U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YOLANDA M. MARTINEZ and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, Los Angeles, CA

Docket No. 97-1192; Submitted on the Record;
Issued December 14, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof to establish that she has an emotional condition causally related to factors of her federal employment; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing on April 9, 1996; and (3) whether the Office abused its discretion by refusing to reopen appellant's claim for merit review on August 21 and December 3, 1996.

On September 12, 1995 appellant, then a 35-year-old entry specialist, filed a claim for mental stress and other complaints which she related to harassment at work by her supervisor. In support of her claim, appellant submitted an attending physician's report, Form CA-20, dated October 16, 1995 on which her treating physician, Dr. Maureen Terrazano, a psychiatrist, diagnosed major depression with psychotic features, and indicated by checking a box marked "yes" that the diagnosed condition was causally related to appellant's employment.

By letters dated November 2, 1995, the Office requested additional information from both appellant and the employing establishment. In a letter dated December 7, 1995, appellant's supervisor, Ms. Maddalena Beltrami, refuted appellant's allegations. No response was received from appellant. Consequently, in a January 9, 1996 decision, the Office rejected appellant's claim on the grounds that the fact of injury was not established.

Appellant submitted a narrative statement disagreeing with the Office's decision and submitted a medical report from Dr. Terrazano.

In a merit decision dated February 14, 1996, the Office found that the evidence submitted by appellant was insufficient to establish that appellant's diagnosed emotional condition arose in the course of the performance of her federal employment duties.

On March 3, 1996 appellant, through counsel, requested an oral hearing before an Office representative. In a decision dated April 9, 1996, appellant's request was denied on the grounds that she had previously requested reconsideration of her claim.

On July 29 and August, 28, 1996, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of her requests. In decisions dated August 21 and December 3, 1996, respectively, the Office found that the evidence submitted with each of appellant's requests was insufficient to warrant merit review of her claim.

The Board finds that appellant has not met her burden of proof to establish that her emotional condition is causally related to compensable factors of her employment.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or 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. Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.[1] When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded because such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.[2] In these cases the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.[3]

In her narrative statement, appellant stated that beginning in 1995, there was a shortage of staff in her office, and that there was a very heavy work load. She added that management expected all work to be completed without errors and that there was constant friction between management and the employees. She stated that on one occasion she was pressured by the management to do a broker interview despite the fact that she had never done one and was not trained to do so. She explained that the situation was exacerbated by the fact that there was no sufficient office coverage and she felt that management expected her to do the interview and to complete the work load in the Office. In addition, appellant stated that when she was off work

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

[2] *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

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

on sick leave, management had questioned the validity of her doctor's excuses and had denied her leave. Appellant further stated that her supervisor, Ms. Maddalena Beltrami, constantly harassed her and scrutinized her work to find error in it and that she did not subject others in the office to the same scrutiny. She stated that she tried to explain to her supervisor that if there were errors in her work, it was due to the lack of staffing and the volume of the work. Appellant concluded that she believed her condition was the result of continued stress and harassment from management.

By letter dated December 7, 1995, Ms. Beltrami contested appellant's allegations. Ms. Beltrami specifically stated that she had been appellant's supervisor since April 3, 1995, and that during her initial weeks as supervisor she spent considerable time "restructuring work assignments and procedures, eliminating backlogs through overtime, equitable distribution of work and streamlined process." She added that she had also issued voluminous written instructions on procedures and policies, that all employees had received training as needed and that no employee had ever been expected to perform a task for which they had not been trained. She noted that during the past summer the performance standards for the position of entry specialist had been rewritten and that the plans, including work assignment deadlines and acceptable levels of performance were agreed upon by management and the employees. Ms. Beltrami explained that all employees were instructed that any problems or backlogs were to be brought to her attention, and that although it was later discovered that appellant had backlogs in virtually all of her work assignments she failed to notify her supervisor of this fact. Ms. Beltrami stated that, contrary to appellant's assertions that she did not do anything about the office backlogs, when she learned of an employees' backlog she took steps to ensure that this did not negatively effect the other employees. Regarding appellant's assertion that she improperly declined to approve her leave requests, Ms. Beltrami explained that appellant was granted the requested advanced sick leave once the employing establishment received medically acceptable certification to support her absence from work. Ms. Beltrami concluded that appellant's work had been subjected to the same guidelines as all other employees, and that her work was not subjected to any more scrutiny than any other employee.

While the actions of a supervisor which an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act, there must be some evidence that such implicated acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.[4] In this case, appellant has not established that her supervisor harassed her or subjected her work to undue scrutiny. The review of an employees work performance and matters concerning the use of sick leave are administrative matters and therefore are not considered to be compensable factors of her employment unless the employing establishment was in error or abusive in these administrative matters. There is no evidence of record that the actions of appellant's supervisor or the employing establishment were in error or abusive to appellant. Ms. Beltrami, appellant's supervisor, specifically refuted these allegations, and appellant did not provided any information which established these allegations as factual. There

[4] *Joan Juanita Greene*, 41 ECAB 760 (1990).

is also no evidence in the record that appellant was ever required to perform a task for which she was not properly trained.

Appellant has established, however, that beginning in 1995 she had very heavy work load and that she had difficulty dealing with this. Appellant's supervisor, Ms. Beltrami, confirmed that when she first began her supervisory duties the office in which appellant worked had a backlog of work which she, as supervisor, made a great effort reduce by "restructuring work assignments and procedures, eliminating backlogs through overtime, equitable distribution of work and streamlined process." Ms. Beltrami also confirmed that appellant had backlogs in virtually all of her work assignments. While appellant has not established that she received disparate treatment, the Board has held that where a claimant demonstrates a heavy work load or overwork as part of their job requirements, reactions from the heavy work load are compensable.[5]

Even though appellant has established that there was at least one compensable factor of employment in her case, she must still establish by medical evidence that this factor caused her emotional condition. To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[6] (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[7] and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[8] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,[9] must be one of reasonable medical certainty,[10] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

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[5] *O. Paul Gregg*, 46 ECAB 624 (1995) (where the Board held that appellant demonstrated that changes in the employing establishment procedures resulted in an increased work load in appellant's regular day-to-day duties and constituted a compensable factor of employment).

[6] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[7] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979).

[8] S*ee generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[9] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[10] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[11] *See William E. Enright*, 31 ECAB 426, 430 (1980).

In a November 20, 1995 report, Dr. Maureen Terrazano indicated that she first saw appellant on September 11, 1995, for complaints of depressed mood, fearfulness, insomnia, lack of energy, difficulty focusing and concentrating, and auditory hallucinations. With respect to the causes of appellant's condition, Dr. Terrazano stated:

> "Her symptoms appeared to be in response to a threat at work that she might not get to keep a promotion at work that she felt she had earned though was unable to get until she had filed a discrimination case. Yolanda felt that she was being watched very closely and that her performance ratings on her new job were unfairly reflecting minor errors. She felt her work was being scrutinized too closely due to resentment at the discrimination claim she had made … the stress of trying to do an adequate job without the benefit of appropriate training and repeated criticism led to self reproach and denigration which led to profound depression with mood congruent psychotic features that was manifested by the symptoms noted above."

The Board notes that the only specific employment-related matters reported by Dr. Terrazano were appellant's feelings that she was being watched too closely, unfairly scrutinized and required to perform work for which she was not adequately trained, which have not been found to be compensable factors of employment. Dr. Terrazano did not address whether appellant's condition was caused by her increased work load, which is the only compensable factor of employment established in this case. Dr. Terrazano's report therefore has little probative value and is insufficient to establish a causal relationship between appellant's compensable factors of employment and her emotional condition. Therefore, the Office properly found that the evidence of record is insufficient to establish that appellant sustained an emotional condition causally related to factors of her federal employment.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

By decision dated April 9, 1996, the Office denied appellant's hearing request. The Office stated that appellant was not entitled to a hearing as a matter of right because she had previously requested reconsideration. The Office exercised its discretion to conduct a limited review of the case and indicated that appellant's request was also denied on the basis that the issues in this case could be addressed through a reconsideration application.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal

[12] *John T. Horrigan*, 47 ECAB 166 (1995).

provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[14] when the request is made after the 30-day period for requesting a hearing,[15] and when the request is for a second hearing on the same issue.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[17]

In the present case, subsequent to the Office's January 9, 1996 decision, appellant submitted a narrative statement disagreeing with the decision, and submitted additional factual and medical evidence in support of her claim. The Board finds that under these circumstances, the Office properly determined that appellant was seeking reconsideration of the January 9, 1996 Office decision, and thus properly issued its February 14, 1996 merit decision on reconsideration.[18] Hence the Office was correct in stating in its April 9, 1996 decision that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its April 9, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical and factual evidence on reconsideration. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[19] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

Finally, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on August 21 and December 3, 1996.

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[13] *Philip G. Feland*, 47 ECAB 418 (1996).

[14] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[15] *Id.*

[16] *Id.*

[17] *Stephen C. Belcher*, 42 ECAB 696, 701-2 (1991).

[18] *See Vicente P. Taimanglo*, 45 ECAB 504 (1994).

[19] *Frederick D. Richardson, supra* note 14; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Under section 8128(a) of the Act,[20] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[21] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[22]

In support of her July 29, 1996 request for reconsideration, appellant submitted a July 23, 1996 statement from Mr. Frank Newman, Chapter President of the National Treasury Employees' Union. In his statement, Mr. Newman stated that members of appellant's team "felt" that they had a constantly excessive amount of work which created backlogs, that the team "gained a perception" that Ms. Beltrami examined their team for mistakes more often than the other teams, and that appellant "began to feel she was being singled out" because her supervisor called her at home to when she was out of work on jury duty, but had not called other employees who were also out on jury duty. With respect to Mr. Newman's assertion that appellant had a constantly excessive amount of work, as the record already contained sufficient evidence to establish that appellant had a heavy work load, this assertion is cumulative. The remainder of Mr. Newman's statement is also cumulative, as it merely repeats appellant's own perceptions, put forth previously by appellant herself and fully considered by the Office, that she was being singled out and unfairly treated. As Mr. Newman's statement is repetitious of evidence already of record, and therefore cumulative in nature, the Office properly found, in its August 21, 1996 decision, that it did not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.[23]

In support of her August 28, 1996 request for reconsideration, appellant submitted a statement from Mr. Robert Mota, a coworker, in addition to a copy of an Equal Employee Opportunity Commission (EEOC) claim which was resolved in her favor. In an undated statement Mr. Mota stated that Ms. Beltrami, appellant's supervisor, had threatened, overworked, retaliated against, harassed and singled out appellant for having testified on Mr.

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.138(b)(1).

[22] 20 C.F.R. § 10.138(b)(2).

[23] *Kathy P. Roberts*, 45 ECAB 548 (1994).

Mota's behalf in his own EEOC claim. Again, this evidence is cumulative of evidence earlier presented by appellant herself, and previously fully considered by the Office.[24] With respect to the EEOC decision, dated sometime in 1994, while the decision does reflect that the employing establishment was found to have engaged in reprisals and discrimination against appellant between 1991 and 1993, as this was prior to the time frame of events in the instant case, which began in 1995, it does not constitute evidence relevant to the issue for the which the Office denied appellant's claim, and is thus insufficient to require the Office to reopen appellant's claim for review of the merits pursuant to section 10.138(b)(1)(iii). Therefore, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on December 3, 1996.

The decisions of the Office of Workers' Compensation Programs dated December 3, August 21, April 9 and February 14, 1996 are hereby affirmed.

Dated, Washington, D.C.
December 14, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[24] *Id.*