United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 08-2378**
	)	**Issued: July 6, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION REGIONAL OFFICE, Chicago, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated January 15 and August 11, 2008 that denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition causally related to her federal employment on August 3, 2007.

FACTUAL HISTORY

On August 28, 2007 appellant, then a 39-year-old veterans service representative (VSR), filed a Form CA-1, traumatic injury claim, alleging that on August 3, 2007 she sustained an emotional condition when while on temporary duty at the St. Paul, Minnesota regional office, she was pulled from a classroom and dismissed from her temporary position as a challenge

curriculum course instructor. She claimed that this occurred because she was the only minority and African-American woman working with an all white staff.

In an August 8, 2007 statement, Carol Burke, course manager, advised that appellant was an alternate instructor for national VSR training list and was selected to replace an instructor who could not attend the training. She described events that led up to the August 3, 2007 removal. Appellant presented documents concerning her right ear neurosensorial hearing loss, right eye blindness and uncontrollable bowel but had not requested any special accommodation while at St. Paul. Ms. Burke related that on August 1, 2007 appellant gave a presentation that was attended by, a training mentor, John Gustin, who reported that appellant's instruction was deficient in content and accuracy, showing a lack of familiarity with the materials. On the morning of August 2, 2007 appellant instructed a different class and provided a handout to all attendees. The course manager was not aware that appellant would provide a handout, which contained multiple grammatical errors. Mr. Gustin observed this class and again advised that she lacked adequate skills in substantive areas as an instructor. He felt that appellant should not be permitted to continue teaching. On Friday August 3, 2007 appellant presented another course and received poor evaluations from the attendees. Ms. Burke stated that, at approximately 3:00 p.m. that day, Jeffrey Alger, the regional director of operations, held a meeting and stated that appellant would be relieved of her duties. She brought appellant to a conference room for a meeting with Mr. Alger, Kay Anderson, a course manager, and Sheila Jackson, a coach in St. Paul. At the meeting Mr. Alger informed appellant that her teaching responsibilities were finished because her instruction was sub par and that she was expected to report back to her Chicago office on Monday morning. Appellant requested union representation and Stanley Walton, a St. Paul union steward, met with her, after which he stated further discussion with management was not needed. Ms. Burke also notified appellant's hotel that she would be checking out that weekend and, on the afternoon of Sunday August 5, 2007, was notified that she had not checked out. When she called the hotel, she was informed that at 1:00 a.m. that morning, appellant was taken to a local hospital by ambulance. Ms. Burke notified Mr. Alger that she was hospitalized and he notified the director of the Chicago regional office of the situation. Appellant's fiancé informed Ms. Burke that she would be in the hospital all week.

In an August 8, 2007 statement, Mr. Alger reported that, on August 1, 2007, Ms. Anderson informed him that she was prepared to pull the St. Paul employees from the training provided by appellant because it was not up to St. Paul standards. He informed Ms. Anderson that she could not take that prerogative but could reteach the material at a later date if necessary. Mr. Alger reported that on August 2, 2007 he was informed about appellant's handout, which had not been shared with either the course manager or other instructors and was concerned because this appeared to be a manipulation of students' evaluations. He discussed this with Mr. Olson, and asked Ms. Anderson and Ms. Burke to monitor class activities to ensure the course curriculum was being followed and to ensure that there were no more disruptions to the appropriate training. Mr. Alger related that, on August 3, 2007, Ms. Anderson told him that the morning presentation by appellant was substandard. He then asked and was granted permission from the central area and office of field operations to remove her as an instructor for failure to

follow the prescribed curriculum and for presenting the material in a substandard fashion. Mr. Alger described the meeting later that day with appellant, Ms. Anderson, Ms. Jackson and Ms. Burke when he informed her that her presentation skills were substandard and that she was to return to Chicago. He stated that appellant's immediate response was that Mr. Alger was racist and demanded union representation, which was provided. Mr. Alger was subsequently called by Ms. Burke and informed that appellant was taken to the hospital by ambulance.

By letter dated September 24, 2007, the Office informed appellant that her claim would be adjudicated as an occupational disease and informed her of the evidence needed to support her claim. On October 13, 2007 appellant stated that she returned to work on October 1, 2007 and was continuing psychiatric care. She requested that her vision problems be included as part of the claim because she had to get treatment. Appellant advised that she had filed an Equal Employment Opportunity Commission (EEOC) claim. On October 29, 2007 she informed the Office that she was not filing a claim of occupational illness or disease because her condition was caused by the traumatic incident of August 3, 2007. Appellant stated that, on August 3, 2007, around 3:50 p.m. while she was assisting teaching a class, she was interrupted in front of the class by Ms. Burke, who is white, who told her to come with her and she was then placed alone in a room. Mr. Alger, who is white, came into the room and told her in a "mean and cold tone" that she was being sent back to Chicago. As a result of this, appellant was hospitalized beginning August 5, 2007. She submitted medical reports from her hospitalization at the University of Minnesota Fairview Hospital, where she was admitted on August 5, 2007 and discharged on August 13, 2007. Appellant was treated there by Dr. Boris Kholomyansky, psychiatrist, who diagnosed adjustment disorder with depressed mood/anxiety with possible personality disorder traits. She reported that she had a history of low-grade depression and was being treated with Prozac and seeing a Dr. Valentin Berman, a Board-certified psychiatrist, in Chicago.

In an August 15, 2007 report, Dr. Rion Rowles, an osteopath, provided a psychiatric assessment, noting that appellant was referred for the partial hospital program at Advocate Christ Medical Center. He diagnosed major depressive disorder, severe, with psychotic features. In an August 30, 2007 note, Dr. Berman advised that appellant should be excused from work from August 4 to December 31, 2007. In an attending physician's report dated September 24, 2007, she diagnosed psychotic depression and paranoia and checked a form box "no," advising that the diagnosed conditions were not caused or aggravated by employment activity. Dr. Berman noted that appellant was on four medications and was totally disabled. In a November 9, 2007 report, Barbara Brooks, a therapist, advised that appellant was referred by Dr. Berman for therapy beginning August 18, 2007 and had been compliant. She advised that there was a 50/50 percent probability that appellant experienced a nervous breakdown on August 3, 2007 due to being forced to leave her job.

By decision dated January 15, 2008, the Office denied the claim, finding that the medical evidence did not mention a work-related incident or explain how employment factors caused the diagnosed condition.

On January 17, 2008 appellant requested a hearing, reiterating that she was not filing an occupational disease claim. At the hearing, held on May 20, 2008, she testified that St. Paul was her first teaching assignment and she was to be there for three weeks. Appellant described the events of Friday, August 3, 2007 and noted that when she returned to the hotel she became sick and suicidal. She called the suicide hot line and, after her fiancé arrived, he called an ambulance. Appellant was hospitalized for five days in St. Paul and, upon her return to Chicago, entered day treatment. She returned to work on October 1, 2007 and continued treatment with Dr. Berman and Lynne Dolce-Brouwer. Appellant alleged that while in St. Paul the other instructors were rude to her and considered this to be racism. She noted that Ms. Jackson was the only African-American manager there and testified that Mr. Alger did not explain why she was being sent home. Although the union representative in St. Paul said he would investigate the situation, he did not. Appellant concluded that the August 3, 2007 removal was a demeaning experience. In a May 19, 2008 report, Ms. Brouwer, M.S.W., noted appellant's report of the precipitating events in St. Paul and described her treatment at the hospital there. She began treating appellant on August 18, 2007, described her symptoms and diagnosed severe depression with psychotic features.

By decision dated August 11, 2008, a hearing representative modified the January 15, 2008 decision to reflect that appellant failed to establish a compensable factor of employment and thus failed to establish that she sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the 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 as 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 illness has some connection with the employment but nevertheless does not come within coverage under the Act.[4] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that

[1] *Ronald K. Jablanski*, 56 ECAB 616 (2005).

[2] 28 ECAB 125 (1976).

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Robert W. Johns*, 51 ECAB 137 (1999).

the disability resulted from his 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 results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[5]

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]

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under the Act.[8] Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[9]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[10] With regard to emotional claims arising under the Act, the term "harassment" as applied by the Board is not the equivalent of "harassment" as defined or implemented by other agencies, such as the EEOC, which is charged with statutory authority to investigate and evaluate such matters in the workplace. Rather, in evaluating claims for workers' compensation under the Act, the term "harassment" is synonymous, as generally defined, with a persistent disturbance, torment or

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

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

[7] *Id.*

[8] *Charles D. Edwards*, 55 ECAB 258 (2004).

[9] *Kim Nguyen*, 53 ECAB 127 (2001).

[10] *James E. Norris*, 52 ECAB 93 (2000).

persecution, *i.e.*, mistreatment by coemployees or workers. Mere perceptions and feelings of harassment will not support an award of compensation.[11]

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition on August 3, 2007. Appellant did not attribute her emotional condition to the performance of her regular duties as a veterans service representative in Chicago. Rather, she attributed her condition to how she was treated at a meeting on August 3, 2007 when she was removed as a training instructor while on temporary duty in St. Paul. Appellant contended that she was harassed and discriminated against at the meeting, which was abusive.

Management officials in the St. Paul training program provided a lengthy explanation describing their experiences with appellant from July 30 to August 3, 2007. Mr. Alger, the regional director, advised that after checking with the central office and field operations, he was granted permission to remove appellant from her teaching duties. Appellant was dismissed from the program for failure to follow the prescribed curriculum and for presenting the material in a substandard manner.

Disciplinary actions are administrative functions of the employer and not duties of the employee and, unless the evidence discloses error or abuse on the part of the employing establishment, not compensable employment factors.[12] In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13] Other than stating that she had filed an EEOC claim, appellant did not submit sufficient evidence to show error or abuse on the part of the St. Paul officials. 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.[14] Appellant submitted no such evidence. She therefore did not establish a compensable employment factor with regard to this administrative matter.

Regarding appellant's contention that she was harassed at the meeting and treated in a discriminatory manner, mere perceptions of harassment or discrimination are not compensable under the Act.[15] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish

[11] *Beverly R. Jones*, 55 ECAB 411 (2004).

[12] *Jeral R. Gray*, 57 ECAB 611 (2006).

[13] *Robert Breeden*, 57 ECAB 622 (2006).

[14] *J.F.*, 59 ECAB ____ (Docket No. 07-308, issued January 25, 2008).

[15] *James E. Norris*, *supra* note 10.

a factual basis for his or her allegations with probative and reliable evidence.[16] As noted appellant did not submit sufficient evidence to support her contention. She therefore did not establish a factual basis for her claim of harassment by probative and reliable evidence.[17]

There is no affirmative evidence of record to establish that the incident of August 3, 2007 rose to the level of error or abuse or otherwise comes within the coverage of the Act. Appellant's reaction would be considered self-generated and not a compensable factor of employment.[18] As the record lacks probative evidence to support her claim, the Board finds that she has not established a compensable employment factor of employment. Appellant did not establish that she sustained a stress-related condition on August 3, 2007.[19]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty.

[16] *Id.*

[17] *See Robert Breeden*, 57 ECAB 622 (2006).

[18] *V.W.*, 58 ECAB ___ (Docket No. 07-234, issued March 22, 2007).

[19] As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record; *see Katherine A. Berg*, 54 ECAB 262 (2002).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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