United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
and	)	**Docket No. 08-2160**
	)	**Issued: May 7, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Midway, KY, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 6, 2008 appellant filed a timely appeal from a December 3, 2007 merit decision of the Office of Workers' Compensation Programs denying her emotional condition claim and a May 27, 2008 nonmerit decision finding that she abandoned her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the May 27, 2008 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly determined that she abandoned her request for a telephonic hearing.

FACTUAL HISTORY

On August 23, 2007 appellant, then a 43-year-old clerk, filed an occupational disease claim alleging that she sustained stress due to factors of her federal employment. She stopped work on August 6, 2007.

In a statement received September 21, 2007, appellant indicated that she was unaware that she could file a workers' compensation claim. She used sick leave to try to recover. Brenda Slusher, the postmaster, telephoned her three times a week for medical information. She told appellant that the information was for the medical unit but it was actually for the workers' compensation unit. Appellant transferred to her current work station in the spring 2005 to escape sexual harassment by Bob Crowdis. Mr. Crowdis and Ms. Slusher spoke about appellant by telephone and in electronic mail messages. Ms. Slusher taped her without her knowledge, issued her suspensions and cut her work hours so she was unable to take family and medical leave. Appellant filed Equal Employment Opportunity (EEO) complaints. On June 4, 2007 Ms. Slusher yelled at her. Appellant went to the bathroom and stated that she was sick. She told Ms. Slusher that she wanted to go home. Appellant stated:

> "I said I had to go home I can't quit throwing up (I was crying while I talked to her) and I said it's because of you, you're yelling at me in front of everybody, you're always angry at me and I can't keep taking it. Ms. Slusher said she didn't to let me go but she would allow it, but I needed a doctor's note to return to work. Ms. Slusher has yelled at me and made me feel like squashed by her. I can't take her meaness, anger, rath, harassment, torture anymore. Ms. Slusher even held my annual leave from me. In 4 weeks of being off sick I received 14 del confirmations and certif from Ms. Slusher, telling me I might be repremanded. When I went back to work on June 10, 2007...."

Ms. Slusher told appellant to bring in a doctor's note on August 2, 2007 when she called in sick. Appellant felt threatened by Ms. Slusher, who allegedly had coworkers spy on her, threatened her job and retaliated against her.[1]

In a statement dated October 4, 2007, Angela Creech, a coworker, related that she had witnessed Ms. Slusher "yell at [appellant] on a few occasions. The last time [Ms. Slusher] yelled at [her] about some marks, [she] refused to let [appellant] speak in her defense." Appellant went to the restroom and then left for home.

On November 6, 2007 Ms. Slusher related that appellant transferred to the current work location on May 14, 2005. She performed the full duties of a clerk without complaint. Ms. Slusher learned that appellant had previously worked restricted duty due to an accepted employment-related ankle injury. She requested that she bring in a release showing that she could perform full duty. Appellant provided a report indicating that she had permanent work restrictions but the restrictions were not specified. She missed some work due to her ankle condition. Ms. Slusher issued appellant a letter of warning on March 30, 2006 for incorrectly processing registered mail. On August 3, 2006 she issued a seven-day suspension because appellant incorrectly processed registered mail and returned to work after stating that she had a possible work injury without providing the postmaster with her restrictions. On January 11,

[1] On October 4, 2007 appellant filed a claim for a traumatic injury occurring on June 4, 2007 when Ms. Slusher yelled at her in front of co-workers. In a telephone call of November 1, 2007, she specified that she was claiming ongoing events at work caused her condition and that "June 4, 2007 was her breaking point."

2007 Ms. Slusher gave appellant a seven-day suspension for failing to follow instructions. The suspension was later reduced to a letter of warning. Ms. Slusher gave appellant a 14-day suspension on April 4, 2007 for misdelivering parcels. She denied screaming at appellant but related that "[h]er continual disregard for instructions has forced me to speak to her sternly to get her to listen." On June 4, 2007 Ms. Slusher questioned appellant regarding why she had not dispatched a package. She stated:

> "[Appellant] started giving me excuses, so I told her that we would discuss the matter later. [She] continued to give me excuses why she had not dispatched the parcel. Again, I told her we would discuss it later. After [appellant] continued to offer up excuses for the third time, I spoke to her using a stern voice and firmly said we will discuss this later in private. I walked off to avoid any additional discussion."

Appellant told her a few minutes later that she was sick and needed to go home. Ms. Slusher did not refuse her request and did not call her at home or request protected information. Appellant telephoned in the afternoon and stated that she would not be at work the next day because she was sick. Ms. Slusher advised her to obtain a doctor's statement. After she received a doctor's statement on August 9, 2007, Ms. Slusher telephoned appellant to tell her that it did not contain all of the required information. Ms. Slusher denied having coworkers spy on appellant or threatening her job. She stated, "The only thing threatening [appellant's] job is her continual inability to perform the duties of it, which is solely in her control." Ms. Slusher denied that Ms. Creech had heard her yell at appellant. She stated, "She possibly has heard me get firm with [appellant] because she will not do as instructed and always argues. I have never yelled at any employee." On July 14, 2007 Ms. Creech drove with appellant on a route but they "deviated from the route. They went driving around another neighborhood. They malingered from one to two hours. After a thorough investigation, Ms. Creech was issued discipline for her actions." Ms. Slusher stated that when appellant returned to work she faced possible discipline "for the part she played in this incident."

By decision dated December 3, 2007, the Office denied appellant's claim on the grounds that she did not establish an injury in the performance of duty. It found that she had not established any compensable employment factors.

On December 31, 2007 appellant requested an oral hearing. On February 11, 2008 the Office informed her that her case was in posture for an oral hearing which would occur within six to eight months. On March 25, 2008 it advised appellant that her telephonic hearing would be held April 29, 2008 at 3:00 p.m., Eastern Time. The Office instructed appellant to call the provided toll free number a few minutes before the hearing time and enter the pass code to gain access to the conference call. It mailed the March 25, 2008 letter to appellant's address of record.

By decision dated May 27, 2008, the Office found that appellant had abandoned her request for a hearing. It determined that appellant received a written notice of the hearing 30 days before the scheduled hearing but did not appear and did not explain her absence either before or after the scheduled hearing.

LEGAL PRECEDENT -- ISSUE 1

Workers' compensation law is not applicable 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. When the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[2] On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.[3]

Administrative and personnel matters, although generally related to the employee's employment are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[4] However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[5] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.[7] A claimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[8] The issue is whether the claimant has submitted sufficient evidence under the Act to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[9] The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in

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[2] 5 U.S.C. § 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[4] *See Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

[5] *See William H. Fortner*, 49 ECAB 324 (1998).

[6] *Ruth S. Johnson*, 46 ECAB 237 (1994).

[7] *See Michael Ewanichak*, 48 ECAB 364 (1997).

[8] *See Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

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

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.[10]

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.[11] If a claimant does implicate a factor of employment, it 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.[12]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied her emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant asserted that the postmaster, Ms. Slusher, harassed and discriminated against her by telephoning her three times a week requesting medical information, secretly taping her, issuing her suspensions, having coworkers' spy on her, threatening her job and retaliating against her. She also related that Ms. Slusher spoke about her to Mr. Crowdis, a man who had sexually harassed her at work. Harassment and discrimination by supervisors and coworkers, if established as occurring and arising from the performance of work duties, can constitute a compensable work factor.[13] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[14] Ms. Slusher denied taping appellant, spying on her, and threatening her job. She explained the reasons for the disciplinary actions. Ms. Slusher related that she requested medical documentation from appellant after she stopped work in June 2007. She again requested documentation in August 2007 because the medical information received was insufficient. Appellant did not submit any factual evidence in support of her allegations of harassment and discrimination, such as witness' statements and thus has not established a compensable work factor.

[10] *Beverly R. Jones*, 55 ECAB 411 (2004).

[11] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[12] *Id.*

[13] *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[14] *Robert Breeden*, 57 ECAB 622 (2006).

With regard to appellant's allegations that management at the employing establishment erroneously denied her leave requests and issued disciplinary action, the Board finds that these allegations relate to administrative or personnel matters unrelated to the employee's regular or specially assigned work duties and do not fall within coverage of the Act absent evidence showing error or abuse on the part of the employing establishment.[15] Although generally related to the employment, they are administrative functions of the employer and not duties of the employee.[16] Mere perceptions of error or abuse are not sufficient to establish entitlement to compensation. Ms. Slusher related that she disciplined appellant on multiple occasions for incorrectly processing mail, failing to follow instructions and misdelivering parcels. She noted that a seven-day suspension was later reduced to a letter of warning. However, the Board has held that the mere fact that personnel actions are later modified or rescinded does not, in and of itself, establish error or abuse on the part of the employing establishment.[17] Appellant has not submitted any evidence that the employing establishment erred in matters involving her use of leave or in issuing disciplinary action; consequently, she has not established a compensable work factor.

Appellant primarily attributed her emotional condition to verbal abuse by Ms. Slusher on June 4, 2007. She asserted that she became ill after Ms. Slusher yelled at her in front of coworkers. The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by the Act.[18] While appellant alleged that Ms. Slusher yelled at her in front of coworkers on June 4, 2007, she did not submit sufficient evidence to establish a factual basis for her allegation. Ms. Creech generally related that she heard Ms. Slusher yell at appellant at various times but did not specifically address the June 4, 2007 incident or provide details of the conversations and thus her statement is of diminished probative value. On June 4, 2007 Ms. Slusher asked appellant why she had not dispatched a package. When appellant began to make excuses, Ms. Slusher informed her that they would talk later. She attempted to continue the conversation and Ms. Slusher spoke to her in a stern voice. Appellant has not submitted sufficient evidence to support that Ms. Slusher yelled at her on June 4, 2007. Further, a raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.[19]

On appeal, appellant contends that the Office failed to consider that her physicians diagnosed her with employment-related post-traumatic stress disorder. The Board finds that, as

[15] *Jeral R. Gray*, 57 ECAB 611 (2006) (disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, are not compensable employment factors); *Judy L. Kahn*, 53 ECAB 321 (2002) (matters involving the use of leave are generally not considered compensable factors of employment as they are administrative functions of the employer and not duties of the employee).

[16] *Id*.

[17] *Paul L. Stewart*, 54 ECAB 824 (2003).

[18] *David C. Lindsey, Jr.*, 56 ECAB 263 (2005). *See also Marguerite J. Toland*, 52 ECAB 294 (2001).

[19] *Karen K. Levene*, 54 ECAB 671 (2003).

she failed to establish any compensable factors of employment, the Office properly denied her claim without reviewing the medical evidence.[20]

Appellant further maintained that she "won her discrimination case" and could submit supporting evidence. She may submit such evidence to the Office with a request for reconsideration under section 8128.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b) provides as follows: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary [of Labor] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office's procedure manual provides in relevant part:

> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement, the claimant has failed to appear at a scheduled hearing and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district] Office."[21]

ANALYSIS -- ISSUE 2

By decision dated December 3, 2007, the Office denied appellant's emotional condition claim. Appellant timely requested an oral hearing. In a March 25, 2008 letter, the Office notified her that a telephonic hearing was scheduled for April 29, 2008 at 3:00 p.m. Eastern Time. It instructed appellant to telephone a toll free number and enter a provided pass code to connect with the hearing representative. Appellant did not telephone at the appointed time. She did not request a postponement of the hearing or explain her failure to appear at the hearing within 10 days of the scheduled hearing date of April 29, 2008.[22] The Board therefore finds that she abandoned her request for a hearing.

On appeal, appellant contends that she did not receive notice of the scheduled hearing. The record reflects that a copy of the March 25, 2008 hearing notice was mailed to her address of

[20] *See Hasty P. Foreman*, 54 ECAB 427 (2003).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *see also G. J.*, 58 ECAB ___ (Docket No. 07-1028, issued August 16, 2007).

[22] *Id*.

record and was not returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course.[23] This is known as the mailbox rule. As the Office properly mailed a hearing notice of appellant's address of record, it is presumed to have arrived at her mailing address.

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty. The Board further finds that she abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 27, 2008 and December 3, 2007 are affirmed.

Issued: May 7, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004); *James A. Gray*, 54 ECAB 277 (2002).