United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 10-1068**
	)	**Issued: January 18, 2011**
U.S. POSTAL SERVICE, HEALTH & RESOURCE MANAGEMENT, Pittsburgh, PA, Employer	)	

Appearances:
Douglas Sughrue, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2010 appellant, through her attorney, filed a timely appeal from a December 22, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for a stress-related condition. 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 sustained anxiety and uncontrollable hypertension due to factors of her federal employment.

FACTUAL HISTORY

On April 9, 2008 appellant, then a 76-year-old labor custodian, filed an occupational disease claim alleging that she sustained anxiety and uncontrollable hypertension due to work-related stress. She attributed her condition to constant harassment after she returned to work following an employment injury.

On July 9, 2008 appellant related that her condition began when she "came back to work April of 2007 after being off work for 10 months on work[ers'] comp[ensation]." When she returned to work following her injury the employing establishment placed her in a clerk's position called "held for postage" rather than in maintenance. Appellant worked as a clerk from July 2007 to February 2008. Christine Carter, a supervisor, accused her of stealing time because she arrived on the work floor after the other clerks. Appellant explained that she had to clock in maintenance and then wait for a mandatory safety talk with her maintenance supervisor. She informed Ms. Carter that it was unfair that she worked as a clerk but received the pay of a maintenance employee. Appellant discussed difficulties obtaining a handicap parking place. In February 2008, she alleged Ms. Carter took mail from her desk. Appellant protested loudly because of her hearing problem and Ms. Carter mistook her loud voice for yelling. She sought help from the inspection service. Appellant claimed Ms. Carter issued her a letter of warning on February 15, 2008 "in retaliation for a grievance [she] filed against her for harassment and unfounded charges." The employing establishment also allegedly improperly issued appellant a letter of warning on March 7, 2008. Appellant asserted that she would have violated her walking restrictions if she had to take an elevator to the first floor and walk to the closest bathroom. She described her need to seek medical treatment due to her high blood pressure from stress.

The letter of warning issued to appellant on February 16, 2008 was for failure to follow instructions and improper conduct on February 6, 2008. It indicated that a manager requested that she "stop yelling on the work floor" but she did not comply. On February 28, 2008 management agreed to settle the grievance by reducing the letter of warning to an official discussion and removing references to the disciplinary action from appellant's personnel file.

In a March 6, 2008 description of incident, appellant related that on February 25, 2008 Mike Bashioum, a supervisor, alleged that appellant violated her limited-duty restrictions by climbing two steps to use the restroom. Mr. Bashioum instructed her to take the elevator down to the work floor to use the facilities. Appellant asserted that walking up two steps was not climbing and maintained that management was retaliating against her for having the inspection service investigate why management assigned her to work as a clerk instead of in maintenance without paying her the proper salary.

In the March 7, 2008 letter of warning, the employing establishment charged appellant with improper conduct and creating an unsafe condition when she violated limited-duty restrictions against climbing.[1] The letter indicated that she walked up and down stairs in violation of the climbing restriction set forth in a February 4, 2008 work restriction evaluation. The employing establishment noted that appellant had previously failed to follow limited-duty restrictions by not having the forms with her and being confrontational. In the attached February 4, 2008 work restriction evaluation, a physician found that appellant could work with restrictions, including zero hours of climbing. In a Step 1 grievance decision dated June 25, 2008, management agreed to reduce the letter of warning issued on March 7, 2008 to an official discussion.

[1] By letter dated March 12, 2008, the employing establishment controverted the claim, noting that it issued the March 7, 2008 letter of warning because appellant was violating her medical restrictions.

In a statement dated April 1, 2008, Mary Wilson, a coworker, related that the employing establishment discriminated against appellant by refusing to allow her to eat lunch in the storeroom and instructing her to use a walker rather than a cart for support when walking.

On June 4, 2008 the employing establishment noted that appellant was confrontational during discussions and had received several disciplinary actions for failing to adhere to her medical restrictions.

By letter dated June 30, 2008, appellant related that she filed a grievance on February 8, 2008 against Ms. Carter, who retaliated by issuing the February 15, 2008 letter of warning.[2] She alleged Mr. Bashioum wrongly accused her of violating her limited-duty restrictions. Appellant related that her physician informed the employing establishment that she could walk up two steps to use the bathroom.

By decision dated October 7, 2008, the Office denied appellant's claim for a stress-related condition after finding that she did not establish any compensable factors of employment.

On June 19, 2009 counsel requested reconsideration. He argued that the employing establishment erroneously changed appellant's work location when she returned to work after her injury in violation of policy. On April 27, 2007, following a grievance, the employing establishment rescinded the change in workstation. The employing establishment also erroneously assigned appellant to work as a clerk but paid her as a custodian upon her return to work following an injury. Appellant filed a grievance that was settled with her receiving "back pay for the difference in wage between the custodian and clerk positions." Counsel maintained that Ms. Carter accused appellant of stealing time because she was later than the other clerks even though she had to travel from a more distant area, used a cane, and had to listen to a safety talk or job assignment from a maintenance supervisor. He further asserted that management harassed her in February 2008 when it gave her a letter of warning for using a convenient bathroom. Counsel contended that the restrictions against climbing referred to ladders rather than climbing two steps to use a bathroom.[3] He stated, "Reprimanding an employee for violating his or her restrictions may be an administrative duty of the employer, but considering the facts surrounding this incident, reprimanding someone for walking up two stairs to use the bathroom is abusive."

In a July 16, 2008 Step 2 grievance decision, received by the Office on September 9, 2009, the employing establishment agreed to pay appellant $999.00 to resolve the grievance she filed contending that she was assigned to perform clerk duties without receiving the proper compensation.

By letter dated September 3, 2009, Ms. Carter related that she supervised appellant when she was assigned to Held for Postage in June 2007. Appellant's coworkers were afraid of her because she was rude, loud and abusive. An inspector from the Office of the Inspector General

[2] Appellant also submitted medical evidence in support of her claim.

[3] Appellant's attorney submitted evidence showing that the position of laborer/custodian required climbing ladders.

(OIG) observed her behavior and told Ms. Carter that appellant should not work with mail because she was a custodian and she threw away first class mail. The investigator "requested that she be removed from the Held for Postage work section and return back to maintenance immediately." Management moved appellant back to working as a modified custodian.

On September 4, 2009 Mr. Bashioum related that appellant could clock in at any location and that she could park in a handicapped space. He submitted evidence describing past disciplinary actions. Mr. Bashioum indicated that appellant volunteered to be assigned to another building upon her return to work but subsequently changed her mind. He enclosed evidence showing that she had selected Building 2, a warehouse, for assignment in April 2007. On April 27, 2007 the employing establishment rescinded appellant's assignment to the warehouse and indicated that she would remain in her current location.

On November 20, 2009 appellant denied that she was violating her restrictions as no physician found that she could not go up two stairs.[4] She maintained that the accusation was in "retaliation for going to the inspection services." Appellant challenged the employing establishment's version of her work and actions. She explained the circumstances surrounding the disciplinary action taken against her. Appellant maintained that the employing establishment erred in not providing her modified work within her craft and harassed her so that she would retire.

By decision dated December 22, 2009, the Office denied modification of its October 7, 2008 decision.

On appeal counsel argued that appellant has established as compensable work factors that the employing establishment erroneously attempted to remove her from the building when she returned to work following an injury. He noted that the letter rescinding the change of assignment indicated that it was made in error. Counsel argued that the employing establishment also erred in its administrative duty "by paying [appellant] the normal wage for a labor-custodian when she was performing clerk work as part of the limited/light[-]duty assignment due to a previously accepted work[-]related injury." He additionally maintained that the employing establishment erred in finding going up two stairs to be climbing. Counsel argued that Ms. Wilson's statement shows harassment by the employing establishment. He also discussed the medical evidence.

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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation

[4] In a statement dated September 15, 2009, George I. Matula, a former coworker, related that appellant endured "negative and antagonizing conduct" while working for the employing establishment. Two other people provided character references.

Act.[5] 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.[6]

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.[7] 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.[8] 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.[9]

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.[10] A claimant 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.[11] 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.[12] 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.[13]

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

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

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

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

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

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

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

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

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

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

providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[14] 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.[15]

ANALYSIS

Appellant did not attribute her anxiety and uncontrollable hypertension to the performance of her regularly or specially assigned duties or as the result of a specific requirement imposed by her employment. Instead she maintained that the employing establishment harassed her and issued unwarranted disciplinary action. Appellant asserted that the employing establishment erred in initially assigning her to a new location when she returned to work following an employment injury. She indicated that, following a grievance, the employing establishment rescinded the reassignment. Matters regarding transfers, however, are not compensable factors of employment without a showing of error or abuse as they do not involve the employee's ability to perform her regular or specially assigned work duties, but rather constitute a desire to work in a different position.[16] In determining whether the employer erred or acted abusively, the Board has examined whether it acted reasonably.[17] On September 4, 2009 Mr. Bashioum related that appellant had selected the warehouse building for assignment but then changed her mind. He submitted an April 25, 2007 preferred duty assignment selection form from her indicating that she preferred the warehouse building and the April 27, 2007 letter rescinding her assignment to the warehouse building. There is no evidence demonstrating that the employing establishment acted unreasonably in initially assigning her to work in a building that she had selected; consequently, she has not established a compensable work factor.

Appellant further attributed her condition to disciplinary action taken by the employing establishment. She maintained that it erroneously issued her a letter of warning on February 16, 2008 for failing to follow instructions and yelling on the work floor on February 6, 2008. 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.[18] Appellant related that she spoke in a loud voice on February 6, 2008 because she had difficulty hearing and Ms. Carter, her supervisor, interpreted her loud voice as yelling. She has not, however, submitted any evidence corroborating this assertion. On February 28, 2008 management agreed to reduce the letter of warning to an official discussion. The mere fact that the employing establishment lessens or reduces a

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

[15] *Id.*

[16] *Hasty P. Foreman*, 54 ECAB 427 (2003); *James E. Norris*, 52 ECAB 93 (2000).

[17] *See Brian H. Derrick*, 51 ECAB 417 (2000).

[18] *See L.C.*, 58 ECAB 493 (2007); *Lori A. Facey*, 55 ECAB 217 (2004).

disciplinary action does not establish that it acted in an abusive manner towards the employee.[19] Appellant, consequently, has not established a compensable work factor.

Appellant additionally maintained that Ms. Carter issued the February 16, 2008 letter of warning in retaliation for a grievance. 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.[20] A claimant, however, must substantiate allegations of harassment and discrimination with probative and reliable evidence.[21] Appellant submitted an April 1, 2008 letter from Ms. Wilson, a coworker, who related that the employing establishment would not allow her to eat lunch in the storeroom and wanted her to use a walker rather than a cart for support when walking. Ms. Wilson did not address any of the incidents identified by appellant as constituting harassment and discrimination; consequently, her statement is of little probative value.

Appellant further maintained that Ms. Carter harassed her by accusing her of "stealing time" because she arrived at work later than the other clerks. She explained that she arrived later because she had to "clock in" in maintenance and listen to a safety talk before beginning work in the area for clerks. Appellant also described difficulty obtaining a handicapped parking spot. Mr. Bashioum, however, related that she could "clock in" to work from anywhere in the building and that handicapped spaces were available. Appellant has not submitted sufficient factual evidence supporting her allegations that Ms. Carter harassed and discriminated her and has not established a compensable work factor.

Appellant additionally argued that the employing establishment wrongly issued her a March 7, 2008 letter of warning for violating her work restrictions on February 25, 2008 by climbing up two steps to use the bathroom. The employing establishment submitted a copy of February 4, 2008 work restrictions indicating that she could perform no climbing. Appellant maintained that the climbing restriction referred to ladders rather than stairs and noted that her physician clarified that she could walk up two steps to use the bathroom. The employing establishment, however, explained that she had received past disciplinary action for failing to adhere to her medical restrictions. On June 25, 2008 following a grievance, it agreed to reduce the letter of warning to an official discussion; however, as previously discussed, the mere fact that the employing establishment lessens or reduces a disciplinary action does not establish that it acted in an abusive manner towards the employee.[22] Appellant has not submitted evidence showing that the employing establishment erred in issuing the March 7, 2008 letter of warning; consequently, she has not shown a compensable work factor.

Appellant further maintained that the employing establishment erred in placing her in the position of clerk when she returned to work following her employment injury but paying her the salary of a maintenance employee. On appeal, counsel contended that paying her as a

[19] *Peter D. Butt, Jr.*, 56 ECAB 117 (2004); *Linda K. Mitchell*, 54 ECAB 748 (2003).

[20] *T.G.*, 58 ECAB 189 (2006); *Doretha M. Belnavis*, 57 ECAB 311 (2006).

[21] *C.W.*, 58 ECAB 137 (2006); *Robert Breeden*, 57 ECAB 622 (2006).

[22] *See Linda K. Mitchell*, *supra* note 19.

maintenance worker instead of as a clerk constituted administrative error.[23] Appellant filed a grievance regarding her pay for her work as a clerk, and, in a July 16, 2008 decision, she received $999.00 as resolution of the grievance. On September 3, 2009 Ms. Carter related that an investigator with the OIG's office questioned why appellant was working as a clerk when she was a maintenance employee and indicated that she should not be working with the mail. The Board finds that appellant has supported her contention that the employing establishment erred in an administrative action by assigning her to work as a clerk without receiving the proper pay.

As appellant has established a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[24] After such further development as deemed necessary, the Office should issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision.

[23] On appeal, counsel also maintains that the employing establishment erred in trying to transfer appellant to another building and by issuing her disciplinary action for allegedly violating her work restrictions. As discussed, however, the evidence is insufficient to show error or abuse by the employer in these administrative actions.

[24] *See A.K.*, 58 ECAB 119 (2006); *Robert Bartlett*, 51 ECAB 664 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 18, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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