United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 10-1398**
	)	**Issued: May 12, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH CARE SYSTEMS, Biloxi, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2010 appellant filed a timely appeal of a March 19, 2010 decision of the Office of Workers' Compensation Programs that affirmed the denial of her claim for compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition or an occupational disease in the performance of duty.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record contains a March 31, 2010 decision; however, appellant's representative has not appealed this decision.

FACTUAL HISTORY

On November 7, 2008 appellant, then a 40-year-old licensed practical nurse, filed an occupational disease claim alleging that she sustained stress and post-traumatic stress when she was harassed and stalked by a coworker. The employing establishment noted that appellant stopped work on November 3, 2008.

An October 11, 2008 uniform offense report described an incident involving appellant and a coworker, Leslie Davis,[3] on that date. Ms. Davis pulled appellant's purse out of her hand and took a tape recorder out of the purse claiming that appellant was taping conversations regarding work shift activities. Appellant confirmed that she had a tape recorder and an iPod in her purse but that there was no tape in the recorder. She submitted a November 1, 2008 e-mail to her supervisors claiming chest pains because Ms. Davis was on the property and appellant was concerned for her safety.

In a November 3, 2008 statement, Karen Hanson, a nurse manager, advised that, on that day, appellant informed Ms. Hanson that her blood pressure was elevated as she "heard Ms. Davis-Smith was on station Monday October 27, 2008 and no one had notified her." She noted that appellant was fearful and was instructed to keep her distance from Ms. Davis until the issue was resolved. Ms. Hanson stated that appellant was given an option to work in another unit. Appellant advised that "she was just under so much stress, her aunt was dying and the incident with Ms. Davis-Smith had her jumping out of her skin." Ms. Hanson referred appellant to the employee assistance program. On November 6, 2008 she controverted the claim. Ms. Hanson noted that appellant had a chronic health condition requiring monthly intravenous immunoglobulin, hypertension requiring medication, sleep apnea and hypothyroidism. She advised that appellant was on a job reassignment due to an August 2007 job injury and that management was available at all times to resolve personnel issues.

In an undated statement received December 29, 2008, appellant noted being harassed by Ms. Davis. She met with Ms. Hanson on October 7, 2008 to discuss her performance and two reports of contact with Ms. Davis. Appellant stated that Ms. Davis sat in on the meeting and harassed and bullied her. Ms. Davis told appellant that, if she had a problem with her, she should talk to her and not Ms. Hanson. Appellant noted that Ms. Davis abruptly left the meeting to get the union president. On October 11, 2008 Ms. Davis yelled, "you better watch out there has been some complaints about people coming by for visits, that they better watch out, that they would be reported." She told appellant that she "should be on the floor working." Appellant told Ms. Davis that she was "her coworker and not her boss" and to mind her own business and to stop following her. She told Ms. Davis to get out of her way and Ms. Davis told her that she was "white trash" and nothing that she did or said mattered to anyone. Appellant changed shifts to avoid Ms. Davis. She also referred to the October 11, 2008 tape recorder incident. Ms. Davis told appellant that she was "going to jail" and called the police. Appellant asserted that Ms. Davis blocked her from the restroom and took a picture of her with her cell phone while a police officer was speaking to her.

[3] She is also known as Leslie Davis-Smith.

In November 4, 2008 and January 7, 2009 reports, Daniel L. Koch, PhD, a licensed clinical psychologist, placed appellant on sick leave. On January 22, 2009 he noted examining her on November 4, 2008 for complaint of "nervousness, anger, sleep, relaxation, energy, bowel problems, depression, stress, headaches, memory, insomnia, nightmares, fears, unhappiness, work, tiredness, making decisions, concentration, health problems and stomach trouble." Appellant reported a work-related incident that caused her severe stress and that she might be experiencing post-traumatic stress disorder. Dr. Koch noted that she had significant levels of anxiety and depression consistent with post-traumatic stress disorder. Appellant felt that she was persecuted. Dr. Koch diagnosed major depression, recurrent, severe without psychotic features and post-traumatic stress disorder.

By decision dated February 3, 2009, the Office denied the claim. It found that the medical evidence did not support that appellant's emotional condition was due to work-related events.

Appellant requested a hearing. On April 28, 2009 an Office hearing representative found the case not in posture for a decision.[4] The hearing representative directed the Office to submit appellant's additional statement to the employer for comments and make appropriate findings regarding which claimed incidents were compensable work factors.

On June 1, 2009 the Office received an undated statement from Ms. Hanson, who described the October 7, 2008 incident pertaining to appellant's performance appraisal and two reports of contact appellant had written concerning her coworker. Ms. Hanson noted that the coworker entered her office and asked appellant "if she had a problem with her." Appellant responded that she did and they raised their voices. Ms. Hanson wanted to settle the matter but the coworker became upset and left the office to contact the union. She was later advised that the meeting should end and another meeting be scheduled. Ms. Hanson noted that both employees worked together the following weekend and an incident arose in which the police were called by the coworker, who claimed that appellant was taping their conversations. The coworker blocked appellant's exit from the office. Appellant alleged that the coworker took a photo of her with her cell phone. Ms. Hanson noted that appellant went to the employee health unit during this time alleging elevated blood pressure. Appellant worked with the team which had been functioning with only three members for a year or more, although there were issues with the interaction of the team members. Ms. Hanson offered to assign each employee to separate buildings and offered appellant an opportunity to work in the intensive care unit to minimize interactions; however, appellant stated that "this was not good enough."

On July 13, 2009 the Office claims examiner held a teleconference with the employer. It confirmed that Ms. Hanson was appellant's supervisor but that appellant no longer worked at the employing establishment. Regarding the October 7, 2008 incident, Ms. Hanson explained that appellant came in to review her performance appraisal and two reports of contact she had filed. One of the reports was about Ms. Davis having visitors in the office and appellant wanted more information about the visitors. The other report was about Ms. Davis harassing appellant who

[4] The hearing representative noted that, while the Office found that the medical evidence was insufficient to establish that a medical condition was due to the established work events, it did not identify what work events were established as it made no specific findings about working conditions that were compensable employment factors.

alleged that Ms. Davis told her that she was going to send her to another building. Appellant confirmed that Ms. Davis, who was standing outside the office door, came in and asked appellant if she had a problem with her. She stated that she did and an altercation started. Ms. Hanson noted that Ms. Davis walked out of the office and stated that she was going to a union representative about the incident. Regarding the October 11, 2008 allegation that Ms. Davis blocked appellant either in the hallway or at the bathroom, Ms. Hanson advised that, on July 31, 2009, the police responded to the hallway/bathroom incident and a report was filed.

The Office received a May 21, 2009 report from Dr. Koch, who opined that "the distress seemed to arise from a work[-]related incident which was very menacing and threatening." Dr. Koch diagnosed post-traumatic stress disorder and advised that appellant was feeling persecuted. He indicated that "no accommodation offered in the work force for [her] to return to gainful employment in a safe secure environment."

On September 18, 2009 the Office referred appellant for a second opinion to Dr. Robert Benson, a Board-certified psychiatrist.[5] In an October 15, 2009 report, Dr. Benson noted her history including the October 11, 2008 tape recorder incident with a coworker. On examination, appellant was aware of her current circumstances, had no evidence of memory deficit, displayed average intellectual ability and reported her story in a logical and coherent manner. Dr. Benson also noted a long history of treatment for attention-deficit hyperactivity disorder. While Dr. Koch documented problems with concentration and focus, he overlooked appellant's prior history of treatment for these conditions. Dr. Benson explained that the reported anxiety symptoms would not meet criteria for any other DSM IV diagnosis. Appellant's current financial problems were a stressor sufficient to explain her current anxiety. Dr. Benson determined that while she felt threatened by her coworker, the threat dissipated when she was out of her presence. He found that appellant did not have a work-related emotional condition.

In an October 23, 2009 decision, the Office denied the claim, noting that the October 11, 2008 incident occurred in the performance of duty.[6]

On November 6, 2009 appellant's representative requested a telephonic hearing, which was held on February 1, 2010. He indicated that additional medical evidence would be submitted; but none was received.

By decision dated March 19, 2010, the Office hearing representative affirmed the October 23, 2009 decision.

[5] The statement of accepted facts found that the October 11, 2008 altercation, in which the employing establishment police responded to a call involving appellant and Ms. Davis, in which Ms. Davis pulled appellant's purse out of her hand and removed a tape recorder occurred in the performance of duty.

[6] It found that the October 7, 2008 verbal altercation was related to appellant's written report of contact regarding Ms. Davis' visitors and was an administrative issue concerning the employer's office rules/procedures which were not compensable. It found that the other incidents alleged by appellant concerning Ms. Davis were not established. The Office found that Dr. Benson's report determined that appellant's financial problems caused her current anxiety.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit: (1) medical evidence establishing an emotional or psychiatric disorder; (2) factual evidence identifying those employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[7]

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. 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.[8]

Larson states that assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of the employment unless, by facilitating as assault that would not otherwise be made, the employment becomes a contributing factor.[9] The Board has held that this principle applies to mental or emotional injuries as well as to assaults.[10] As with assaults, when the subject matter of a verbal altercation is imported into the employment from a claimant's domestic or private life and there is no indication that work contributed to or facilitated the dispute, the dispute is not a compensable factor of employment and any injury resulting there from does not arise out of employment.[11]

ANALYSIS

Appellant alleged that she sustained an emotional condition due to a number of employment incidents and conditions. The Board must initially review whether the alleged incidents of employment are compensable factors under the terms of the Act.

With respect to the regular or specially assigned duties as a nurse, the record supports that while appellant was performing her duties on October 11, 2008, an altercation occurred when Ms. Davis pulled her purse out of her hand and took a tape recorder out of the purse. Ms. Davis claimed that appellant was taping conversations regarding work activities. Ms. Hanson

[7] *George C. Clark*, 56 ECAB 162 (2004).

[8] *Lillian Cutler*, 28 ECAB 126 (1976).

[9] A. Larson, *The Law of Workers' Compensation* § 8.00 (May 2004).

[10] *Monica M. Lenart*, 44 ECAB 772, 774 n.5 (1993).

[11] *See Edward Savage, Jr.*, 46 ECAB 346 (1994).

confirmed that the incident occurred. The Board finds that this altercation occurred in the performance of duty. The Board has held that workplace altercations occur in the performance of duty where the work brings the two together and creates the conditions that result in the altercation.[12] The Board has recognized that friction and strain may arise as an inherent part of the conditions of employment.[13] In this case, the reason for the altercation originated from the workplace, *i.e.* it was related to her shift activities.[14] Work brought the two together and created the conditions that resulted in the altercation; therefore, the incident occurred in the performance of duty. The Board finds that the October 11, 2008 altercation arose out of appellant's employment and constitutes a compensable work factor under *Cutler*.[15]

Appellant also made an allegation related to administrative and personnel actions. In *Thomas D. McEuen*,[16] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employer is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employer erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[17]

Appellant alleged that, on October 7, 2008, she was in a meeting with Ms. Hanson to review her performance appraisal and two reports of contact between herself and Ms. Davis. She alleged that Ms. Davis came into the meeting and asked her if she had a problem with her, she should just talk to her and not go to Ms. Hanson. Thereafter, Ms. Davis abruptly left and requested union representation. Ms. Hanson confirmed that she was meeting with appellant to discuss performance and two reports of contact related to Ms. Davis when Ms. Davis entered her

[12] *See C.O.*, Docket No. 09-217 (issued October 21, 2009).

[13] The friction and strain doctrine recognizes that workplace employees under strains and fatigue from human and mechanical impacts creating frictions, which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. However, the explosion point is merely the culmination of antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. A. Larson, *supra* note 9 at § 801(6)(a). The Board has recognized the friction and strain doctrine. *See Shirley Griffin*, 43 ECAB 573 (1992). *See also M.A.*, Docket No. 08-2510 (issued July 16, 2009). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.12(b) (March 1994) (Coworker Harassment or Teasing).

[14] *See supra* notes 9, 11.

[15] *See supra* note 8.

[16] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[17] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

office and asked appellant "if she had a problem with her." She confirmed that Ms. Davis became upset and left the office. Ms. Hanson clarified that one of the reports of contact was about Ms. Davis having visitors in the office and appellant wanted more information about the visitors and the other one was about Ms. Davis harassing her and slandering coworkers, staying late in the office and following her around. She noted that the allegations were never substantiated. The Board notes that a discussion of performance and administrative reports or complaints would not be a factor of employment as it is an administrative matter. The employer responded to appellant's complaints in connection with her allegations. The record reflects that the employing establishment reasonably took action that it deemed appropriate. The Board also finds that a raised voice in the course of a conversation does not, in and of itself, warrant a finding of verbal abuse.[18] The evidence does not establish error or abuse by the employing establishment in this matter.

Appellant also alleged that she was harassed and stalked by her coworker. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[19] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[20] The employing establishment has denied that appellant was harassed or discriminated against and she has not submitted sufficient evidence to establish her allegations.[21]

Appellant alleged that she feared for her safety and alleged that she changed shifts to avoid Ms. Davis. She sent an e-mail to her supervisors on November 1, 2008 advising that her coworker was on property. Appellant did not describe in detail an alleged act of harassment or unfair treatment by Ms. Davis on that date. Ms. Hanson, on November 3, 2008, did not note any particular incidents of inappropriate behavior by Ms. Davis. She advised appellant of options she could take including the employee assistance program. There were no specific incidents that are established as occurring on or about November 1, 2008 showing that harassment did in fact occur. An employee's dissatisfaction with working in an environment which is considered to be tedious, monotonous, boring or otherwise undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[22] Appellant has not established a compensable factor in this regard.

Appellant also alleged that Ms. Davis made several comments that she believed were harassment or verbal abuse. They included that Ms. Davis yelled "better watch out there has

[18] *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

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

[20] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[21] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[22] *See David M. Furey*, 44 ECAB 302, 305-06 (1992).

been some complaints about people coming by for visits that they better watch out, that they would be reported"; Ms. Davis reportedly calling her "white trash;" Ms. Davis criticizing, ridiculing or degrading her; Ms. Davis blocking appellant from exiting the restroom; Ms. Davis stalking and following appellant; that appellant changed shifts to avoid Ms. Davis; and that Ms. Davis took a picture of appellant with her cell phone. However, appellant has provided no corroborating evidence, such as witness statements, to establish that the particular statements actually were made or that the actions actually occurred at specific times. Ms. Hanson advised that the allegations were not supported. As noted, mere perceptions of harassment are not compensable. The Board has held that, while verbal abuse may constitute a compensable factor of employment, not every statement uttered in the workplace will be covered by the Act.[23] The evidence does not support a compensable factor of employment in this regard.

In the present case, appellant has established one compensable factor of employment, the October 11, 2008 incident where Ms. Davis grabbed appellant's purse and pulled a tape recorder out of it. However, her burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[24]

Appellant submitted several reports from Dr. Koch. In a January 7, 2009 report, Dr. Koch advised that she reported "a work[-]related incident" that caused severe stress. However, he did not specifically describe the October 11, 2008 incident and explain how that incident caused or aggravated a diagnosed emotional condition. Likewise, in a May 22, 2009 report, Dr. Koch noted that appellant had work problems and noted "a work[-]related incident which was very menacing and threatening" but he did not identify the October 11, 2008 incident and explain how it caused or aggravated a diagnosed emotional condition. Other reports from Dr. Koch also did not address the October 11, 2008 work incident. As these reports do not explain how the October 11, 2008 incident caused or aggravated the claimed emotional condition, they are insufficient to meet appellant's burden of proof.[25]

Furthermore, Dr. Benson, an Office referral physician, reviewed a statement of accepted facts and examined appellant. In an October 15, 2009 report, he opined that she did not have a work-related emotional condition and opined that her current financial problems were a stressor that explained her current anxiety problems.

The record does not contain any other medical evidence to establish that appellant sustained an emotional condition due to the established employment factor.

[23] *C.T.*, *supra* note 18.

[24] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[25] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an emotional condition or an occupational disease in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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