United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 09-1651**
	)	**Issued: June 3, 2010**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FIELD OFFICE, Cleveland, OH, Employer	)	

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 June 22, 2009 appellant, through her representative, filed a timely appeal from the June 3, 2009 merit decision of the Office of Workers' Compensation Programs which found no compensable factors of employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On July 1, 2008 appellant, then a 57-year-old federal investigator, filed a claim for compensation alleging that she sustained a psychological injury in the performance of duty. She first became aware of a causal relationship between her condition and her federal employment on June 2, 2005.

Appellant explained that in mid 2005 her ability to perform her duties competently became increasingly difficult. She began to worry about her caseload, the unresolved cases and dealing with new management. Each reorganization came with new policies, procedures and a lecture that "everything we had been doing was wrong and we needed to 'step it up.'" Appellant alleged unwritten policies that pushed the settlement of cases as quickly as possible. She implicated an increased workload due to the attrition of investigators and work coming in from outside her region or the west coast. Appellant stated that a new procedure required all investigators to handle intake duties for an entire week on a rotating basis while still handling the same number of cases. She alleged retaliation by her local director for challenging one of the director's decisions and having it overturned. After receiving her first unsatisfactory performance review, the director attempted to remove her telecommuting privileges. Appellant summarized her claim, as follows:

> "The combination [of] the unmanageable case load, bosses telling me to close 'cause' cases regardless of the facts involving the case, the frequency of having to spend an entire week on intake and my supervision attempting to revoke my telecommuting privileges, for reasons the union found were in violation of union contract, I had a nervous break down."

On September 9, 2008 the immediate supervisor responded to appellant's claim, noting that investigative procedures had not changed since 1995. She stated that a reorganization occurred in 2006 but did not change the role of the investigators. The supervisor stated employees were never told things were done wrong. They were informed that different forms were being required with an emphasis on wisely using limited resources to effectively process cases.

The supervisor acknowledged that budget restraints prevented filling investigator vacancies and that workload distributions were made throughout the country to balance workloads nationwide. "These cases were equally divided among all staff." She explained that individual investigators never had any numerical production goals and that whenever the field office lost staff, any office goals were proportionately reduced. The supervisor added:

> "[Appellant's] problem was that she failed to contact witnesses, return [tele]phone calls and failed to follow cases through to completion. [She] had no class cases and cases in her workload during FY 2007 were not complicated. [Appellant's] pending inventory was average."

The supervisor worked with appellant daily over many years and appellant never complained of her workload being excessive. She removed appellant's telecommuting privileges after numerous complaints from members of the public regarding her unresponsiveness to telephone calls and e-mails. The supervisor denied discouraging appellant or any investigator from finding cause. She stated that appellant never worked overtime or availed herself of working credit hours. The supervisor stated that the field office had numerical goals, which were the responsibility of supervisory and management staff and which were exceeded for at least the past 10 years. She added that cases are required to be processed in a timely manner.

The supervisor stated that she did adjust deadlines on appellant's cases on several occasions. She stated that management began reviewing charges prior to assignment to investigators and mailing correspondence to the charging parties, which in most cases resolved the case. Therefore, the only thing left for the investigator to do was to tab the case and prepare the closure documents, which would take approximately one hour.

The supervisor stated that in early 2007 appellant advised that she was depressed and told her about some personal issues. During 2007, she stated, appellant's attitude toward work and management changed. "Some days [appellant] was able to produce cases like a machine. Other times, she went for weeks without turning in any cases." The supervisor stated that appellant would not conduct on-site investigations and wanted only to stay in the office or take work home.

On September 12, 2008 appellant stated that early in her career she averaged 20 to 30 cases, but beginning in 2006 her caseload had increased to 60 to 80 cases due to cases from other offices, increasing pressure from management to take more charges and a decrease in investigators from about 18 to 10 to 12. She stated that, doing a week of intake duties, a new procedure that took place in 2005-2006, left little or no time to perform regular investigator duties. Because of the loss of investigators, the rotation at the intake desk went from every six to eight weeks to every four to five weeks in 2007. As a result, appellant stated that she was not able to close as many cases and her inventory increased causing stress and anxiety. She stated that the pressure to close cases was most prevalent at the end of the fiscal year, when it was important to management to reduce caseload inventory.

Appellant stated that she had deadlines. Although the agency did not allow management to set numerical quotas for the investigators, she stated: "Everything we did revolved around closing cases and then being assigned more. Each group's goal was to close 100 cases a month and if we were falling short we had increased management supervision and harassment to get cases closed." If they managed to close more than 100 cases, appellant explained, certain resolved cases would be held for closure counts the next month.

Appellant noted that they had only four government vehicles to use for their monthly requirements of on-site visits. This caused scheduling problems, postponements or use of private vehicles, which added to her anxiety because some cases warranted on-site visits before a determination of cause or no cause. Appellant clarified that the purpose of her claim was that her job caused her anxiety and that she developed depression brought on by a combination of hostile workplace, ever-increasing caseload and added duties.

Appellant alleged that she was being held to a higher standard because she was Caucasian. She believed that the director had encouraged a female coworker to file a sexual harassment complaint against her, which resulting in the interviewing of all female employees, which in turn embarrassed appellant.

In mid 2005 appellant stated that she had difficulty getting her computer fixed. The computer technician agreed to fix it only if the request came from management and if she left the room. The director agreed, which made appellant feel like he was treating certain individuals better than others. "This made a great impact of the fairness in the job, on my health, which

continued to get increasingly worse." Appellant alleged a difficult working relationship with the director, which was exacerbated by her refusal to write up cause cases when there was little or no evidence.

Appellant stated that, it became increasingly difficult to function in September 2007, as the end of the fiscal year and the deadline to turn in cases was approaching and her telecommuting privileges were revoked. The union advised that this was a violation of the contract, so the process was postponed for two weeks. Appellant filed a grievance and on September 17, 2008 while working at home, she had a nervous breakdown or panic attack.

In an undated statement received by the Office on October 21, 2008, the director stated that he had no idea what appellant was talking about when she said she went over his head on a case. He did not recall any such incident and any reversal of a decision in a particular case would not, in any case, result in an adverse action against an investigator or have any impact on the overall performance rating of the members of the district team.

On October 29, 2008 appellant responded to her supervisor's statement. She stated that, while prioritization procedures had not changed since 1995, the Cleveland office went through major processing changes. Appellant worked under six different directors or Acting directors, who had their own procedure for investigators to follow. She worked under three different supervisors who had their own way of running their group in regards to processing cases. Appellant noted that she and other employees complained about increased caseloads during office meetings when management was present. She stated that she was vocal about it and her supervisor was aware that she had complained. "I also personally complained to her about the effect of out of state cases and intake duties were having on my other cases and their processing."

Appellant stated that she did not know about proportional reductions of office goals. However, every time an investigator left, the caseload of other employees went up. "You cannot anticipate the number of charges that will come in that still needed to be assigned to and resolved by fewer investigators." Appellant stated that there were e-mails from the director and her supervisor informing investigators of the additional out of state cases they would be receiving for processing and the numbers, for example, were 200 from this state, 150 from another state. She submitted computer printouts showing the number of cases assigned and resolved and the significant increase in her assigned caseload.

Appellant took issue with several points made by her supervisor. She noted that cases were distributed in piles and unless the supervisor reviewed every one of her cases in 2006-07, she would have no idea if the cases were complicated. Appellant stated that she earned numerous credit hours, many of which were noted in time and attendance logs. Eventually, she stated that, they were noted or tracked in other ways because of inspection. Appellant informed her supervisor as early as the fall of 2005 that she was depressed and had experienced anxiety nearly a year prior to that. "My decline was due to my job increasing my anxiety and caused by depression." Appellant contended that the director treated certain minorities more favorably than whites.

In a decision dated November 10, 2008, the Office denied appellant's claim for compensation. It found that the evidence was insufficient to establish any compensable factor of employment.

Appellant requested an oral hearing, which was held on March 19, 2009. She reiterated many of the points raised in her correspondence, noting that 18 investigators became 10 to 12 and they started getting cases from New Orleans, New York and Seattle. When appellant tried to talk to charging parties in Seattle, whose time zone was three hours later, she had to take her cases home to try to talk to them at 8, 9 or 10 o'clock at night. She stated that working intake duty for a week at a time meant that she could not work on her inventory and she became frustrated with her inability to clear her caseload. Doing on-site visits to places such as Columbus meant appellant could not work on her files.

After the hearing, appellant's supervisor responded to the testimony. She first became aware that appellant was taking anti-anxiety medication in 2005. Appellant told the supervisor that she was having panic attacks and told her about some things that were upsetting her. "She told me about some personal issues and her concern about changes the Philadelphia District office was implementing in the Cleveland Field office."

The supervisor stated that the manner in which she assigned cases changed. Rather than assigning a new case every time an investigator closed one, each investigator received an equal share every month. Additionally, the supervisor began working on cases to assist and gave the investigators full credit for processing their cases. However, appellant's caseload had increased and her resolutions had decreased. She was no longer conducting on-site visits and her cases were aging. The supervisor strongly disputed that the unavailability of automobiles led to appellant's inability to conduct on-site visits. When the automobiles were booked, the investigator had the option of taking their private vehicles and receiving mileage and they were required to conduct one on-site visit per month. The supervisor stated: "[Appellant's] performance problems stemmed from the fact that she was told on more than one occasion to conduct an on-site on a particular case and failed to do so. This inability to follow instructions led to her removal from participation in telecommuting."

In a decision dated June 3, 2009, the Office hearing representative affirmed the denial of appellant's claim for compensation. The hearing representative found that she failed to establish a compensable factor of employment. While it was accepted that caseloads increased due to the loss of investigators and cases received from other districts, the supervisor noted that the work was divided equally among the staff. The hearing representative found that, individual investigators had no numerical production goals, office goals were proportionately reduced by staff reductions and the agency extended appellant's deadlines and assisted with her caseload.

On appeal, appellant contends that the June 3, 2009 Office hearing representative failed to adequately address her allegations and relied on the response of her supervisor, especially with respect to the numerous changes in the workplace and the size of her caseload. She added that the mere fact that others were assigned approximately the same number of cases did not negate the fact that her workload was too great.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for disability of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[2] "In the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[3]

When an employee experiences stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties and the medical evidence establishes that the disability resulted from her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from her reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered by workers' compensation because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[4]

Workers' compensation does not cover a psychological reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[5] The Board has held that actions of an employer which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that harassment or discrimination did in fact occur. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for a psychological condition claim.[6] Mere perceptions and feelings of harassment or

---

[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[4] *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[6] *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 allegations of unfair treatment to determine if the evidence corroborated such allegations).

discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[7] 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.[8]

ANALYSIS

The Office denied appellant's claim for compensation on the grounds that she failed to establish a compensable factor of employment. In the June 3, 2009 decision, it accepted as factual that she experienced an increased caseload due to the reassignment of cases from other districts and a reduction in the number of investigations at her Office. The Board has held that workload is a compensable factor of employment in an emotional reaction to a demonstrated increase under *Cutler*.[9] Appellant stated that her caseload went from 20 to 30 cases to 60 to 80 cases beginning in 2006. She was required to handle intake duties for a week at a time beginning in 2005-06, giving her less time to perform her regular investigator duties. The reduction of investigators in appellant's group, increased her rotation to intake duties in frequency from every six to eight weeks to four to five weeks in 2007.

Appellant's supervisor did not dispute appellant's characterization of her workload. She acknowledged that budget restraints prevented filling investigator vacancies and that workloads throughout the country were redistributed. The supervisor noted that these additional cases were equally divided among the staff. The Office hearing representative relied on the equal distribution of cases as grounds for finding that appellant's increased caseload was not compensable. It is well established, however, that an increased workload is no less compensable because other employees experienced the same increase. While the individual investigators had no numerical production quotas, the supervisor acknowledged that investigators faced deadlines and were required to process cases in a timely manner. The fact that she extended appellant's deadlines and assisted with her caseload does not take appellant out of coverage under *Cutler* with regard to her regular and specially assigned duties as an investigator.

The Board finds that appellant has established a compensable factor of employment. The Board will set aside the Office's June 3, 2009 decision and remand the case for further action. The Office shall review the medical opinion evidence to determine whether a causal relationship exists between the compensable factor of employment and appellant's diagnosed condition. After such further development as may be warranted, the Office shall issue an appropriate final decision on appellant's claim for compensation.

---

[7] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

[8] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

[9] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

Appellant explained that she had a nervous breakdown due to a combination of factors, including her caseload and the frequency of her intake duties. As the latter contributed to the difficulty she had with the former, these relate to the same factor of employment. Other factors included her bosses telling her to close cause cases regardless of the facts. The supervisor disputed this. This is not a compensable factor. Even if she were so instructed or encouraged to resolve cases before the end of the quarter or fiscal year, appellant's disagreement with how her superiors managed the field office is not a compensable basis for the payment of compensation benefits.

Appellant implicated the revocation of her telecommuting privileges. That was an administrative decision and, in the absence of proof that management acted erroneously, appellant has not established that it is a compensable factor of employment. Appellant alleged that the action was in violation of the union contract and retaliatory, but she submitted no evidence to substantiate her claim. She filed a grievance over the matter but submitted no decision finding that management's actions were in error. Appellant also alleged a hostile work environment and discrimination based on race, but again, she submitted no proof. She has not established her allegations against the director of the field office.

CONCLUSION

The Board finds that this case is not in posture for decision. Appellant has established a compensable increase in her workload from 2005 to 2007. The Office, therefore, must evaluate the medical opinion evidence to determine whether this factor of employment caused or contributed to her diagnosed condition.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: June 3, 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