United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 07-557**
	)	**Issued: July 16, 2007**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Denver, CO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2006 appellant filed a timely appeal from the December 5, 2006 merit decision of the Office of Workers' Compensation Programs, which denied her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of her claim.

ISSUE

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

FACTUAL HISTORY

On July 10, 2006 appellant, then a 43-year-old claims examiner, filed an occupational disease claim alleging that her major depression was a result of her federal employment: "Stress and anxiety caused by trying to meet the daily requirements of the position and the difficulties I faced in trying to manage the workload and an inability to carry out the duties of the position."

She first became aware that her disease or illness was related to her federal employment on August 18, 2004, the date she stopped work.[1]

Under OWCP File No. A11-2016624, the Office accepted appellant's earlier occupational disease claim for depression causally related to the pressure of having to meet multiple deadlines at the end of May 2003. Appellant received compensation for total disability from July 19, 2003 through March 28, 2004 and from October 3, 2004 to the present. Under OWCP File No. A11-2024686, appellant filed a traumatic injury claim alleging that she sustained an emotional condition in the performance of duty on August 18, 2004, but the Office denied this claim and the Board affirmed.[2]

While pursuing her traumatic injury claim, appellant implicated other factors of employment: "Instead of reassignment I was ostracized by being moved to the eleventh floor where I was totally out of place, and expected to accomplish sixth floor deadlines with no access to the sixth floor, little or no access to critical resources or support staff, and no access to case files." Appellant added that she was trying to meet the daily requirements of her position from a remote location with access to resources virtually eliminated and no access to paper files. She alleged great difficulties trying to manage the workload. Appellant's supervisor responded:

> "The assignment of [appellant] to the 11th floor was at the direction of Ms. Dorrell. Appellant was given a larger cubicle within the office of OWCP/EEOICP by the EEOICP Assistant District Director, Kevin Peterson and the EEOICP District Director, Robert Mansanares. We mutually agreed to a cubicle outside the main flow of traffic in that office so the employee would have more privacy and not be bothered by the day-to-day operations of the EEOICP staff. The Public Health (PH) physician, according to Ms. Dorrell, reviewed the employee's psychological conditions for her accommodation request and recommended that [appellant] perform her same duties, but in an area removed from all personnel in the Denver DFEC office for a three[-]month period, followed-up with an examination to assess her condition. It was the PH physician's opinion that the employee be removed from the people who had previously caused her stress.
>
> "We accommodated the employee with a larger work cubicle, provided her with all of her reference materials and everything else from her desk on the 6th floor (DFEC office). Her computer was hooked-up -- the same one she used in her

[1] OWCP File No. A11-2035395.

[2] Docket No. 06-634 (issued June 7, 2006). The Board found that appellant's conversation with EEO Unit Director Kate Dorrell on August 18, 2004 about possible accommodation or reassignment under the Rehabilitation Act of 1973 had nothing to do with the duties she was hired to perform. The Board noted that her claim was not that she experienced emotional stress in carrying out her employment duties or had fear and anxiety regarding her ability to carry out those duties. Rather, she claimed that she experienced emotional stress from what Ms. Dorrell told her on August 18. 2004. According to appellant's attending psychiatrist, the impact of this one specific incident worsened appellant's depression. The facts of appellant's traumatic injury claim, as set forth in the Board's June 7, 2006 decision, are hereby incorporated by reference.

DFEC work area -- and she had total access to all programs available to her on the 6th floor.

"Additionally, we worked out a system to where our mailroom staff supervisor picked up her outgoing mail and requests from a designated area within her cubicle daily; any incoming was also delivered to her on a daily basis by the same mailroom supervisor.

"Ms. Dorrell recommended that [appellant] pick and choose to attend any unit/office meetings that were being held. Information from those meetings that she did not attend was shared with [her] by me in face-to-face meetings. I encouraged her, in accordance with the PH physician's restrictions, to avoid coming to the 6th floor so there would be no contact with those individuals who she believed had previously caused her stress.

"[Appellant] was continually updated on new information, as she was and continues to be, a listed member of the unit in my group email address.

"[Appellant] was encouraged to contact me if she had any problems or concerns, either when I visited with her on the 11th floor -- approximately once per week -- or by email or by telephone. She was also encouraged to communicate with her Senior Claims Examiner and ask any questions by email or by [tele]phone."

On June 7, 2006 the Board issued a decision on appellant's claim for a traumatic injury occurring on August 18, 2004 but noted that she also appeared to be claiming a different type of injury. The Board stated that appellant could pursue these allegations by filing an occupational disease claim. The present claim followed.

On August 9, 2006 the Office asked appellant to submit additional information to support her most recent occupational disease claim. Given the facts in her other cases, the Office asked her to explain what exposure she was claiming. The Office received no reply.

In a decision dated September 11, 2006, the Office denied appellant's claim.

Appellant requested reconsideration. She stated: "Exposure to factors of federal employment occurred between July 14 and August 18, 2004 (following change in work assignment and location)." Appellant submitted, among other things, a September 7, 2004 report from her attending psychiatrist, Dr. Randolph W. Pock who noted her earlier claim for depression and her current evaluation:

"I reevaluated [appellant] today at which time she described to me continuing symptoms of depression like those previously noted. As you may be aware, she returned to work of her own volition and continued to work for 4-1/2 months until August 18, 2004. It should be noted that a written agreement was made to reassign her to another position (in a discussion between … Marty Walker and an EEO counselor). Despite this agreement, however, she was subsequently refused re-assignment. Conditions of employment have continued to contribute to her depression which has worsened, requiring her to leave her job on August 18[,

2004]. It is my opinion that her depression is a permanent condition which will involve periods in which her disability may remit and then intensify."

Appellant submitted documents related to her claim of a traumatic injury on August 18, 2004. She submitted a September 24, 2004 letter to the Office Director, in which she discussed her request for accommodations under the Americans with Disabilities Act (ADA). She stated in this letter that she believed reassignment was possible because she had seen it several times with coworkers, and she asked the Director for his assistance in expediting matters. Appellant also submitted a portion of Dr. Pock's November 2, 2004 report:

> "Regarding the specific incident of August 18, 2004, [appellant] was told in a conference with EEO Unit Director, Kate Dorrell, that her department was not required to accommodate the ADA request made of the department. [Appellant] had been moved from the 6th to the 11th floor, a change which had actually made her situation worse since she had no access to cases or to support staff after the move to the 11th floor. The decision announced by … Marty Walker to reassign [appellant] to the 11th floor and the refusal to accommodate the ADA request left [her] more depressed with increased crying, increased anxiety, decreased concentration, and loss of appetite with inability to sleep or eat."

Appellant submitted a December 1, 2003 report from Dr. Pock, who wrote that appellant "may return to work effective December 1, 2003 with the restriction that she is unable to return to her previous department." She also submitted an April 2, 2004 report from the employing establishment occupational health service [OHS, a.k.a. public health] physician recommending a three-month accommodation to a new workplace. The physician explained that Dr. Pock's clinical observations presented a strong case for a temporary change in appellant's workplace.

In a decision dated December 5, 2006, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. Although the evidence appellant submitted reflected her disagreement with return-to-work arrangements, her disagreement with the results of her telephone conference with Ms. Dorrell, her apparent desire to be reassigned to a different program, indications were that appellant was implicating other factors raised in her traumatic injury claim. The Office addressed these factors and made the following finding:

> "Although the employee has alleged that she experienced difficulty working from a remote location (the 11th floor), evidence of file establishes that she was provided with a computer, access to all needed computer programs, resource material, reference material, e-mail updates, telephone contact with the assigned Senior Claims Examiner and her immediate supervisor, and a system was in place to receive and distribute mail and requests for files. The employee has not provided specific details regarding what difficulty she experienced, has not identified specific dates, times, and incidents that proved difficulty for her. Therefore, the allegation is not substantiated by probative and reliable evidence."

The Office also found that appellant provided no details to support her allegation that she experienced difficulty managing her work load.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] 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."[4] To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration. 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 her employment and while she was reasonably fulfilling the duties of her employment or engaged in doing something incidental thereto.[5]

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.[6]

A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[7] including that she sustained an injury in the performance of duty.[8] As a rule, allegations alone are insufficient to establish a factual basis for an emotional condition claim.[9] The claimant must

[3] 5 U.S.C. § 8102(a).

[4] 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).

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

[6] *Lillian Cutler*, 28 ECAB 125 (1976).

[7] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[8] *Elaine Pendleton*, 40 ECAB 1143 (1989); *see Daniel R. Hickman*, 34 ECAB 1220 (1983).

[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 to determine if the evidence corroborated such allegations).

substantiate such allegations with probative and reliable evidence.[10] 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.[11]

ANALYSIS

Appellant's most recent claim is that exposure to employment factors from July 14 to August 18, 2004, following the change in her work assignment and location, contributed to her previously accepted depression. She alleged stress and anxiety in "trying to meet the daily requirements of the position and the difficulties I faced in trying to manage the workload and an inability to carry out the duties of the position." Having effectively borrowed language from the case of *Lillian Cutler*,[12] appellant has succeeded in attributing her condition, or worsening thereof, to matters that are generally recognized as within the scope of the Act.

However, appellant's allegation is vague. She did not mention specific difficulties and she did not elaborate how she was unable to carry out her duties. The Office asked appellant to explain the exposure she was implicating, but it received no response within the time provided. As her claim form alone was insufficient to establish the injury alleged, the Board will affirm the Office's September 11, 2006 decision denying her claim.

When appellant did respond, she was not very forthcoming. She clarified only that the exposure to "employment factors" occurred from July 14 to August 18, 2004. Appellant submitted documents relating to her other claims, most of which were irrelevant to the claim she was currently pursuing. In her traumatic injury claim, however, she did raise certain complaints about working on the eleventh floor during the period in question. Appellant alleged no access to the sixth floor, little or no access to critical resources or support staff and no access to paper files. In his November 2, 2004 report, Dr. Pock, the attending psychiatrist, stated that moving from the sixth to the eleventh floor made her situation worse "since she had no access to cases or to support staff."

The Board finds that appellant has failed to establish a factual basis for her claim. She has not submitted evidence to document the alleged lack of access. Appellant's supervisor has already rebutted these allegations in the traumatic injury case. The supervisor stated that the employing establishment provided appellant with all of her reference materials and everything else from her desk on the sixth floor. The employing establishment hooked up the same computer she used in her old work area, giving her total access to all the programs that were previously available to her. The employing establishment arranged for daily pickup of her outgoing mail and requests as well as daily delivery. Appellant was given the option to attend

[10] *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

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

[12] *See* text accompanying *supra* note 6.

any unit or office meetings, and if she chose not to attend, the supervisor shared the relevant information with her in person. As a listed member of the unit in the group email address, appellant was continually updated on new information. The supervisor encouraged her to discuss any problems or concerns and to communicate with her senior claims examiner.

Appellant has submitted no probative evidence to the contrary, nor has she submitted evidence to document the great difficulties she alleged in managing her workload. In the absence of substantial evidence showing that she had little or no access to critical resources from July 14 to August 18, 2004, the Board finds that appellant has not met her burden of proof to establish as factual the compensable factors alleged. The Board will therefore affirm the Office's December 5, 2006 decision denying benefits.

CONCLUSION

The Board finds that appellant has not met her burden of proof. She has failed to substantiate her allegations with probative and reliable evidence.

ORDER

IT IS HEREBY ORDERED THAT the December 5 and November 11, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 16, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board