United States Department of Labor
Employees' Compensation Appeals Board

LORRAINE M. JUPITER, Appellant	)	
and	)	**Docket No. 01-1752**
	)	**Issued: January 26, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Metairie, LA, Employer	)	

Appearances:
Lorraine M. Jupiter, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 29, 2001 appellant filed a timely appeal from the November 27, 2000 decision of the Office of Workers' Compensation Programs denying her claim for an emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim. The Board also has jurisdiction to review the Office's February 26, 2001 decision refusing to reconsider the merits of her claim. On appeal, appellant has submitted additional evidence to support her claim. Pursuant to 20 C.F.R. § 501.2(c)(2), the Board has no jurisdiction to review this evidence and may consider only the evidence that was before the Office at the time of its November 27, 2000 and February 26, 2001 final decisions.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition in the performance of duty on or about November 14, 1998; and (2) whether the Office properly denied appellant's February 2, 2001 request to reconsider the merits of her claim.

FACTUAL HISTORY

On December 14, 1998 appellant, then a 53-year-old clerk, filed a claim for compensation alleging that she sustained an emotional condition on November 14, 1998 when she had a confrontation with her supervisor that caused her unbearable stress. Appellant stopped work on December 3, 1998 and received continuation of pay.[1]

On December 3, 1998 Dr. Serge T. Celestin, a Board-certified psychiatrist, reported that appellant was more depressed, anxious and dysphoric: "Her condition seems to deteriorate in response to the stress and harassment at the employing establishment. She is unable to cope with it, adding the fact that she recently lost her son." Dr. Celestin suggested that appellant take two months off work. On January 28, 1999 Dr. Celestin diagnosed major depression and indicated with an affirmative mark that appellant's condition was caused or aggravated by an employment activity.

Appellant's supervisor commented on appellant's claim as follows:

> "On Saturday, November 14, at approximately 12:20 [appellant] walked through my office on the way to her work area. I asked her if she had been to lunch. She sarcastically replied, 'Yes, and I get a second break too.' I then replied that she just needed to follow the schedule. When I said that she started screaming that I am cruel, insensitive, and a racist. She walked to her desk screaming loudly that I am cruel and a racist and that I may tell the other Blacks what to do, but that I can[no]t tell her. I went to her work area and told her to clock off and leave. She continued yelling and drew the attention of other employees and was saying to them, 'How can she treat me this way?' I again said that I am asking you to clock off and leave. She then left the building. I felt very shaken by the whole incident.
>
> "All employees in the finance office were given a lunch and break schedule by the previous supervisor. I reissued this schedule in July 1998. At that time I told them ([appellant] included) that if for some reason they could not follow the schedule they just needed to let me know. The other employees do this. [Appellant] has always refused. If I ask her if she has been to lunch or break, she considers it harassment. She refuses to acknowledge that if she would let me know what is happening, I would not have to ask.
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> "On November 19, a predisciplinary meeting was held with [appellant]. No action has been taken at this time. [Appellant] was given a seven[-]day suspension in August for yelling at me and threatening to cause me big trouble. It has been requested that progressive discipline (14-day suspension) be taken. I have be[en] reluctant to take this action considering the death of her son and would prefer a letter of warning for her outburst. I believe that some discipline is

[1] On May 30, 1998 appellant filed a stress/harassment claim, file number 160319090, which the Office denied on August 31, 1998. Evidence relating to that claim is not pertinent to appellant's claim of a traumatic injury on November 14, 1998.

warranted considering her attitude toward me. We have given consideration to relieving [appellant] of her timekeeping duties until she is able to deal with her grief.

"On December 3, the other employees in the finance office wanted to play Christmas music on the radio. They asked [appellant] if it would be alright since they were concerned that it might upset her. She replied that it would be nice and might make her feel better. The music played for a couple of hours and then before anyone knew that anything was wrong, she was laying on the floor and screaming that she could n[o]t stand it anymore. Her daughter came to get her and she has not returned to work."

On February 26, 1999 the Office requested that appellant submit additional information to support her claim. Appellant submitted an April 9, 1999 report from Dr. William E. Fowler, a psychologist, who had seen appellant in psychotherapy since July 23, 1998. Appellant reported chronic work-related stress dating to at least 1992, which became worse since May 1998. With respect to the events of November 14, 1998, Dr. Fowler stated as follows:

"On November 14, 1998 she reported that the supervisor harassed her claiming she did not take her break on time. She was called into the office a week later for discussion. She believes this was done in retaliation of her EEO [Equal Employment Opportunity] complaint. She reports the supervisor told her that even though the son had died in the mean time she had to follow through on it because the incident occurred prior to her son's death on September 3, 1998.[2] [Appellant] filed a complaint at this point. She took a couple of days off to regroup. She returned to work. On December 3, 1998 she began screaming at her cubicle. She reports the supervisor was constantly watching her, and allowing other employees greater flexibility than she was allowed. She lost control at that point and began yelling without being aware of it. She sought treatment from Dr. Celestin at that point. She was off work for about two months and returned to work in February 1999.

"[Appellant] reported that she developed paranoia, forgetfulness, headaches, high blood pressure, heart palpitations, sleep disturbance, crying spells, low energy, poor appetite, trouble with memory and attention.

"My treatment has consisted of psychotherapy and Dr. Celestin has addressed treatment with antianxiety and antidepressant medication. Progress has been difficult because of the added burden of her son's death, and because she continued to go to what she experiences as a hostile work environment. She has returned to work but continues to experience crying spells and stress at work for which we are treating her."

[2] On October 15, 1998 Dr. Fowler reported that appellant was unable to work, likely for an indefinite period of time, arising from the recent death of her son.

In a decision dated November 27, 2000, the Office denied appellant's claim for compensation on the grounds that she failed to establish an injury in the performance of duty. The Office found no compensable factors of employment, as appellant had submitted no evidence to support her allegations.

On February 2, 2001 appellant requested that the Office reconsider the merits of her claim:

> "I am requesting reconsideration on the above case for two reasons. First, it took your office two years to send me a letter of denial, which you admitted to me when we spoke on the [tele]phone, that this procedure normally takes six months. I feel my case was not handled in a timely manner. Second, I am still being treated for stress by Dr. Fowler and Dr. Celestin. I have been away from the stressful environment of the [employing establishment] since November 11, 2000 at the request of Dr. Fowler. Enclosed you will find a [February 1, 2001] letter from Dr. Fowler concerning my condition."

On February 1, 2001 Dr. Fowler wrote as follows:

> "This is to certify that [appellant] remains under my care for stress-related problems. She has been out from work since November 11, 2000. She has been unable to cope with the work demands and stress.
>
> "She continues to have difficulty sleeping and is depressed to a significant degree, preventing her from functioning adequately on the job."

In a decision dated February 26, 2001, the Office denied a review of the merits of appellant's claim. The Office found that Dr. Fowler's February 1, 2001 report was irrelevant because appellant had not yet established as factual any compensable factor of employment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[3] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[5] "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in her employer's business, at a place where she may reasonably be expected to be in connection with

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8102(a).

[5] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.[6]

As the Board observed in the case of *Lillian Cutler*,[7] however, workers' compensation law does not cover each and every illness that is somehow related to the employment. When an employee experiences emotional stress in carrying out her employment duties or has fear and anxiety regarding her ability to carry out her duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from her emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of her work. By contrast, there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position. Workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence shows error or abuse on the part of the employing establishment.[8]

As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[9] In *Kathleen D. Walker*,[10] the employee attributed her emotional disability, in part, to disputes with coworkers. The Board noted that, while established disputes arising from the performance of one's duties could give rise to coverage under the Act, the claimant's unfounded perceptions could not constitute a compensable factor of employment. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.[11]

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[6] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[7] 28 ECAB 125 (1976).

[8] *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566, 572-73 (1991).

[9] *See Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

[10] 42 ECAB 603, 608 (1991).

[11] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

The Board has underscored that, in claims for a mental disability attributed to work-related stress, the claimant must submit factual evidence in support of his or her allegations of stress from "harassment" or a difficult working relationship. The claimant for compensation must specifically delineate those factors or incidents to which the emotional condition is attributed and submit supporting factual evidence verifying that the implicated work situations or incidents occurred as alleged. Vague or general allegations of perceived "harassment," abuse or difficulty arising in the employment is insufficient to give rise to compensability under the Act. Based on the evidence submitted by the claimant and the employing establishment, the Office is then required to make factual findings which are reviewable by the Board. The primary reason for requiring factual evidence from the claimant in support of his or her allegations of stress in the workplace is to establish a basis in fact for the contentions made, as opposed to mere perceptions of the claimant, which in turn may be fully examined and evaluated by the Office and the Board.[12]

ANALYSIS

Appellant filed a claim for compensation on December 14, 1998 alleging that she sustained an emotional condition on November 14, 1998 when she had a confrontation with her supervisor about whether she had been to lunch and about following the schedule. The supervisor ultimately told appellant to clock off and leave. As a general matter, such an interaction lay outside the scope of workers' compensation. It is not something for which a claimant may receive compensation. The only exception, as the Board explained earlier, is where the evidence establishes that the supervisor's actions were erroneous or abusive. Appellant's allegations of harassment are not enough, by themselves, to establish the exception and she has submitted no factual evidence to verify error or abuse by the supervisor during the November 14, 1998 interaction. The supervisor's statement of what happened on that date lends no support to appellant's claim of harassment. With no corroborating evidence to establish that harassment did in fact occur, appellant has not met her burden to establish a factual basis for her claim. The Board will affirm the Office's November 27, 2000 decision denying her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[13]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

[12] *Paul Trotman-Hall*, 45 ECAB 229 (1993) (concurring opinion of Michael E. Groom, Alternate Member).

[13] 20 C.F.R. § 10.605 (1999).

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[14]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

ANALYSIS

On February 2, 2001 appellant requested that the Office reconsider the merits of her claim. She gave two reasons. First, she argued that the Office did not handle her case in a timely manner. She cited no violation of any regulation or procedure, only a general assertion by the Office that the process normally takes six months. This alone is not sufficient to show, under the first criterion above, that the Office erroneously applied or interpreted a specific point of law, nor has appellant established the relevancy of this argument under the second criterion. She has made no showing that she might be entitled to additional substantive or procedural rights as a result of the time the Office took to issue a decision in her case.

Appellant did support her application for reconsideration with new evidence. On February 1, 2001 Dr. Fowler certified that appellant remained under his care for stress-related problems. He noted that she had been out from work since November 11, 2000, that she was unable to cope with the work demands and stress that she continued to have difficulty sleeping and was depressed to a significant degree, preventing her from functioning adequately on the job. The question for determination, under the third criterion for obtaining a merit review of her claim, is whether such medical opinion evidence is relevant to her claim for compensation.

The Board has held that 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. 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 compensable 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 submitted.[16]

[14] *Id*. at § 10.606.

[15] *Id*. at § 10.608.

[16] *Norma L. Blank*, 43 ECAB 384 (1992).

In this case, appellant asserted a compensable factor of employment, harassment, but failed to submit sufficient factual evidence to substantiate that harassment did in fact occur. In these circumstances, medical opinion evidence becomes irrelevant. Harassment, established as a matter of fact, is a necessary prerequisite for any medical opinion attempting to relate appellant's diagnosed condition to the events of November 14, 1998. Because appellant failed to establish a factual basis for her claim, no amount of medical opinion evidence can establish her entitlement to compensation. Dr. Fowler's February 1, 2001 report is not relevant and does not satisfy the third criterion for obtaining a merit review of appellant's claim.

Because appellant's February 2, 2001 request to reconsider the merits of her claim fails to meet at least one of the criteria for obtaining a merit review of her claim, the Office properly denied her application for reconsideration without reopening the case for a review on the merits. The Board will affirm the Office's February 26, 2001 decision.

CONCLUSION

Appellant has not met her burden of proof to establish that she sustained an emotional condition in the performance of duty on or about November 14, 1998. The Office properly denied appellant's February 2, 2001 request to reconsider the merits of her claim.

ORDER

The February 26, 2001 and November 27, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member