

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA G. UTKE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Fayetteville, AR

*Docket No. 00-2705; Submitted on the Record;
Issued September 19, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty.

On February 7, 1996 appellant, then a 42-year-old physician, filed an occupational disease claim¹ (Form CA-2), alleging that her stress was due to the wrongful termination of her employment on August 8, 1995.²

In an August 3, 1995 treatment note, Dr. Bronson Stillwell, an attending physician, diagnosed job-related stress and situational anxiety.

In a letter dated March 5, 1996, the employing establishment denied that appellant had been wrongfully terminated as the action was taken during her probationary period and based upon her attendance, performance and conduct.

In a report dated September 18, 1996, Dr. Tavis Jenkins, an attending Board-certified psychiatrist, opined "that the additional stress and psychiatric symptoms that she experienced, are to some extent, caused by and certainly exacerbated by the stressful difficulties that have come her way as an employee" at the employing establishment. Dr. Jenkins noted that he had been treating appellant since 1994 for adult attention-deficit disorder and that, in February 1995, she related that her supervisor was harassing her. In March 1995, the physician opined that appellant was deteriorating to some extent with anxiety, mild agitation and an inability to concentrate, which appeared to be directly related to her reports of the activities of her

¹ This was assigned claim number 16-0275730.

² The record contains a copy of an occupational disease claim dated February 24, 1995 alleging that her stress was due to harassment by her supervisor. This was assigned claim number 16-0256950 and denied by the Office of Workers' Compensation Programs on September 18, 1995.

supervisor. Due to her deterioration, Dr. Jenkins recommended a medical leave due to job-related stress in early March and returned her to work in early April.

In a letter dated September 26, 1996, responding to an Office request for additional information, appellant indicated that her depression and stress was due to being forced to undergo a physical examination where her breasts were allegedly fondled by the physician performing the examination, that her supervisor had continually harassed her since March 1994, that she was forced to work with the physician who allegedly molested her and that her schedule was overlapping in two areas of the hospital. Appellant noted that she repeatedly requested that her schedule be changed so she could get to the clinic after leaving the admission area without being written up as absent without leave for leaving the admission area to be on time for duty at the clinic area. Appellant also alleged that on August 8, 1995 she was assaulted by the physician who had molested her during her physical examination and had continually harassed her.

On November 6, 1996 the employing establishment responded to appellant's allegations, denying that she had been harassed and acknowledging that she had inadvertently been scheduled to work for a short period of overlapping time. The employing establishment noted that appellant did not inform anyone of the conflict in her schedule until there were complaints and that the schedule was changed once the conflict became obvious. Regarding the forced physical examination, the employing establishment noted all physicians were required to undergo a physical so they could wear a respirator for entering the room of a tuberculosis patient. Appellant had made no request to have a female doctor perform the examination.

On March 18, 1997 appellant filed an Equal Employment Opportunity (EEO) claim alleging discrimination based upon sex, handicap, reprisal for her prior EEO activities and reprisal for whistleblowing activities. She also alleged that she was assigned to increasing number of nights and weekends and removed from her regular tour duties. Appellant alleged that she was forced to work in a hostile work environment due to her being assigned to work with Dr. Parta and that derogatory comments were placed in her work file during her stress-related absence.

By decision dated September 11, 1997, the Office denied appellant's claim on the basis that she had failed to establish any compensable work factors.

In a letter dated October 6, 1997, appellant requested an oral hearing.

By letter dated March 16, 1999, appellant requested a review by the hearing representative as she was unable to attend the hearing and submitted copies of a lawsuit filed against the employing establishment, an August 10, 1995 letter addressed to the Office of Special Counsel, Complaints Examination Unit, two copies of SF50's dated 1995 and numerous medical records.

By letter dated April 14, 1999, the employing establishment responded and submitted evidence in response. It noted that appellant's allegations of sexual harassment were investigated on two occasions and were not supported by the testimony of the employee health nurse present in the room during her examination.

By faxes dated April 16, 18 and 19, 1999, appellant submitted numerous documents and excerpts from depositions. In a March 15, 1999 letter, Dr. Jenkins diagnosed a stress-related disability, which he opined were due to employment events that started in February or March 1994.

In a decision dated May 20, 1999, the hearing representative affirmed the denial of appellant's claim. The hearing representative found that appellant's allegation that her stress was due to conflict over her overlapping work schedules was compensable, but the record contained no rationalized medical evidence supporting that her disability was related to this compensable factor.

In a letter dated May 18, 2000 and received on May 23, 2000, appellant requested reconsideration and submitted an August 3, 1995 report by Dr. Stillwell, progress notes dated August 8, 1995 and a March 3, 2000 report by Dr. Jenkins in support of her request. In his report, Dr. Jenkins detailed appellant's history and diagnosed post-traumatic stress disorder with depression and anxiety and attention deficit hyperactivity disorder, predominantly inattentive type. He noted that when he saw appellant in May 1995 she related that "she was still having a lot of conflicts, problems and stress with the staff at her employment, and no resolution on her EEOC complaint, which added to her stress."

By merit decision, the Office denied appellant's request for modification on May 30, 2000.

The Board finds that appellant has not established an emotional condition in the performance of duty.

To establish an emotional condition causally related to factors of his or her federal employment, a claimant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.³

In emotional conditions claims, 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. 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

³ *Fred Faber*, 52 ECAB ____ (Docket No. 99-1256, issued October 10, 2000); *Leslie C. Moore*, 52 ECAB ____ (Docket No. 00-126, issued November 1, 2000).

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.⁴

Regarding appellant's allegations that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, wrongly denied leave, improperly assigned work duties, and unreasonably monitored his activities at work, 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 Federal Employees' Compensation Act.⁵ Although the handling of disciplinary actions, evaluations and leave requests, the assignment of work duties, 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.⁶ 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.⁷ The evidence of record is insufficient to establish administrative error or abuse. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant has also alleged that harassment and discrimination on the part of her supervisors and coworkers contributed to her claimed stress-related condition. 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 his regular duties, these could constitute employment factors.⁸ 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.⁹ 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 or coworkers.¹⁰ Appellant alleged that supervisors engaged in actions which he believed

⁴ *Dennis J. Balogh*, 52 ECAB ____ (Docket No. 99-1512, issued January 25, 2001); *Felix Flecha*, 52 ECAB ____ (Docket No. 00-596, issued February 26, 2001).

⁵ See *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

⁶ *Id.*

⁷ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹⁰ 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).

constituted harassment and discrimination, but she provided no corroborating evidence, such as witness statements, to establish that the actions actually occurred.¹¹ Appellant's allegations of harassment during a physical examination were refuted by the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that the employing establishment improperly proposed to change her work shift from the daytime to the nighttime. As noted above, disability is not covered where it results from such factors as frustration from not being permitted to work in a particular environment or to hold a particular position. On the other hand, the Board has held that a change in an employee's work shift may under certain circumstances be a factor of employment to be considered in determining if an injury has been sustained in the performance of duty.¹² Appellant's assertion that the proposed change in work shift was made contrary to the relevant policy relates to an administrative function of the employing establishment. To show that an administrative action such as the proposed change in work shift implicated a compensable employment factor appellant would have to show that the employing establishment committed error or abuse.¹³ Appellant has not provided sufficient evidence to establish such action on the part of the employing establishment. Thus, appellant has not established a compensable employment factor under the Act with respect to the proposed change in work shift.

In the present case, appellant has established a compensable factor of employment with respect to an overlapping one-half hour schedule for being in admissions and at the clinic. However, a claimant's burden of proof is not discharged by the fact that he or she has established an employment factor that may give rise to a compensable disability under the Act. To establish an occupational disease claim for an emotional condition, a claimant must also submit rationalized medical evidence establishing that he or she has an emotional condition and that such condition is causally related to the accepted work factors.¹⁴

The Board finds that the medical evidence is insufficient to establish that appellant has an emotional condition causally related to the accepted schedule overlap. The medical evidence submitted by appellant does not specifically attribute her emotional condition to this employment factor. For example, Drs. Stillwell and Jenkins both opined that appellant's stress was job related. However, Dr. Stillwell's August 3 and 8, 1995 reports make no mention of any compensable employment factors or provide an employment history. Dr. Jenkins noted appellant's history but provided no specific opinion regarding whether specific compensable employment factors caused or aggravated her condition.

For these reasons, appellant has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.

¹¹ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹² See *Gloria Swanson*, 43 ECAB 161, 165-68 (1991); *Charles J. Jenkins*, 40 ECAB 362, 366 (1988).

¹³ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁴ *Ronald C. Hand*, 49 ECAB 113 (1997); *Mary J. Ruddy*, 49 ECAB 545 (1998).

The decision of the Office of Workers' Compensation Programs dated May 30, 2000 is hereby affirmed.

Dated, Washington, DC
September 19, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member