United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 09-99**
	)	**Issued: July 15, 2009**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, El Paso, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 15, 2005 appellant, through counsel, filed a timely appeal from a September 23, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant sustained a psychiatric condition in the performance of duty.

FACTUAL HISTORY

On February 27, 2007 appellant, then a 50-year-old immigration enforcement agent, filed an occupational disease claim alleging that on January 31, 2007 she sustained an emotional condition when her supervisor advised that she could no longer be accommodated in her light-duty position and that she would be required to repay authorized uncontrollable overtime (AUO)

she had worked since 2005. She alleged that she was told to go home as there was no work available for her within her restrictions. Appellant stopped work on January 31, 2007. On February 8, 2007 she first realized her emotional condition was employment related.

By letter dated April 4, 2007, the Office informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised to submit additional evidence to support her claim.

In a February 8, 2007 letter, the employing establishment informed appellant that it no longer had any light-duty positions available to accommodate her physical restrictions. It also noted that the Union contract regarding light-duty provided that such work was assigned on a temporary basis based upon availability and necessity to qualified employees. The employing establishment provided appellant with the options available to her as it no longer had any light-duty positions available to accommodate her restrictions.

On April 30, 2007 Dr. Jose Luis Porras, a treating physician, diagnosed anxiety attacks which he opined seemed to be related to her work problems and a fear of losing her job.

In a May 1, 2007 letter, Qasem M. Al-Ali, chief immigration enforcement agent, stated that he advised appellant on January 31, 2007 that there were no positions available for light duty. He stated that he advised appellant to contact the Office to discuss her options. Mr. Al-Ali related that appellant was not performing work as an immigration enforcement agent, but doing administrative work. Appellant would receive a bill for the AUO hours for which she had been paid but at the same time, the AUO hours worked would be converted to overtime hours for which she would receive a check.

On May 29, 2007 the Office received a September 6, 2005 e-mail from Steven E. Lino, who stated that appellant and other people on light duty were "allowed to work [c]ontrol, to include on AUO, if they are needed."

By decision dated September 28, 2007, the Office denied appellant's claim.

By letter dated October 4, 2007, appellant's counsel requested a telephonic hearing before an Office hearing representative.

In a decision dated November 19, 2007, the Office hearing representative set aside the October 4, 2007 decision and remanded the use for development of the evidence regarding whether the employing establishment's actions in withdrawing her light-duty job constituted a compensable factor of employment. The hearing representative determined that the claim was a traumatic injury rather then an occupational disease as it had occurred during one day.

On December 31, 2007 the employing establishment responded to the Office's request for additional information. It noted that the withdrawal of light duty affected all light-duty personnel. The employing establishment stated that the action taken was a withdrawal of light duty.

By decision dated March 14, 2008, the Office denied appellant's claim. It found that the employing establishment's withdrawal of light-duty was not a compensable factor of employment.

By letter dated March 21, 2008 appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on July 15, 2008.

By decision dated September 23, 2008, the Office hearing representative affirmed the denial of appellant's claim.[1] The representative found appellant failed to establish that the employing establishment acted erroneously in withdrawing her light-duty job.

LEGAL PRECEDENT

A claimant 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 factors of her federal employment.[2] To establish her claim that she sustained an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional condition or psychiatric disorder; 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 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 Federal Employees' Compensation Act.[4] 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.[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

[1] The hearing representative noted in a footnote that the Office accepted that appellant developed bilateral carpal tunnel syndrome under claim number xxxxxx432 as of August 5, 1999. She also noted that a January 25, 2008 letter advised appellant that her claim had been accepted for a recurrence of disability for the period February 1 to June 3, 2007.

[2] *Edward C. Heinz*, 51 ECAB 652 (2000); *Martha L. Street*, 48 ECAB 641 (1997).

[3] *Judy L. Kahn*, 53 ECAB 321 (2002); *Ray E. Shotwell*, Jr., 51 ECAB 656 (2000); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] 5 U.S.C. §§ 8101-8193.

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

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.[7]

As a general rule, 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.[8] 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.[9] An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.[10]

ANALYSIS

Appellant alleged that she sustained an emotional reaction on January 31, 2007 when advised that her light-duty job was to be terminated and that she would be required to repay the AUO she had worked since 2005. These allegations involve administrative or personnel actions that are generally not compensable under the Act absent evidence of error or abuse

Appellant contends that the employing establishment improperly withdrew her light-duty job and that she would have to repay AUO she had worked from 2005. These are administrative or personnel matters unrelated to appellant's regular or specially assigned work duties. Although the assignment of work duties are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[11] However, the Board has held 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.[12] In determining whether the employing establishment erred or acted abusively, the Board has examined whether it acted reasonably.[13] Appellant contended that the Office's acceptance of a recurrence of

[6] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Norma L. Blank*, 43 ECAB 384 (1993).

[7] *Lori A. Facey*, 55 ECAB 217 (2004); *Norma L. Blank*, *supra* note 6.

[8] *Felix Flecha*, 52 ECAB 268 (2001).

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

[10] *Barbara J. Latham*, 53 ECAB 316 (2002).

[11] *V.W.*, 58 ECAB ___ (Docket No. 07-234, issued March 22, 2007); *see Janet I. Jones*, 47 ECAB 345, 347 (1996).

[12] *K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007).

[13] *J.C.*, 58 ECAB ___ (Docket No. 07-530, issued July 9, 2007).

disability under claim number xxxxxx432 due to the withdrawal of her light-duty work supports a finding of error or abuse on the part of the employing establishment. Contrary to appellant's contention, the fact that a recurrence claim was accepted based on the withdrawal of light-duty work does not, in and of itself, establish error or abuse. In accepting a recurrence of disability under claim number xxxxxx432, the Office followed both the procedure manual and Board precedent which defines a recurrence of disability to include the withdrawal of light-duty work.[14] The employing establishment noted that the withdrawal of appellant's light-duty impacted not only her but all employees working light duty. Appellant has not submitted evidence to establish her allegation that she and one other person were the only ones singled out for withdrawal of light-duty.[15] The Board finds that she submitted insufficient evidence to establish that the employing establishment erred or acted abusively with regard to the withdrawal of her light-duty position.

Appellant also alleged that she sustained an emotional reaction as a result of being informed that she would have to repay AUO she had worked from 2005. The record shows that appellant was advised that an audit would be conducted regarding AUO she had worked since 2005, as she had been performing administrative duties rather than immigration enforcement agent work. Any AUO she had worked would be converted to overtime and she would receive a check for that work. The record contains an e-mail from a Mr. Lino who stated that appellant and any people working light-duty were permitted to work AUO. However, the status of Mr. Lino, with the employing establishment is not identified in the e-mail. Appellant was also informed by Mr. Al-Ali that she would be required to repay AUO for administrative work she had performed since 2005 but that she would receive a check for those hours as they would be converted to overtime. There is no evidence to establish that she was incorrectly advised of the amounts due or, any improper pay adjustment was made as a result of the conversion of the AUO hours to overtime, that the record is devoid of any evidence of error or abuse on the part of the employing establishment with respect to the repayment of AUO work performed by appellant since 2005. Appellant has not established a compensable employment factor under the Act with respect to these administrative matters.

As appellant failed to establish any compensable factors of employment, the Office properly denied her claim.[16]

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[14] The Office's procedure manual defines recurrence of disability to include withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1)(c) (May 1997). The procedure manual also indicates that, to constitute recurrence of disability, the withdrawal of a light-duty position must have occurred for reasons other than misconduct or nonperformance of job duties. *Id.* The Board has held that a claimant's showing that light-duty work was unavailable constitutes a change in the nature or extent of light-duty requirements sufficient to establish a recurrence of disability. *See J.F.*, 58 ECAB ___ (Docket No. 06-186, issued October 17, 2006).

[15] *See generally Barbara Ambrose*, Docket No. 00-324 (issued June 14, 2001) (the Board found appellant failed to establish that the failure of the employing establishment erred or acted abusively in failing to provide her with light-duty work).

[16] As appellant did not establish a compensable employment factor, the Board need not address the medical evidence of record. *See D.L.*, 58 ECAB ___ (Docket No. 06-2018, issued December 12, 2006); *Kathleen A. Donati*, 54 ECAB 759 (2003).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated September 23, 2008 and the Office's decision dated March 14, 2008 are affirmed.

Issued: July 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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