United States Department of Labor
Employees' Compensation Appeals Board

SUSIE TSENG, Appellant	)	
and	)	**Docket No. 04-2066**
	)	**Issued February 17, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Susie Tseng, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 18, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 23, 2003, which denied modification of a September 24, 2003 decision rejecting her claim for an emotional condition. Appellant also appealed an April 28, 2004 Office decision denying reconsideration under 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that she sustained an emotional condition in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 10, 2003 appellant, then a 68-year old distribution clerk, filed a claim for an occupational disease alleging that she developed stress and anxiety after experiencing a

continuing pattern of harassment by her supervisor. She stopped working on January 30, 2003 and did not return.

Appellant submitted a statement and alleged that on January 27, 2003 she had a dispute with a coworker regarding the seating arrangements at work and Lyn Loftin, her supervisor, screamed at her in front of coworkers, demanding in an offensive tone that the employees return to their appropriate seats. Appellant alleged that another coworker heard Ms. Loftin threaten to kill her. She alleged that Ms. Loftin wrongfully denied her request for leave from February 2 to February 6, 2003. Appellant also alleged that Ms. Loftin forbade her and other coworkers from speaking any language other than English while in the workplace.

Appellant submitted a January 30, 2003 report, from Dr. Chai-Kiong Lau, a Board-certified internist, who diagnosed work-related stress. He noted symptoms of muscle tension, trembling, dizziness and high blood pressure. Dr. Lau advised that appellant would be off work from January 30 to February 13, 2003.

In a letter dated February 26, 2003, the employing establishment controverted appellant's claim. In a February 20, 2003 letter, Ms. Loftin advised that on January 28, 2003 appellant was instructed to report to her duty station and perform her assignment; however, she proceeded to speak with another supervisor and performed no work for one and a half hours.

By letter dated March 7, 2003, the Office asked appellant to submit additional information including a detailed description of the employment factors or incidents, which she believed had contributed to her claimed illness. In a letter dated April 16, 2003, the Office asked the employing establishment to submit information addressing the incidents alleged by appellant.

In a January 30, 2003 report, Dr. Lau noted treating appellant for high blood pressure due to stress and anxiety at work. In a statement dated April 1, 2003, appellant reiterated her allegations of work-related stress indicating that Ms. Loftin screamed at and humiliated her while in front of her coworkers and generally treated her unprofessionally.

In a statement dated January 30, 2003, Patricia Mathews advised that on January 28, 2003 she witnessed appellant switch seats with another coworker and thereafter speak with Ms. Loftin. She noted that appellant was angry and speaking loudly. Another coworker whose name is illegible advised that on January 28, 2003, Ms. Loftin requested that appellant return to her assigned seat in her work area. The witness indicated that appellant failed to follow a direct order and Ms. Loftin advised that she would call security. The witness further noted that Ms. Loftin was a fair and likeable supervisor. Julia Silvers, a coworker, noted on January 30, 2003 appellant permitted her to sit in her assigned seat because appellant wanted to sit near a friend in another mail zone. Mohan Bassi, advised that on January 28, 2003 he witnessed Ms. Loftin repeatedly request that appellant return to her seat assignment. In a statement dated February 13, 2003, Patricia Harmon, a coworker, advised that on January 28, 2003 Ms. Loftin repeatedly requested that appellant return to her zone and advised that she would call security if appellant did not comply. Thereafter, Ms. Loftin made a general announcement to all the clerks that they must report to their assigned mail zones and not change seats without permission from

their supervisors. Ms. Harmon opined that appellant was a chronic complainer, ignored rules, failed to comply with procedures and ignored authority.

The employing establishment submitted a February 15, 2003 statement, from Ms. Loftin, who noted that she had been appellant's supervisor since August 2002. She denied discriminating against appellant and advised that on January 28, 2003 she observed appellant sitting in the wrong mail zone and instructed her to return to her assigned seat. Ms. Loftin indicated that appellant explained why she was in the incorrect seat and Ms. Loftin instructed her to return to her assigned workstation and she would discuss the matter at another time; however, appellant failed to comply. On January 29, 2003 she conducted a just cause interview with appellant concerning her failure to follow instructions on January 28, 2003 and advised her that the investigation could result in discipline. Ms. Loftin contends that she never used abusive language toward appellant, never yelled at her and never stated that she would kill appellant. She sometimes spoke loudly to be heard over the mail machines; however, she did not yell at employees. Ms. Loftin further noted that she spoke to all employing establishment employees concerning postal rules that only English must be spoken on the workroom floor and explained that employees may speak other languages on their breaks and at lunch. With regard to appellant's request for leave for the period February 2 to 6, 2003, she advised that the request was denied by the office clerk because the time slot was unavailable. However, appellant was advised that she could use eight hours of annual leave on February 2, 2003. In a statement dated April 24, 2003, Ms. Loftin advised that appellant was generally not able to perform the required duties of her light-duty position, she talked during her entire shift, was argumentative and her conduct was poor.

In a decision dated September 24, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to demonstrate that the claimed emotional condition arose in the performance of duty.

By letter dated October 22, 2003, appellant requested reconsideration and submitted additional medical evidence. In a report dated October 10, 2003, Dr. Lau advised that she experienced chronic stress related to her work.

In a decision dated December 23, 2003, the Office denied modification of the September 24, 2003 decision.

By letter dated February 19, 2004, appellant requested reconsideration and submitted additional medical evidence. In reports dated January 12 and 16, 2004, Dr. Lau advised that appellant was emotionally agitated and unstable due to the public humiliation caused by her supervisor.

In a decision dated April 28, 2004, the Office denied appellant's reconsideration conducting a merit review on the grounds that the evidence submitted in support of the application was cumulative and repetitious and therefore insufficient to warrant review of the December 23, 2003.

LEGAL PRECEDENT -- ISSUE 1

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.[1]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[2] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[3] 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 under the Act.[4] When an employee experiences emotional stress in carrying out her employment 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 an in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.[5] 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 under the Act.

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]

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

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[5] *Lillian Cutler, supra* note 2.

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

[7] *Id.*

ANALYSIS -- ISSUE 1

Appellant alleged that on January 27, 2003[8] Ms. Loftin screamed at and humiliated her in front of coworkers, demanding in an offensive tone that employees return to their appropriate seat assignments. She also alleged that another coworker heard Ms. Loftin threaten to kill her. To the extent that incidents alleged as constituting harassment by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[9] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[10]

Ms. Loftin stated that she did not discriminate against appellant. She advised that on January 28, 2003 she observed appellant sitting in the wrong mail zone and instructed her several times to return to her assigned seat and appellant failed to comply. Ms. Loftin noted that on January 29, 2003 she conducted a just cause interview with appellant concerning her failure to follow instructions on January 28, 2003. Ms. Loftin stated that she never used abusive language toward appellant, she never yelled at her or stated that she would kill her. The Board notes that the witness statements from appellant's coworkers corroborate Ms. Loftin's account of the events of January 28, 2003, specifically that Ms. Loftin repeatedly instructed appellant to return to her assigned seat and that appellant failed to comply. The employing establishment further contended that at no time did management harass appellant. Appellant has not submitted sufficient evidence to establish that she was harassed by her supervisor on January 28, 2003, as alleged.[11]

Although appellant alleged that her supervisors made statements and engaged in actions which she believed constituted harassment, she provided insufficient evidence or witness statements to establish that the statements were actually made or that the actions occurred as alleged.[12] The employing established refuted her allegations. The Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.[13] Appellant's vague allegations that her supervisor stated to a coworker that she wanted to kill her is insufficient to establish that she was threatened. Ms. Loftin denied that she made any threats towards appellant and the witness statements do not address any threats. The Board finds that

[8] Although appellant stated the date of the incident was January 27, 2003, it appears from the witness statements and supervisor statements that the correct date was January 28, 2003.

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

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

[11] *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).

[12] *See William P. George*, 43 ECAB 1159, 1167 (1992) (claimed employment incidents not established where appellant did not submit evidence substantiating that such incidents actually occurred).

[13] *See Leroy Thomas, III*, 46 ECAB 946, 954 (1995); *Alton L. White*, 42 ECAB 666, 669-70 (1991).

appellant has not established a compensable employment factor under the Act with respect to the claimed threats.

Appellant's other allegations of employment factors that caused or contributed to her condition fall into the category of administrative or personnel actions. In *Thomas D. McEuen*,[14] 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. Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[15]

Appellant alleged error in that Ms. Loftin denied her request for leave from February 2 to 6, 2003. The handling of leave requests and attendance matters are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[16] In this case, the Board finds that the employing establishment acted reasonably in this administrative matter. Ms. Loftin advised that the leave request was denied by the office clerk because the time slot was unavailable. However, appellant was offered eight hours of annual leave on February 2, 2003 which she accepted. Appellant has not presented evidence to support that the employing establishment erred or acted abusively with regard to this allegation. Thus, she has not established administrative error or abuse in regard to Ms. Loftin's denial of appellant's request for leave.

Appellant alleged that Ms. Loftin forbade her and other coworkers of speaking in a language other than English while in the workplace. In her statement, Ms. Loftin noted that she spoke to all employees concerning postal rules that required that only English be spoken while on the workroom floor and explained that employees could speak in other languages while on their breaks and at lunch. It appears that Ms. Loftin was merely enforcing existing employing establishment policies. The Board has found that an employee's complaints concerning the manner in which a supervisor performs his or her duties as a supervisor or the manner in which a supervisor exercises his or her supervisory discretion fall, as a rule, is outside the scope of coverage provided by the Act. This principle recognizes that a supervisor or manager in general must be allowed to perform his or her duties, that employees will at times dislike the actions taken, but that mere disagreement or dislike of a supervisory or management action will not be actionable, absent evidence of error or abuse.[17] Appellant has not presented evidence to support

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

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

[16] *See Judy Kahn*, 53 ECAB __ (Docket No. 00-457, issued February 1, 2002).

[17] *See Marguerite J. Toland*, 52 ECAB 294 (2001).

that the employing establishment erred or acted abusively with regard to these allegations. The record reveals that appellant was not forbidden from speaking languages other than English at work, rather she was instructed to speak English while on the workroom floor but was free to speak in another language while on a break or at lunch. The Board finds that appellant has not established administrative error or abuse in the performance of these actions and therefore they are not compensable under the Act.

Consequently, appellant has not established a compensable employment factor as being the cause of her claimed condition.[18]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[19] 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 10.606(b)(2) of the implementing federal regulation,[20] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> (ii) Advances a relevant legal argument not previously considered by the [Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[21]

ANALYSIS -- ISSUE 2

The Office's April 28, 2004 decision, denied reconsideration on the grounds that the evidence submitted was cumulative and repetitive of evidence already considered by the Office. In support of her request for reconsideration, appellant submitted two reports from Dr. Lau, who advised that she was emotionally agitated and unstable due to the public humiliation caused by her supervisor. This evidence is not directly relevant to the issue on which the claim was denied,

[18] As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496 (1992).

[19] 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.606(b) (1999).

[21] 20 C.F.R. § 10.608(b).

i.e., that she did not establish any allegation as a compensable employment factor.[22] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for further merit review.

Appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office, nor did she submit relevant and pertinent evidence not previously considered by the Office. As appellant's February 19, 2004 request for reconsideration did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty. The Board further finds that the Office's April 28, 2004 decision properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2004, December 23 and September 24, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[22] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).