

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

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**K.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

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**Docket No. 09-1994  
Issued: July 6, 2010**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 3, 2009 appellant, through her attorney, filed a timely appeal from a July 10, 2009 merit decision 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 November 15, 2007 appellant, then a 40-year-old modified clerk, filed a recurrence of disability claim due to a June 14, 2007 work injury. She indicated that she worked limited duty from June 14 to July 31, 2007 because of a left arm injury. Appellant asserted that the employing establishment created a hostile work environment. It assigned her a variety of work duties that worsened her injury-related condition. Appellant experienced increased pain because

she could not elevate her injured arm or prevent physical contact by coworkers. She stopped work on June 21, 2007 and did not return.<sup>1</sup>

In a report dated June 15, 2007, Dr. Karen D. Shockley, a general practitioner, released appellant to return to work with restrictions against any use of the left arm. On June 20, 2007 she accepted a limited-duty job offer requiring the use of the right arm and hand only.

In a March 31, 2008 Equal Employment Opportunity (EEO) report, an investigator noted that appellant alleged that she sustained left shoulder strain and epicondylitis due to a June 14, 2007 work injury. On July 15, 2007 appellant “was given a limited[-]duty assignment which she could not perform because the injured arm was aggravated due to the positioning of the work area.” The investigator discussed her allegations that the employing establishment failed to promptly grant her leave request on June 15 and 19, 2007 and inappropriately issued her a notice of removal on July 27, 2007 for violating a last chance agreement.

On April 16, 2008 the employing establishment controverted the claim. The employing establishment maintained that it had provided appellant work within her restrictions.<sup>2</sup>

By letter dated May 19, 2008, the Office noted that appellant had submitted a notice of recurrence of disability of her orthopedic condition, assigned case file number xxxxxx403. It determined that she was alleging a new emotional condition claim that would be adjudicated separately from her orthopedic claim. The Office requested additional factual and medical information from appellant regarding her emotional condition claim.

On May 20, 2008 appellant received treatment at a hospital for left shoulder pain, coughing and shortness of breath.

In a June 5, 2008 statement, Rob Jackson, a coworker, related that on June 15, 2007 he witnessed appellant talking with her supervisor. Appellant was crying and holding her left arm. Mr. Jackson stated, “It appeared to me from my observation that [appellant] was having difficulties working her temporary assignment due to her being unable to use her injured arm. [She] also made complaints of being bumped into by other employees in this work assignment.”

In a statement dated June 5, 2008, Tom Brickey, a coworker, related that he witnessed appellant performing various duties from June 15 to 21, 2007. He noted that she appeared to have difficulty working because she could not elevate her swollen arm.

On June 16, 2008 appellant, in response to the Office’s request for information, submitted evidence from her EEO complaint. She advised the Office that she was not claiming a new

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<sup>1</sup> On December 27, 2007 appellant notified the employing establishment that she intended to file a complaint of discrimination based on race, sex and physical disability due to her work injury. She described a work injury to her left arm and elbow on July 14, 2007. Appellant returned to limited-duty employment on June 15, 2007 but experienced increased pain and swelling performing her work duties. She could not elevate her arm and another employee hit her injured arm with a tray of mail. Appellant described her attempts to take leave and obtain medical treatment and related that she experienced anxiety attacks and crying at night.

<sup>2</sup> The employing establishment maintained that appellant’s injured arm had bruises similar to those left by fingers.

emotional condition but instead requesting an expansion of her accepted orthopedic claim assigned file number xxxxxx403. Appellant attributed her emotional condition to her accepted employment injury and the employing establishment's failure to provide her with limited-duty assignment. She summarized the evidence that she submitted with her EEO complaint.

By decision dated June 19, 2008, the Office denied appellant's claim on the grounds that she did not submit sufficient factual and medical information to establish an injury as alleged. On June 23, 2008 it noted that it had received evidence after it issued the June 19, 2008 decision and that it would consider this evidence and issue a new decision.

On April 7, 2009 appellant, through her attorney, requested reconsideration.<sup>3</sup> On May 26, 2009 she questioned why the Office had not issued another decision as had been represented and requested that it combine this case with file number xxxxxx403 as her condition was a result of that injury.<sup>4</sup>

On July 18, 2007 Dr. Fred W. Gaskin, a Board-certified psychiatrist, found that appellant was off work due to illness beginning June 22, 2007 and could resume work on July 19, 2007. In a report dated January 28, 2008, received by the Office on June 3, 2009, Dr. Frank J. Niesen, who specializes in family practice, diagnosed left elbow epicondylitis and provided a permanent impairment rating.

By decision dated July 10, 2009, the Office denied modification of its June 19, 2008 decision. It found that appellant had not established error or abuse by the employing establishment in the assignment of her work duties. The Office noted that she had a disability due to an accepted injury under file number xxxxxx403.

### **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.<sup>5</sup> 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 his frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>6</sup>

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<sup>3</sup> Appellant submitted evidence regarding her EEO complaint.

<sup>4</sup> In a statement dated June 24, 2007, received by the Office on June 3, 2009, Teresa Dye, a coworker, asserted that it would be difficult for an employee who could use only one arm to perform manual sorting work duties safely.

<sup>5</sup> 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>6</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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

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<sup>7</sup> See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>8</sup> See *William H. Fortner*, 49 ECAB 324 (1998).

<sup>9</sup> *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>10</sup> See *Michael Ewanichak*, 48 ECAB 364 (1997).

<sup>11</sup> See *Charles D. Edwards*, 55 ECAB 258 (2004); *Parley A. Clement*, 48 ECAB 302 (1997).

<sup>12</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>13</sup> *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>14</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>15</sup>

### ANALYSIS

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied her 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 alleged that the employing establishment discriminated against her when it failed to timely grant her leave requests on June 15 and 19, 2007 and when it issued her a notice of removal on July 27, 2007. 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.<sup>16</sup> A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.<sup>17</sup> Appellant has submitted no evidence, such as witness statements or a finding by an adjudicatory body, corroborating her allegation that she experienced discrimination by the employing establishment in denying requests for leave or issuing discipline. Additionally, the Board notes that matters involving leave and 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, not compensable employment factors.<sup>18</sup> Appellant has not submitted any evidence showing error or abuse by the employing establishment in an administrative or personnel matter and thus has not established a compensable work factor.

Appellant alleged that the employing establishment assigned her work duties that increased her arm pain. The Board has held that being required to work beyond one's physical limitations may constitute a compensable employment factor if such activity is substantiated by the evidence of record.<sup>19</sup> Appellant, however, has not submitted sufficient evidence to establish that she was required to work beyond her physical limitations. She did not specifically describe the work outside of her restrictions other than to note difficulties elevating her arm and avoiding coworkers touching her arm. The employing establishment maintained that it provided her work within her restrictions of no use of the right arm. In a witness statement dated June 5, 2008, Mr. Jackson asserted that appellant had difficulty performing her work duties and complained that other employees bumped into her injured arm. In another statement dated June 5, 2008, Mr. Brickey related that she had problems working because she could not elevate her arm. These witness statements support that appellant experienced difficulties working but do not substantiate

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<sup>15</sup> *Id.*

<sup>16</sup> *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

<sup>17</sup> *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>18</sup> *See V.W.*, 58 ECAB 428 (2007); *Lori A. Facey*, 55 ECAB 217 (2004).

<sup>19</sup> *Robert W. Johns*, 51 ECAB 137 (1999).

that the employing establishment assigned her work outside her physical limitations. Consequently, appellant has not established a compensable work factor.

To the extent appellant attributes her stress-related condition to pain and swelling in her left arm due to her June 14, 2007 work injury; the Board has held that an emotional condition related to chronic pain and other limitations resulting from an employment injury may be compensable under the Act.<sup>20</sup> Appellant may pursue this as part of her case under file number xxxxxx403.<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 10, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 6, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *Clara T. Norga*, 46 ECAB 473 (1995); *Arnold A. Alley*, 44 ECAB 912 (1993).

<sup>21</sup> *Charles D. Gregory*, 57 ECAB 322 (2006).