United States Department of Labor
Employees' Compensation Appeals Board

TERESA WEXLER, Appellant	)	
and	)	**Docket No. 06-358**
	)	**Issued: April 7, 2006**
U.S. POSTAL SERVICE, CASTOR STATION, Philadelphia, PA, Employer	)	

Appearances:
Teresa Wexler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 20, 2005 appellant filed a timely appeal of an August 25, 2005 decision of the Office of Workers' Compensation Programs denying her emotional condition claim and a September 22, 2005 nonmerit decision denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of her emotional condition claim.

ISSUES

The issues are: (1) whether appellant has established an emotional condition causally related to compensable work factors; and (2) whether the Office abused its discretion in denying her request for a hearing.

FACTUAL HISTORY

On December 20, 2004 appellant, then a 33-year-old window clerk, filed an occupational disease claim alleging that she developed a major depressive disorder due to factors of her federal employment. She attributed her emotional condition to being verbally and physically abused by coworkers who, she believed, were jealous because she was younger and had seniority. Appellant alleged that coworkers made fun of her and her children. She alleged that on November 22 and 23, 2004, Bob Lautenschlager yelled at her and called her a "stupid idiot" when she made mistakes in her work. On November 24, 2004 Mary Loughlin threw a large box on the floor inches from where appellant was standing. Ms. Loughlin later screamed at appellant while in front of another coworker for a mistake she made. On October 29, 2004 June Cohen yelled at her and, on November 24, 2004, Ms. Cohen laughed at appellant for a small mistake and had been laughing at her in this manner since 2001. Appellant alleged that Ms. Cohen talked about her to other employees, calling her stupid and imitating her voice "like [I] was retarded." She alleged that Odessa Freeman slapped her and yelled at her. Appellant alleged that on November 24, 2004 and other occasions, Deborah McFadden, supervisor of customer service, had telephoned the office and asked for employees other than appellant to pick up the telephone. Appellant was upset because she had seniority and felt neglected. Appellant also submitted medical evidence in support of her claim.

On January 13, 2005 Ms. Freeman submitted a statement denying that she had ever struck appellant. In a January 9, 2005 statement, Ms. McFadden denied that appellant was ever verbally abused and had perceived that other workers were talking about her. She stated that no one treated appellant as she were retarded. Ms. McFadden indicated that Mr. Lautenschlager denied yelling at appellant. When Ms. McFadden was out of the office and made telephone calls to the facility and the answering machine was on, she asked for various employees to pick up the telephone. Ms. McFadden stated that she did not ask for appellant to pick up the telephone because, "she is off so many days, that's why I never ask for her." Ms. McFadden investigated appellant's complaint that coworkers had physically abused her but found no evidence to support this allegation.

By decision dated April 25, 2005, the Office denied appellant's emotional condition claim on the grounds that the evidence did not establish a compensable work factor.

On August 2, 2005 appellant requested an oral hearing.

By decision dated September 22, 2005, the Office denied appellant's request for a hearing on the grounds that it was not timely filed within 30 days of the April 25, 2005 decision. The Office stated that the issue in the case could be resolved equally well through a request for reconsideration and the submission of additional evidence.

LEGAL PRECEDENT -- ISSUE 1

To establish a claim that she sustained an emotional condition in the performance of duty, a claimant 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]

The Board has held that 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 an illness has some connection with employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the medical evidence establishes that the disability results from an employee's emotional reaction to her regular or specially assigned employment duties or to a requirement imposed by the employing establishment, the disability comes within coverage of the Federal Employees' Compensation Act. The same result is reached when the emotional disability resulted from the employee's emotional reaction to the nature of her work or her fear and anxiety regarding her ability to carry out her work duties.[2]

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 the employment, such as when disability results from an employee's fear of reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

The Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable work factors of employment, which may be considered by a physician when providing an opinion on causal relationship, and which are not deemed compensable factors of employment and may not be considered.[4] As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim; the claim must be supported by probative evidence.[5]

ANALYSIS -- ISSUE 1

Appellant alleged that Ms. McFadden had requested employees other than her to pick up the telephone when she called the office. Appellant explained that she became upset because she had seniority status. Actions of the employing establishment in administrative matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.[6] However, an administrative or personnel matter will be considered to be an employment

[1] *Pamela D. Casey,* 57 ECAB ___ (Docket No. 05-1768, issued December 13, 2005; *George C. Clark,* 56 ECAB ___ (Docket No. 04-1573, issued November 30, 2004).

[2] *Id.; see also Lillian Cutler,* 28 ECAB 125 (1976).

[3] *Id*.

[4] *Dennis J. Balogh,* 52 ECAB 232 (2001).

[5] *See Charles E. McAndrews,* 55 ECAB ___ (Docket No. 04-1257, issued September 10, 2004).

[6] *Michael L. Malone,* 46 ECAB 957 (1995).

factor where the evidence discloses error or abuse on the part of the employing establishment.[7] The Board has held that mere disagreement or dislike of a supervisory or management action will not be compensable without a showing, through supporting evidence, that the incidents or actions complained of were unreasonable.[8] Ms. McFadden stated that when she made telephone calls to the postal facility, she asked for various employees to pick up the telephone but did not ask specifically for appellant, who was frequently absent. Appellant has not established that Ms. McFadden erred or acted abusively when she asked other employees to answer the telephone. Therefore, this allegation regarding an administrative matter is not deemed a compensable factor of employment.

Appellant alleged that she was verbally abused and threatened by coworkers who ridiculed her and her children. She alleged that Mr. Lautenschlager yelled at her and called her an idiot for mistakes in her work. Appellant alleged that Ms. Cohen also yelled at her, laughed at her for making mistakes and talked about her to other employees, calling her stupid and imitating her voice to make her sound "retarded." She alleged that Ms. Loughlin screamed at her for a mistake she made. Appellant alleged that Odessa Freeman also yelled at her. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring these could constitute a compensable employment factor.[9] However, for harassment and 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.[10] The Board has held that, while verbal abuse may constitute a compensable factor of employment, this does not imply that every statement uttered in the workplace will give rise to coverage under the Act.[11] Ms. McFadden denied that appellant was verbally abused and no one had treated her as if she were retarded. Ms. McFadden indicated that Mr. Lautenschlager also denied yelling at appellant. There is no evidence that appellant's coworkers ridiculed her children. Appellant has provided insufficient evidence to establish these alleged incidents of harassment or discrimination occurred as alleged. Therefore, these allegations are not deemed compensable employment factors.

Appellant alleged that she was physically abused by certain employees. She alleged that on November 24, 2004 Ms. Loughlin threw a large box on the floor, inches from where appellant stood. She also alleged that Odessa Freeman had slapped her. Physical contact arising in the course of employment, if substantiated by the evidence of record, may support an award for compensation if the medical evidence establishes that the condition was caused or aggravated.[12] There is no evidence that Ms. Loughlin ever threw a box at appellant as alleged and

[7] *Charles D. Edwards,* 55 ECAB ___ (Docket No. 02-1956, issued January 15, 2004).

[8] *Janice I. Moore,* 53 ECAB 777 (2002).

[9] *Charles D. Edwards, supra* note 7.

[10] *Donna J. DiBernardo,* 47 ECAB 700 (1996).

[11] *See Judy L. Kahn,* 53 ECAB 321 (2002).

[12] *Alton L. White,* 42 ECAB 666 (1991); *Helen Casillas,* 46 ECAB 1044 (1995).

Ms. Freeman denied that she had ever struck appellant. There are no statements from witnesses substantiating these allegations. Ms. McFadden investigated appellant's complaint that coworkers had physically abused her but found no evidence to support this allegation. There is insufficient evidence that appellant was physically abused by her coworkers. Therefore, she has not established a compensable employment factor. The Board finds that appellant has failed to establish a compensable factor of employment. Therefore, the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing, or, in lieu thereof, a review of the written record.[13] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.[14] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[15] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[16]

ANALYSIS -- ISSUE 2

Appellant's request for an oral hearing was postmarked August 2, 2005, more than 30 days after the Office's April 25, 2005 decision. Therefore, appellant was not entitled to a hearing as a matter of right. The Office exercised its discretion and determined that the issue in the case could be resolved through a request for reconsideration and the submission of additional evidence. The Board finds no evidence to indicate that the Office abused its discretion in denying appellant's untimely request for a hearing in its September 22, 2005 decision.

CONCLUSION

The Board finds that appellant failed to establish that her emotional condition was causally related to a compensable factor of employment.[17] The Board further finds that the Office did not abuse its discretion in denying her untimely request for a hearing.

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[13] 5 U.S.C. § 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary of Labor is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary of Labor. Section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing and a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days. *See Charles J. Prudencio*, 41 ECAB 499 (1990).

[14] 20 C.F.R. § 10.616(a).

[15] 20 C.F.R. § 10.616(b).

[16] *James Smith*, 53 ECAB 188 (2001).

[17] Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence. *See Barbara J. Latham*, 53 ECAB 316 (2002); *Garry M. Carlo*, 47 ECAB 299 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and April 25, 2005 are affirmed.

Issued: April 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board