United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 09-1183**
	)	**Issued: February 22, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, Employer	)	

Appearances:
James Wright, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2009 appellant, through her representative, filed a timely appeal from June 11, 2008 and January 22, 2009 merit decisions of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On February 8, 2008 appellant, then a 51-year-old supervisor, filed a recurrence of disability on August 13, 2007 causally related to a May 13, 2006 work injury, assigned file number xxxxxx628. Under file number xxxxxx628, the Office accepted that she sustained adjustment disorder with depression on May 13, 2006 when Chris Catalano, a subordinate, "bumped into [her] left breast and shoulder." On appellant's notice of recurrence of disability

form, she indicated that she stopped work and sought medical treatment on August 13, 2007. Appellant's supervisor indicated that appellant worked limited duty until she was released to resume her regular employment on December 6, 2006.

In an accompanying statement, appellant maintained that after her work injury she experienced difficulties dealing "with craft employees or people in general." She told her supervisor, Scott Renteria, that she "was having difficulties dealing with men since the assault and having to talk to carriers at their case." Mr. Renteria and another manager tried from June 2006 to January 16, 2007 to have her released to full duty. In January 16, 2007, appellant returned to her position as a manager. She told Mr. Renteria that a union stewart indirectly threatened her and that Theil Sylve, a subordinate, sexually harassed her in April 2007. Mr. Renteria issued appellant a false letter of warning and told her that the union would picket the building unless she moved to another location. On March 30, 2007 he moved her to another location and told her that she had to deal directly with city carriers. Appellant was the only female at her level. She did not feel safe and was not informed which employees were aggressive. In June 2007, Fred Talbot, a subordinate, harassed appellant and called her house screaming about another supervisor even though she was not his manager. A July 2007 newsletter contained an article about her. On August 7, 2007 management told appellant that she was being removed from her duties as a manger. Appellant stated, "On Monday, August 13, 2007 while working with the supervisors, we determined how many hours of mail needed coverage. I had a business briefing and during the briefing a carrier verbally attacked me. Mike Hoffman [a manager] was present at the business briefing and witnessed the carrier's verbal assault." She related that Mr. Hoffman knew that she had previously been assaulted but that when he "witnessed an employee going off on me at a stand-up he walked away. It was while I was talking to the employee at his case that I experienced another setback."

On January 10, 2008 the Office noted that appellant was working without restrictions after May 21, 2007 and that she had alleged new work factors. It advised her that her claim would be adjudicated as an occupational disease.

On December 11, 2007 Mr. Renteria controverted appellant's claim.[1] He confirmed that she did tell him that she was raped while in the military and had difficulty with men. Mr. Renteria indicated that appellant was removed as a manger from one location because of her performance and had been removed "three times since May 13, 2006 due to unacceptable performance." He assigned her to a different location so that she could improve her communication skills. Mr. Renteria noted that appellant had been released to full duties and that communication with employees was one of her managerial duties. He denied that she told him that Mr. Sylve sexually harassed her. Mr. Renteria asserted that appellant successfully interacted with Mr. Talbot until "after it was found out that he had posted some inflammatory remarks on a website about her…." He also noted that an article written in a newsletter did not mention her by

[1] Appellant filed a claim for a traumatic injury occurring on August 13, 2007. In an accompanying statement she related that on August 13, 2007 she was verbally attacked by a subordinate while giving a talk and that Mr. Hoffman, a manager, witnessed the verbal attack. Afterwards appellant went to speak with the subordinate he aggressively stepped towards her three times and she had "a flashback of the carrier that assaulted me in 2006 and feared he would hit me." She asked Mr. Hoffman to go with her outside. Appellant left work and drove to see her physician.

name. Mr. Renteria related that the August 3, 2007 incident described by appellant was "not confirmed by [Mr.] Hoffman" and that there were no other witnesses.

In a handwritten statement, Amber Angeline, a coworker provided information about appellant's mental state. In a November 17, 2007 statement, Robbie D. Halverson noted that he worked as a carrier when appellant was a manager in 2000 and that she was confident and dealt with all employees. He worked with her again in 2006 during rural route inspections and she was again confident. In April 2007, however, appellant was "emotionally unstable." Mr. Halverson related that Mr. Renteria and another manager removed her from her position and walked her and her belongings across the work floor in front of everyone. When the next manager arrived to replace appellant he immediately received adequate staffing.

By decision dated June 11, 2008, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained an injury in the performance of duty. It found that she had not established any compensable employment factors.

On July 10, 2008 appellant requested an oral hearing. She submitted medical reports from her treatment at a local emergency room on August 13, 2007.

At the hearing held on October 28, 2008, appellant related that Mr. Renteria decided that she needed to get past her fear of employees and assigned her to another office as a supervisor. She had a "stand-up with employees" and one employee became "verbally aggressive" because she did not give him certain information before the meeting. He also used aggressive body language. A manger, Mr. Hoffman, witnessed the incident but did nothing. When appellant went to talk with the employee after the meeting he got into her space and came at her three times. She related, "And a third time he came towards me, I just had flashbacks, flashbacks from the incident with [Mr. Catalano], and everything that happened afterwards." Appellant drove herself to the emergency room. She described her prior assault on May 13, 2006. When appellant returned to work after the assault a union steward asked, "[W]hen's the bitch leaving?" Mr. Sylva sexually harassed her which caused flashbacks to when she was raped in the military. Appellant reported the sexual harassment to Mr. Renteria. He moved her to another work location because of union pressure and told her that she needed to improve performance. A former employee accused appellant of assault when she fired her during her probationary period.

A grievance filed against appellant for alleged abusive incidents was resolved on August 25, 2006 with the requirement that she have training in interpersonal relations. On March 27, 2007 she was reassigned to another location to work on specific issues. On April 16, 2007 Mr. Renteria placed appellant on a success improvement plan (SIP). He noted that, as a manager, one of her tasks was communicating with subordinates. On August 16, 2007 appellant received a notice of removal for failing to discharge her duties.

In a statement dated November 25, 2008, Mr. Renteria noted that on February 20, 2007 appellant received a letter of warning for failing to discharge her duties and to follow instructions. On March 27, 2007 he told her that she was moving to another location to work on specific areas of performance. Mr. Renteria placed her on a SIP on March 30, 2007 with instructions to develop her management skills. He put appellant on administrative leave on August 7, 2007 for failing to discharge her duties. Mr. Renteria noted that she did not have work

restrictions against supervising employees on August 13, 2007. Appellant told him that unflattering comments were made on a union website but did not report sexual harassment. Mr. Renteria indicated that there was "nothing that supports that there was any form of sexual harassment between [appellant] and [Mr.] Sylve."

By decision dated January 22, 2009, an Office hearing representative affirmed the June 11, 2008 decision. He found that appellant had not established any compensable work factors.

On appeal, appellant's representative argues that the Office should have consolidated this claim with her accepted claim as a result of the May 2006 incident. He contends that she was harassed after she returned to work after the May 2006 assault and that Mr. Talbot called her a "bitch." Management was aware of her history of rape and of the May 2006 assault and knew that she had work restrictions against dealing directly with nonsupervisors. On August 13, 2007 Mr. Sylve aggressively entered her space. Appellant notified Mr. Hoffman and he did nothing. The employing establishment erroneously placed her on a SIP.

LEGAL PRECEDENT

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]

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]

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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).

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] Aclaimant must establish a factual basis for his or her allegations with probative and reliable evidence. Grievances and Equal Employment Opportunity 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 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, 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.[12]

ANALYSIS

The Board notes that the Office properly adjudicated the claim as a new occupational disease claim rather than a recurrence of disability. Appellant alleged new employment factors and exposure after she returned to work following her May 2006 injury.[13]

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

[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).

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

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

[12] *Id.*

[13] A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 20 C.F.R. § 10.5(x). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

grounds that she did not establish any compensable employment factors. The Board must review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant attributed her condition, in part, to sexual harassment by management and coworkers. She related that when she returned to work as a manager on January 16, 2007 an employee made a threat against her and, in April 2007, Mr. Sylve sexually harassed her. Appellant told Mr. Renteria about the sexual harassment but he did nothing. Mr. Talbot, a subordinate, called her at her home yelling about another supervisor. He also referred to appellant as a "bitch." Mr. Renteria told her that the union was going to picket the location where she worked unless she was transferred. In July 2007 articles about appellant appeared in a newsletter. 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.[14] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[15] In a December 11, 2007 statement, Mr. Renteria denied that she informed him that she was sexually harassed. He stated that the article in the newsletter did not refer to her by name. Mr. Renteria found that there was no evidence that Mr. Sylve sexually harassed appellant. Appellant has not submitted any evidence to substantiate any of the alleged incidents. As she has not established a factual basis for her allegation of harassment with reliable and probative evidence, she was not established a compensable employment factor.[16]

Appellant maintained that Mr. Renteria unfairly gave her a letter of warning, inappropriately assigned her work-supervising employees, transferred her to a new location, placed her on a SIP and removed her from her position as a manager. The assignment of work duties, matters relating to a transfer and disciplinary actions are administrative functions of the employer and not duties of the employee.[17] An administrative or personnel matter will be considered compensable employment factors only where the evidence discloses error or abuse by the employing establishment.[18] Appellant has not submitted sufficient evidence to support her allegation that the employing establishment committed error or abuse in the assignment of work, transferring her to a new location, issuing her a letter of warning or placing her on a SIP and thus she has not established a compensable work factor.

Appellant primarily attributed her emotional condition to an incident on August 13, 2007. She maintained that she was briefing subordinates at a meeting when a carrier "verbally attacked" her. Appellant related that he was loud and used threatening body language. She

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

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

[16] *Lori A. Facey*, 55 ECAB 217 (2004).

[17] *Jeral R. Gray*, 57 ECAB 611 (2006) (the assignment of work is an administrative function of a supervisor); *Robert Breeden*, *supra* note 15 (allegations of unfair disciplinary actions relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act); *Ernest J. Malagrida*, 51 ECAB 287 (2000) (as a denial of a transfer is an administrative decision, absent error or abuse in the decision making process, it is not compensable).

[18] *Id*.

asserted that Mr. Hoffman witnessed the incident and did nothing. After the meeting appellant spoke with the employee and he invaded her space in a threatening manner three times. She experienced a flashback to the prior assault in May 2006. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will be covered under the Act.[19] A raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.[20] Appellant maintained that Mr. Hoffman, another manager, witnessed the incident between herself and the carrier; however, Mr. Renteria indicated that Mr. Hoffman had not confirmed that the incident occurred as alleged and that there were no witnesses. Additionally, she has not specifically described any statements that would rise to the level of verbal abuse. Appellant has not submitted any evidence supporting her allegation that a carrier verbally attacked her during the meeting or used threatening body language either during or after the meeting. Without such corroborating evidence, she has failed to establish that the event actually occurred as alleged.[21]

As appellant failed to establish any compensable factors of employment, the Office properly denied her claim.[22]

On appeal, appellant's representative contends that the Office should have consolidated this claim with her accepted claim as a result of the May 2006 incident. As discussed, however, the Office properly considered her claim as one for a new injury as she alleged new work factors. Appellant's representative further contends that she was harassed after she returned to work after the May 2006 assault and described the incidents that she believed constituted harassment. He also describes incidents that he maintains shows abuse by the employing establishment in administrative actions. As noted, however, it is appellant's burden to establish her allegations of harassment or of error and abuse by the employing establishment through the submission of corroborating evidence. While she raised many allegations, she did not submit any factual evidence substantiating her allegations.[23]

Appellant's representative also alleged that the employing establishment assigned appellant's work outside her restrictions; however, it appears that she was not working with restrictions at the time she was directed to work directly with subordinates. He also reviewed the medical evidence and argued that the medical evidence showed that her condition resulted from her employment. It is well established, however, that a claimant must first establish a compensable work factor before the medical evidence is considered.[24]

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[19] *Cyndia R. Harrill*, 55 ECAB 522 (2004); *Beverly R. Jones*, 55 ECAB 411 (2004).

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

[21] *See Linda J. Edwards Delgado*, 55 ECAB 401 (2004).

[22] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Hasty P. Foreman*, 54 ECAB 427 (2003).

[23] *Katherine A. Berg*, 54 ECAB 262 (2002); *Jamel A. White*, 54 ECAB 224 (2002).

[24] *Richard Yadron*, 57 ECAB 207 (2005).

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 22, 2009 and June 11, 2008 are affirmed.

Issued: February 22, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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