

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

D.A., Appellant)

and)

SOCIAL SECURITY ADMINISTRATION,)
OFFICE OF THE INSPECTOR GENERAL,)
Atlanta, GA, Employer)

Docket No. 09-1181
Issued: January 26, 2010

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 31, 2009 appellant filed a timely appeal from a March 19, 2009 decision of the Office of Workers' Compensation Programs denying reconsideration of a January 9, 2009 merit 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 established that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On June 25, 2008 appellant, a 40-year-old special agent, filed an occupational disease claim (Form CA-2) alleging that she sustained stress and anxiety from "being exposed to [her supervisor's] inappropriate comments and behavior" and a hostile work environment. She first

became aware of her condition and that it was caused by her federal employment on March 1, 2007. Appellant alleges that her supervisor, Resident Agent in Charge, Guy Fallen, told inappropriate stories about his friends and personal life. She alleges Mr. Fallen made inappropriate and sexually charged statements that made her uncomfortable. Appellant alleges that since filing a discrimination/harassment complaint against Mr. Fallen her work environment has been very tense. She alleges that Mr. Fallen continuously retaliated against her “in various forms such as ... e-mails and heavily scrutinizing [her] work.” Appellant alleges that the stressful and hostile work environment created by her supervisor prevents her from focusing on her work and performing at a satisfactory level. She alleged that her supervisor provided inadequate training and support. Appellant alleged that she had not had performance issues until having to work under her current supervisor. She reported feeling “emotionally and mentally drained ... and embarrassed to face [her] peers.”

Appellant’s supervisor, Mr. Fallen, submitted a note dated July 25, 2008, in which he refuted her allegations. He stated that he never had any inappropriate conversation about his friends or personal life with appellant. Mr. Fallen alleged that another employee approached him and reported that appellant told her that he made appellant feel uncomfortable. This employee suggested that Mr. Fallen be careful dealing with appellant and that this employee thought appellant was “up to something.”

Appellant submitted reports and notes from her attending physician diagnosing major depression.

By decision dated January 29, 2009, the Office denied the claim because appellant had not identified compensable employment factors responsible for her condition.

On March 9, 2009 appellant requested reconsideration.

Appellant submitted additional medical evidence.

By decision dated March 19, 2009, the Office denied the reconsideration request.

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.¹ On the other hand, the disability is not covered where it results from such factors as an

¹ 5 U.S.C. §§ 8101-8193.

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

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.³ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁴

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.⁵ 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 supervisor's alleged conduct, harassment and hostile work environment as the employment factor that caused her emotional condition. The Board must, thus, initially review whether these alleged incidents and conditions of employment are established as covered employment factors under the terms of the Act.

Appellant alleged that her supervisor provided inadequate training, support and engaged in and used inappropriate behavior and language. She alleged that her supervisor retaliated against her for filing a discrimination complaint. Appellant alleged that the stressful and hostile work environment created by her supervisor prevented her from focusing on her work and performing at a satisfactory level. These statements are not sufficient to establish harassment, retaliation or hostile work environment as a compensable employment factor.⁶

To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.⁷ However, for harassment to give rise to a compensable

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

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ See *William F. George*, 43 ECAB 1159, 1167 (1992).

⁷ See *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions and unsubstantiated allegations of harassment are not compensable under the Act.⁸ Appellant's supervisor denied her allegations and, as previously noted, appellant's allegations alone are insufficient to establish a factual basis for an emotional condition claim.⁹

Although the evidence reflects that an investigation was initiated or continued, an investigation alone does not substantiate appellant's allegations that she was retaliated against or subjected to a hostile work environment. The Board notes that investigations are administrative functions of the employer and are 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.¹⁰ Appellant has not submitted any evidence supporting that the actions taken by the employing establishment in continuing to investigate any alleged discrimination and harassment constituted error or abuse in an administrative or personnel matter. While her reports may have led to the employing establishment's investigation of these issues there is no evidence to support any claim of retaliation, discrimination or harassment. Thus, appellant has not established a compensable employment factor.

Regarding appellant's allegations that she was provided inadequate training and support, these allegations also relate to administrative matters, unrelated to the employees' regular or specially assigned work duties and do not fall within the coverage of the Act, absent evidence of error or abuse on behalf of the employing establishment.¹¹ She has not submitted any evidence of error regarding a request for training. On the contrary, appellant has also alleged that her supervisor scrutinized her work more than she liked. Training and support of an employee involves scrutiny of work activities. Appellant has not established error in her supervisor's scrutiny of her work or in her training.

Finally, to the extent that appellant attributed her emotional condition to dissatisfaction with her job after filing her complaint, the Board notes that assignment of work is also an administrative function of the employer and would not be compensable absent error or abuse by the employing establishment.¹² Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.¹³ The Board has examined whether the employing establishment acted reasonably.¹⁴

⁸ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

⁹ 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).

¹⁰ See generally *Bobbie D. Daly*, 53 ECAB 691 (2002); *James E. Norris*, 52 ECAB 93 (2000).

¹¹ *Brian H. Derrick*, 51 ECAB 417 (2000).

¹² See *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

¹³ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁴ See *id.*

While appellant may not have liked the manner in which her supervisor issued instructions and the content of such instructions, generally complaints about the manner in which a supervisor performs his or her duties or the manner in which a supervisor exercises his or her discretion fall, as a rule, outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties and employees will, at times, dislike the actions taken. Appellant has not submitted evidence showing that the employing establishment committed error or abuse with regard to these matters. Thus, she has not established a compensable employment factor.

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

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 the Office erroneously applied or interpreted a specific point of law nor did it advance a new relevant legal argument not previously considered by the Office. Thus, appellant was not entitled to reconsideration based on the first two enumerated grounds.

Appellant also did not satisfy the third enumerated ground, submission of new relevant and pertinent evidence not previously considered by the Office. The relevant issue here is the existence of compensable employment factors. This is a question of fact and therefore the medical evidence appellant submitted, though new, is neither relevant nor pertinent.

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, 502-3 (1992).

¹⁶ 5 U.S.C. §§ 8101-8193. 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).

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 appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT March 19 and January 9, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2010
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