U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SEMERIA G. WILSON and U.S. POSTAL SERVICE,
POST OFFICE, North Suburban, Ill.

Docket No. 95-3054; Submitted on the Record;
Issued September 23, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim for aggravation of generalized anxiety depression.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for aggravation of generalized anxiety depression.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[1] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[4]

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[1] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

[2] *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

[3] *See Frank J. Meta, Jr.,* 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[4] *Laura H. Hoexter*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

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 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 her frustration from not being permitted to work in a particular environment or to hold a particular position.[5] 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.[6] 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.[7]

In the present case, the Office accepted on September 11, 1992 that appellant sustained an employment-related aggravation of generalized anxiety depression. By decision dated April 15, 1994, the Office rescinded its acceptance of appellant's claim for aggravation of generalized anxiety depression and by decision dated July 11, 1995, the Office affirmed its April 15, 1994.[8]

In support of its rescission of appellant's accepted emotional condition, the Office presented extensive new legal argument. Prior to the acceptance of appellant's claim, the Office had not engaged in an evaluation of the employment factors alleged by appellant as required. In connection with its rescission action, the Office explained how it evaluated appellant's claimed employment factors.[9]

The Office noted appellant alleged that a supervisor, Mary Ann Ives committed harassment and discrimination between January and March 1988. Appellant claimed that Ms. Ives sabotaged her mail distribution efforts, unfairly criticized and evaluated her performance, wrongly disclosed personal information to outsiders, unfairly restricted her duties, made threats

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

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

[7] *Id.*

[8] By decision dated July 29, 1994, the Office denied appellant's request for a hearing before an Office hearing representative, but appellant did not request an appeal of this matter and it is not currently before the Board.

[9] In November 1993 the Office produced a statement of accepted facts regarding appellant's claimed employment factors.

and screamed at her and subjected her to improper comments and touching of a sexual nature. Appellant also alleged that, beginning in 1991, another supervisor, Val Sendor, subjected her to harassment and discrimination by disciplining her for tardiness without providing justification, requiring her to complete forms, which others were not required to complete, improperly evaluating her performance, discriminating against her based on her physical condition, unfairly denying her requests for overtime work and leave and subjecting her to threats. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[10] 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.[11] In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by her supervisors.[12] Appellant alleged that supervisors made statements and engaged in actions, which she believed constituted harassment and discrimination, but she did not provide sufficient corroborating evidence to establish that the statements actually were made or that the actions actually occurred.[13] The records contain statements, in which coworkers indicated that supervisors "harassed" and "criticized" appellant. The Office properly noted that these statements lack specificity with respect to their allegations and are insufficient to establish the existence of harassment or discrimination; moreover, it is unclear in many of these statements whether the coworkers actually witnessed the actions alleged to have been committed by supervisors or heard such allegations from other sources. In one of these statements, a coworker indicated that Ms. Ives complemented appellant's hair and mode of dress, but this statement would not be sufficient in itself to establish sexual harassment on the part of Ms. Ives.[14] Thus, the Office properly noted in connection with its rescission action that appellant did not establish a compensable employment factor under the Act with respect to harassment or discrimination.

Appellant alleged that the employing establishment acted improperly when it terminated her in March 1988 for lack of performance and that she was trained with erroneous cards for scheme training and was granted an additional four hours of scheme training with the correct cards. Regarding appellant's allegations that the employing establishment issued unfair and unwarranted disciplinary actions and mishandled her training regimen, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[15] Although the

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

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

[12] *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).

[13] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[14] It should be noted that appellant did not raise sexual harassment charges until two years after the initial filing of her claim and five years after the alleged occurrences of the incidents.

[15] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C.*

handling of disciplinary actions, evaluations and leave requests and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[16] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[17] Appellant did not establish error or abuse with respect to her termination. Appellant's termination from the employing establishment was canceled due to the settlement of an Equal Employment Opportunity claim, the settlement specifically indicated that the agreement was reached without a finding of wrongdoing by the employing establishment. The mere fact that personnel actions were later modified or rescinded, does not in and of itself, establish error or abuse.[18] Thus, appellant has not established a compensable employment factor under the Act in this respect. However, the record does contain evidence showing that she was trained with erroneous cards for scheme training and was granted an additional four hours of scheme training with the correct cards; therefore, appellant has identified a compensable employment factor in this regard.

The Office also provided additional legal argument in support of its rescission action by evaluating the medical evidence to determine whether it supported the existence of an emotional condition related to the accepted employment factor -- the error in appellant's training scheme, which was committed by the employing establishment. No such evaluation had been made at the time appellant's claim was accepted in September 1992 and the Office noted that the record did not contain a medical opinion relating an emotional condition to the error in appellant's training scheme.

In a report dated November 11, 1991, Dr. Argelia Prieto, an attending Board-certified psychiatrist, diagnosed generalized anxiety disorder and major depression related to disciplinary actions at work. In a report dated November 26, 1991, Dr. Judith E. Kniffin, a Board-certified psychiatrist, to whom the employing establishment referred appellant, diagnosed generalized anxiety disorder and major depression but did not clearly specify the cause. In a note dated June 2, 1992, an Office medical adviser stated that appellant had a work-related aggravation of a generalized anxiety disorder.[19] Although some of these reports contain statements regarding appellant's stress at work, none of the reports contain an opinion relating appellant's emotional condition to the accepted employment factor, the error in appellant's training scheme.

DeDonato, 39 ECAB 1260, 1266-67 (1988).

[16] *Id.*

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

[18] *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

[19] After the Office's initial rescission action, appellant submitted a March 14, 1995 report of Dr. William P. Reich, an attending clinical psychologist. Dr. Reich indicated that appellant had anxiety and psychosomatic symptoms due to her relations with supervisors, but he did not relate appellant's condition to a specific compensable employment factor.

The Office also provided new medical evidence in support of its rescission action. The Office had referred appellant, along with the case record and the revised statement of accepted facts to Dr. Ronald B. Baron, a Board-certified psychiatrist, for evaluation of appellant's emotional condition. In a report dated February 23, 1994, Dr. Brown noted that appellant did not exhibit generalized anxiety disorder, depression or any serious psychiatric disorder.

For these reasons, the Office presented sufficient new argument and evidence to justify the rescission of its acceptance of appellant's claim for aggravation of generalized anxiety depression.

The decision of the Office of Workers' Compensation Programs dated July 11, 1995 is affirmed.

Dated, Washington, D.C.
September 23, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member