 11, 2008 note, Dr. Robert G. Summerlin, a psychologist, reported findings on examination, a review of appellant’s medical history and diagnosed her with adjustment disorder with depressed mood, occupational problem, malingering and conversion disorder.

Appellant submitted an undated note in which Dr. LaShondra T. Washington, a Board-certified psychiatrist, reviewed her course of treatment and diagnosed her with severe major depressive disorder without psychosis.

By decision dated December 15, 2008, the Office hearing representative affirmed the Office’s July 31, 2008 decision.

On January 4, 2009 appellant requested reconsideration.

Appellant submitted reports dated October 22 and November 5, 2008, signed by Dr. Joseph N. Saba, a Board-certified neurologist, who reported findings on examination and diagnosed her with moderate senile dementia, primary degenerative dementia, aggravation of depression, hypertension and significant abnormal obesity.

Appellant submitted a copy of Dr. Washington’s undated note as well as additional notes, dated August 27 and September 8, 2008, also signed by Dr. Washington, diagnosing appellant with major depressive disorder without psychosis and cognitive disorder.

By decision dated February 3, 2009, the Office denied appellant’s reconsideration request.¹

¹ On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board’s jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision). As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant’s appeal.

LEGAL PRECEDENT -- ISSUE 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 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 his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.² 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.³

Appellant 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.⁴ This burden includes the submission of a detailed description of the employment factors or conditions, which she believes caused or adversely affected the condition or conditions for which compensation is claimed.⁵

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.⁶ 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.

ANALYSIS -- ISSUE 1

Appellant identified her supervisors' alleged conduct as employment factors that caused her emotional condition. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that supervisors threatened her, hollered and cursed at her and snatched things out of her hand. She also alleged that she was "scolded by [her] managers." The Board

² 5 U.S.C. §§ 8101-8193.

³ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁶ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

has recognized the compensability of physical threats or verbal abuse in certain circumstances.⁷ To the extent that disputes and incidents alleged are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.⁸ However, for this type of conduct to give rise to a compensable disability under the Act, there must be evidence that it actually occurred. Unsubstantiated allegations of harassment or verbal abuse are not determinative of whether such an incident occurred.⁹ However, appellant has not provided sufficient evidence, such as witness statements, to establish that the alleged incident actually occurred.¹⁰ Appellant's supervisors all denied her allegations and, as previously noted, her allegations alone are insufficient to establish a factual basis for an emotional condition claim.¹¹

Moreover, the Board finds that as far as appellant's allegations purport to relate to administrative or personnel matters, her vague allegations do not fall within the coverage of the Act. Allegations which concern a supervisor's performance of supervisory duties 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 is a question of reasonableness.¹² Appellant has not submitted evidence showing that the employing establishment committed error or abuse with regard to any matter.

Regarding appellant's allegation that she developed stress, depression and fear of the postal system, an employee's dissatisfaction with their employment or employment environment is not compensable under the Act.¹³ The Board notes that her reaction to such conditions and incidents at work must be considered self-generated.¹⁴ The Board therefore finds that appellant has not established a compensable employment factor under the Act with respect to the claimed conduct of her supervisors and managers.

For the above-mentioned 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.¹⁵

⁷ See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 66, 669-70 (1991).

⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ See *Michael Ewanichak*, 48 ECAB 364 (1997).

¹⁰ See *William F. George*, 43 ECAB 1159, 1167 (1992).

¹¹ See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegation of unfair treatment to determine if the evidence corroborated such allegations).

¹² See *Richard J. Duke*, 42 ECAB 916, 920 (1991).

¹³ See *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993); *Purvis Nettles*, 44 ECAB 623, 628 (1993).

¹⁴ *Tanya A. Gaines*, *supra* note 13.

¹⁵ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. See *Margaret S. Krycki*, 43 ECAB 496, 502-03 (1992).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁶ the Office's regulations provide that the evidence or argument submitted by 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.¹⁷ 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.¹⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁹

ANALYSIS -- ISSUE 2

Appellant's reconsideration request did not demonstrate that the Office erroneously applied or interpreted a specific point of law. Her reconsideration request did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant was not entitled to reconsideration under the first two enumerated statutory grounds.

Concerning the third enumerated ground, appellant has not submitted relevant and pertinent new evidence not previously considered by the Office. The relevant issue is whether compensable employment factors caused her alleged emotional condition. This is a factual issue, not a medical issue. As such, the reports and notes appellant submitted are not relevant and pertinent evidence requiring the Office to reopen her claim for merit review.

Because appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly refused to reopen her case for further review of the merits of her claim.

CONCLUSION

The Board finds that appellant has not satisfied her burden of proof to establish that she sustained an emotional condition in the performance of duty. The Board also finds that the Office properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁶ *Supra* note 2. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2009 and December 15 and July 31, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 2, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board