U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA J. REEVES and DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Minneapolis, MN

Docket No. 98-1003; Submitted on the Record;
Issued December 21, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained an emotional condition in the performance of duty, causally related to compensable factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

On May 14, 1997 appellant, then a 38-year-old meat inspector, filed a claim alleging that unnecessary work stress caused her to develop severe headaches. Appellant stopped work on June 10, 1997 and did not return. In an attachment, appellant stated that she was under severe stress from her foreman to do her job one way, but that quality control told her to do it another way, which caused headaches, anxiety attacks and weight loss.

By letter dated July 18, 1997, the Office requested further information including a detailed description of the employment incidents or conditions which she believed caused her condition and a comprehensive medical report describing her condition.

In a response dated July 25, 1997, appellant alleged that her condition developed due to harassment, intimidation and threats. She claimed that she started feeling nervous, then began to have headaches which she connected with stress but which went away when she was away from work, that she totally mistrusted everyone due to their attacks against her, and that the only emotional condition she had previously suffered was anorexia due to work stress in 1991.

Appellant submitted additional materials detailing various complaints, grievances, allegations and requests regarding herself, her coworkers, her supervisors and conditions of her employment.

Specific allegations were as follows: appellant alleged that in about November 1995 inspector Robert Peskey got very nasty and that it made her feel threatened. Appellant alleged that during her training in 1995 and 1996 she felt unsure of herself due to lack of training and the

number of her questions which were left unanswered by other inspectors. Appellant alleged that she often felt insecure. She alleged that about December 1995 or January 1996 a foreman backflushed a drain causing the drip pan over her to pour on her, that the other inspectors laughed about it, and that she was humiliated because she alleged that it was done on purpose. Appellant alleged that about January 1996 when she had come off many weeks of nights onto days, she inadvertantly signed in on nights, and when she checked out at the end of the day someone had written "dummy" by her name. She claimed that she felt belittled.

Appellant alleged that in 1996 she was having trouble getting on full time and got the run around for about three weeks. She claimed that she felt as though she was being discriminated against for being female as her male counterpart did not go through the same run around. Appellant alleged by letter in October 1996 that the rotation pattern was questioned by her and her coworker, and that they were retaliated against for it. She alleged that inspector Hessel, the union representative, attacked her in a letter for her October 1996 information, which made her feel attacked and upset. Appellant alleged that in October 1996 others had gone behind her back and tried to keep her from being hired full time by saying that there was a conflict of interest, which hurt her. She claimed that the employing establishment was using her husband's employment with Little Silver Corporation as a basis for denial of her conversion to full time.

Appellant alleged that she went to Dr. Beauman for advice on relief positions, annual leave scheduling, training, starting time changes and assignments, but did not like his explanations or his cautions to use appropriate channels to resolve complaints. She alleged that on October 24, 1996 an employing establishment directive regarding conflict of interest and employee restrictions was on the table where she normally sat by habit, which made her furious because it happened right after being told that she would not be coming on full time due to conflict of interest. Appellant alleged that in October 1996 she was having trouble with cooperation with other inspectors which made her feel uneasy. She alleged that she was belittled by inspector Jerry Nelson when he told the trimmer to pull her tag and place it on a different hog. Appellant alleged that others were having private meetings.

Appellant alleged that she asked Dr. Benson in on November 2, 1996 about stopping the harassment, but that he was hesitant and reluctant to admit that there was a problem. She alleged that when she asked for help regarding the union representative's release of her October 1996 letter, the intimidation and harassment became unbearable. Appellant alleged that Donnie Bulls approached her and asked about what she had told the supervisor about his sister working at the plant, which made her nervous. She alleged that the working conditions were totally unbearable. Appellant alleged that she was very concerned with the possibility that others were trying to set Bill Thompson up, and that if they did it to him, they might do the same thing to her. She alleged that she was upset with Dr. Wilson speaking to Nancy McGregor about her and the confidentiality of her allegations regarding Mr. Thompson being set up; she alleged slander, libel and defamation and requested that Dr. Wilson apologize, which never happened. Appellant alleged that she and Barbara Thompson, a coworker, were confronted about their letters at a union meeting, that they were belittled about their spelling, and that it was very upsetting and they felt cornered.

Appellant alleged that she was concerned about assignments and felt that she was not getting an equal opportunity as senior inspectors. She alleged that on November 12, 1996 in the breakroom Henry Buers threw $5.00 in front of her and made a nasty remark about clearing her conscience, which upset her and made her feel like crying. Appellant alleged that on November 14, 1996 she was not allowed to leave work at the time she requested as Jeff Stoterau and others did not relieve her. She alleged that she saw and felt bad looks and feelings at work which frustrated and intimidated her. Appellant alleged that by letter dated November 15, 1996 she reported that she had been attacked verbally by inspector Robert Peskey in front of others, that he told her she was messing around with the wrong person and that he would have her "ass." She alleged that he had been very aggressive towards her for two weeks prior to this. Appellant alleged that foreman Jonna Vader hassled her several times over railed out hogs. She alleged that Mrs. Thompson told her several questionable statements made by other inspectors dealing with her. Appellant alleged that Dr. Kaiser made a statement to Bill Thompson that her problems were going to cause changes, knowing it would get back to her, which upset her. She alleged that she was not satisfied with the union representation she was receiving.

Appellant alleged that she was belittled by Dr. Wilson when she had a problem with a drain and wanted the regulations enforced, and Dr. Wilson backed the company. She alleged that she had not received her standards or any reviews since coming on full time, that she was concerned that this would effect promotions, and that she felt that she was being discriminated against and was not wanted. Appellant alleged on February 20, 1997 that she was still having problems with the drain, that she asked for floor help but never saw any remedy, and that she was simply being ignored. She alleged that on February 21, 1997 she was intimidated by Dave Volden when he said a meeting was scheduled for two to three hours but that he was prepared to go for seven, especially after "tonight." Appellant alleged that the air in the room was very uncomfortable. She also alleged that she was told by the relief veterinarian to sign as a volunteer to cover for a missing inspector, which she did, but that the next day Mike Stolba left a note on the board about "being unqualified," which was very degrading.

Appellant alleged that on February 21, 1997 Dr. Wilson gave her her standards and told her that if she was to give her a rating at that time it would be a "does not meet" which was very upsetting. She alleged in a letter dated February 26, 1997 that she had a problem receiving an emergency phone call from her child about her father. Appellant alleged that her basic red meat book was never gone over by Dr. Benson and her, that Dr. Benson told her she was making a big mistake when she talked about filing the grievance on February 24, 1997, that he stated that he would deny the conversation and told her she was digging herself a deep hole, that this would catch up with her, and that she would find she could not work for the government. She alleged that she felt her job was threatened and that her safety was in jeopardy, that she felt uneasy and that the foreman was watching her. Appellant alleged that Dr. Wilson wrote bad remarks on a February 3, 1997 evaluation form about an unsatisfactory future which hurt her, that her notes were unfair, and that she stated many untruths, which made her cry. She stated that a coworker told her that she was going to get her walking papers which shocked her. Appellant alleged that there were leave problems about going to Bill Thompson's funeral, and she was held absent without leave (AWOL). Appellant alleged that she felt attacked by the union on the leave issue. She alleged stress due to her multiple grievances, Equal Employment Opportunity (EEO) complaints, union problems, and leave problems. Appellant alleged that she was being harassed

by being told that policy was that stud earrings, rings and watches were not to be worn, and that a note was put on her locker. During negotiations appellant was told that she was misinterpreting and misunderstanding anything and everything from verbal to written instructions and even negotiations which made her feel stupid and so she filed a formal complaint.

The statement of Mrs. Thompson, a coworker, regarding Mr. Thompson's funeral was also included, as was Mrs. Thompson's EEO complaint. She noted that appellant complained about blue ink poured in the hand wash sink that ran onto the floor, that appellant was mortified that she seemed to be ignored, that two foremen had been putting her and appellant in choke holds for several days,[1] that Mrs. Thompson was humiliated when one foreman kicked her in the rear, that there was hair in the sink, that appellant was charged with AWOL but that she had submitted workers' compensation forms, and that stress at work precipitated Mr. Thompson's death. Mrs. Thompson also provided a statement of work incidents as reported to her by appellant. Additionally submitted were joint statement from appellant, Mrs. and Mr. Thompson, to the union which contained complaints and comments.

By decision dated November 6, 1997, the Office found that appellant failed to implicate any compensable factors of employment. The Office found that none of the factual events of confrontation, intimidation or drain backflushing alleged were supported by witnesses or other corroborating evidence, that none of the alleged events of harassment or hasseling were corroborated or supported by witness statements, that the "dummy" allegation supposedly written by her name was not supported by concrete evidence, and that no evidence of discrimination was supported by the facts of record or by EEO findings. The Office also found that the general allegations of slander, libel, defamation and lack of confidentiality were totally unsupported by the record. The Office found that none of appellant's union grievances were upheld, none of her whistleblower complaints, and none of her EEO complaints were upheld. The Office found that training issues, performance rating issues, promotion issues, rotation issues, assignment issues, and employment status issues are not considered to be compensable factors of employment for compensation purposes. The Office also found that leave issues, union issues, personnel and management policy and regulation issues, and investigations, were not considered to be compensable factors of employment for compensation purposes.

By letter dated December 9, 1997, appellant requested an oral hearing. By decision dated January 28, 1998, the Office denied appellant's request noting that it was untimely requested and finding that the issue could be adequately addressed by requesting reconsideration and by submitting new evidence not previously considered.

The Board finds that appellant has failed to establish that she sustained an emotional condition in the performance of duty, causally related to compensable factors of her federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the

[1] No specific factual evidence identifying persons, place or time was provided.

individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2]

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[3] Rationalized medical opinion evidence is medical evidence that 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. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[4]

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but are not covered because they do not arise out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Act. Generally speaking, when an employee experiences an emotional reaction to his or her regular or special assigned employment duties or to a requirement imposed by his employment or has fear or anxiety regarding his or her ability to carry out assigned duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is regarded as due to an injury arising out of and in the course of the employment and comes within the coverage of the Act.[5] Conversely, if the employee's emotional reaction stems from employment matters which are not related to his or her regular or assigned work duties, the disability is not regarded as having arisen out of and in the course of

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[4] *Id.*

[5] *Donna Faye Cardwell*, *supra* note 3, *see also Lillian Cutler*, 28 ECAB 125 (1976).

employment, and does not come within the coverage of the Act.[6] Noncompensable factors of employment include administrative and personnel actions, which are matters not considered to be "in the performance of duty."[7]

When working conditions are alleged as factors in causing 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.[8] When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.[9] When the matter asserted is a compensable factor of employment, and the evidence of record establishes the truth of the matter asserted, then the Office must base its decision on an analysis of the medical evidence of record.[10] If the evidence fails to establish that any compensable factor of employment is implicated in the development of the claimant's emotional condition, then the medical evidence of record need not be considered.

In the present case, the Office properly found that none of the causative factors appellant alleged were compensable factors of employment.

Many of appellant's allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*[11] the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment 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.[12] Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. The incidents and allegations made by appellant which fall into this category of administrative or personnel actions include: appellant being

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[6] *Id.*

[7] *See Joseph Dedenato,* 39 ECAB 1260 (1988); *Ralph O. Webster*, 38 ECAB 521 (1987).

[8] *See Barbara Bush*, 38 ECAB 710 (1987).

[9] *Ruthie M. Evans*, 41 ECAB 416 (1990).

[10] *See Gregory J. Meisenberg*, 44 ECAB 527 (1993).

[11] 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

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

monitored,[13] training questions,[14] appellant being instructed on how to handle procedures,[15] being bypassed with assignments,[16] trouble getting on full time,[17] policy changes and enforcement,[18] leave problems and usage,[19] appellant receiving poor performance evaluations,[20] and general criticism. Appellant has presented no evidence of administrative supervisory error or abuse in the performance of these actions, and therefore they are not compensable now under the Act.

The Board also finds that the employment factors appellant alleged which are not covered under the Act include her involvement with her own and another worker's EEO complaints and grievances.[21] The Board has held that stress or frustration resulting from failure to obtain appropriate redress or corrective action from other administrative agencies with which the complaints are filed against the employing establishment are not compensable under the Act because such actions of the particular administrative agency in reviewing and investigating the charges and rendering a decision thereon do not have any relationship to the employee's regular or specially assigned duties.[22]

Appellant alleged that she was harassed by multiple people in a variety of ways. She alleged that she was laughed at, belittled, humiliated, hurt, had "dummy" written by her name when she erred when signing in, upset, stared at, had nasty remarks made to her, was ignored, and was generally harassed, all without corroborating witness statements identifying time, place and persons involved. With regard to her allegations of harassment, it is well established that for harassment to give rise to a compensable disability under the Act there must be some evidence that the implicated incidents of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable.[23] An employee's charges that he or she was harassed or discriminated against are not determinative of whether or not harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[24] The Board has

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[13] *Id.*

[14] *Jose L. Gonzalez-Garced*, 46 ECAB 559 (1995).

[15] *Id.*

[16] *See David W. Shirey*, 42 ECAB 783 (1991).

[17] *Helen Casillas,* 46 ECAB 1044 (1995).

[18] *See David W. Shirey*, 42 ECAB 783 (1991).

[19] *Martha L. Watson,* 46 ECAB 407 (1995); *Elizabeth Pinero*, 46 ECAB 123 (1994).

[20] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 783 (1991).

[21] *See Eileen P. Corigliano*, 45 ECAB 581 (1994); *Donna Faye Cardwell, supra* note 3.

[22] *Donna Faye Cardwell, supra* note 3.

[23] *Helen Casillas*, 46 ECAB 1044 (1995); *Ruth C. Borden*, 43 ECAB 146 (1991).

[24] *See Anthony A. Zarcone*, 44 ECAB 751 (1993).

held that actions of an employee's supervisor or of her coworkers which the employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act.[25] However, in order for harassment to give rise to a compensable disability under the Act, there must be some factual evidence that such harassment did in fact occur. The Board finds that appellant has failed to submit any specific, reliable, probative and substantial evidence in support of her allegations. Appellant has the burden of establishing a factual basis for her allegations, however, the allegations in question are not supported by specific, reliable, probative and substantial evidence and have been refuted by statements from appellant's employer. Accordingly, the Board finds that these allegations cannot be considered to be compensable factors of employment since appellant has not established a factual basis for them.

The Board also finds that none of the factual evidence of record supports that there was any intentional confrontation, intimidation or deliberate backflushing of drains on appellant or of clogging sinks with the purpose of harassing appellant. Further, the Board notes that appellant's allegations related to union activities and union personnel are not compensable under the Act, as union activities are personal in nature and are not considered to be within an employee's course of employment or performance of duty.[26]

As appellant has failed to implicate any compensable factors of her employment in the development of her stress-related condition, she has failed to meet her burden of proof to establish her claim.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under § 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[27]

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary

[25] *Sylvester Blaze*, 42 ECAB 654 (1991).

[26] *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

[27] 5 U.S.C. § 8124(b)(1).

review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[28]

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 provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[29] 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 for a hearing,[30] when the request is made after the 30-day period for requesting a hearing[31] and when the request is for a second hearing on the same issue.[32] In these instances the Office will determine whether a discretionary hearing should be granted of, if not, will so advise the claimant with reasons.[33] 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.[34]

In the present case, the Office issued its most recent merit decision denying appellant's claim on the issue in question on November 6, 1997. Appellant requested a hearing in a letter dated December 9, 1997. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[35] Since appellant did not request a hearing within 30 days of the Office's November 6, 1997 decision, she was not entitled to a hearing under § 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its January 28, 1998 decision and denied the request on the basis that appellant could pursue her claim by

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[28] 20 C.F.R. § 10.131(a).

[29] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[30] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[31] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[32] *Johnny S. Henderson*, *supra* note 29.

[33] *Id.*; *Rudolph Bermann, supra* note 30.

[34] *See Herbert C. Holley, supra* note 31.

[35] 20 C.F.R. § 10.131(a).

requesting reconsideration and submitting additional relevant evidence not previously considered.

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 deductions from known facts.[36] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 28, 1998 and November 6, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 21, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[36] *Daniel J. Perea*, 42 ECAB 214 (1990).