United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 10-1993**
	)	**Issued: June 17, 2011**
DEPARTMENT OF DEFENSE, DEFENSE EDUCATION ACTIVITY, Yigo, Guam, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 29, 2010 appellant filed a timely appeal from the June 22, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for a work-related stress condition. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a stress condition in the performance of duty.

FACTUAL HISTORY

On August 28, 2009 appellant, then a 44-year-old teacher, filed a Form CA-1 (traumatic injury claim) alleging that she sustained injury on January 13, 2009. On that date, she perceived

[1] 5 U.S.C. § 8101 *et seq.*

antagonistic behavior from Administrator Helen Bailey that happened repeatedly during class in homeroom B2, at the Andersen Elementary School, Guam. Appellant stated that the nature of her injury was an "aggravated existing heart condition; triggered and sustained elevated anxiety symptoms." No additional information was received in support of the claim.

In a November 10, 2009 letter, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

In a December 16, 2009 decision, the Office denied appellant's claim for a stress condition on the grounds that she had not established any compensable employment factors. It noted that she had not established that she was subjected to antagonistic behavior at work as alleged.

In a December 7, 2009 statement, appellant asserted that prior to January 13, 2009 she set up meetings with Ms. Bailey to discuss her performance evaluation but the meetings never occurred. On January 12, 2009 she went to Ms. Bailey's office and asked to speak with her about a lesson plan prior to a formal observation session and Ms. Bailey told her that she would be fine and ignored her. Prior to January 13, 2009, appellant discussed with Mrs. Bailey the discomfort she felt when a Mr. Wigglesworth, a coworker, came into her classroom about two times per week. She stated that Ms. Bailey advised her that Mr. Wigglesworth was supposed to go to her classroom to help children with language issues, but she felt that he was there to observe her performance as he would often take notes. When appellant was out sick on February 17, 2009, she received e-mails from Ms. Bailey demanding the keys to her classroom and she was told by a coworker that the substitute teacher did not have the lesson plan despite the fact that she left it where it was supposed to be. She claimed that on March 15, 2009 she and her brother met with Ms. Bailey and that Ms. Bailey addressed her with "an authoritative voice" and told her to make notations in connection with her concerns about her performance evaluation. Appellant asserted that Ms. Bailey would go into her classroom and observe her teach for 5 to 10 minutes at a time. On one occasion, Ms. Bailey came into her classroom, sat on the floor with her students, nodded her head in a "disapproving manner" and remarked that she did not know something about part of her lesson presentation about seeds.

Appellant alleged that Ms. Bailey came into her classroom, sat at a table and nodded her head while students were reading. Ms. Bailey asked students what they were doing. Appellant felt that this was disruptive, especially since it occurred when she was telling the students something. She indicated that on January 13, 2009 Ms. Bailey completed her formal observation of appellant and noted that, when she tried to explain to Ms. Bailey where her lesson plan and grade book were, she was told to go back to teaching. Appellant stated that on January 13, 2009 Ms. Bailey nodded her head in disapproval when she was teaching, rudely told her to go back to her teaching and left before the lesson was finished. She claimed that she was not able to have a meeting about the formal observation of her performance and that, on or about February 5, 2009, she received a negative written memorandum that she did not agree with. Appellant stated that she was sick prior to February 17, 2009 and noted that, although she submitted medical records to Ms. Bailey to justify her leave usage, her leave request was improperly denied. She was given a memorandum dated February 26, 2009 which stated that she could submit a letter of resignation or a request for retirement due to medical disability. Appellant claimed that

Ms. Bailey wrote a letter dated March 9, 2009 stating that she had no other choice but to propose her removal from federal service due to her inability to perform the duties of her job.

In a January 10, 2010 statement, appellant asserted that her belongings were improperly boxed up while she was still employed. She asserted that when Ms. Bailey observed her class she would whisper to the children. Appellant felt that Ms. Bailey wanted her to resign and tried to accomplish this goal by issuing letters and memoranda, subjecting her to constant visits and gestures and questioning the medical documentation she submitted. She asserted that Bea Guerrero, a coworker, got upset during a lunch break, "asked her what was funny and told her that she can throw a table." Appellant stated that she reported this incident to Ms. Bailey but that Ms. Bailey never followed up with her complaint.

Appellant submitted medical reports from an attending Board-certified internist and an attending clinical psychologist. She also submitted a number of administrative documents, including those relating to lesson plans, performance evaluations and certificates of appreciation. The record contains numerous documents regarding appellant's use of leave and copies of disciplinary letters. In an undated statement, a Robert Santos stated that he was present when appellant met with Ms. Bailey on or about February 24, 2009. He observed that Ms. Bailey's voice became louder when she told appellant to document her concerns about her performance evaluation. Mr. Santos indicated that appellant began to cry at this point.

Appellant requested a hearing before an Office hearing representative concerning her stress claim. At the April 29, 2010 hearing, she stated that she had a stroke in 2006 and that sometimes she would forget what she was doing while she was teaching. Appellant repeated her assertions about the discomfort she felt when Ms. Bailey and Mr. Wigglesworth observed her teaching. She indicated that Ms. Bailey's attitude and demeanor toward her made her worry about her job performance.

In a June 22, 2010 decision, an Office hearing representative affirmed the Office's December 16, 2009 decision. He noted that appellant had expanded her claim to allege employment factors covering more than one day or work shift, but found that she had not established any compensable employment factors.

LEGAL PRECEDENT

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 the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[2] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-

[2] 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

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.[4] However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.[5] In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.[6]

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[7] However, for harassment or 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.[8]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[9] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.[10]

In cases involving stress 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.[11] If a claimant does implicate a factor of employment,

[3] *Gregorio E. Conde*, 52 ECAB 410 (2001).

[4] *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

[5] *William H. Fortner*, 49 ECAB 324 (1998).

[6] *Ruth S. Johnson*, 46 ECAB 237 (1994).

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

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

[9] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[10] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

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

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.[12]

ANALYSIS

Appellant alleged that she sustained a stress condition as a result of a number of employment incidents and conditions. In December 16, 2009 and June 22, 2010 decisions, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors. The Board must review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act. The Board notes that appellant's allegations do not pertain to her regular or specially assigned duties under *Cutler*.[13] Rather, appellant has alleged error and abuse in administrative matters and harassment and discrimination on the part of her coworkers and managers.

Appellant alleged that Ms. Bailey, her supervisor, subjected her to improper observation sessions while she was teaching her classes and unnecessarily interrupted her students. She was intimidated by Ms. Bailey's presence in the classroom and believed that she gave disapproving looks and nods while observing appellant teaching on several occasions in early 2009. Appellant claimed that Mr. Wigglesworth, a coworker, had engaged in improper observation sessions despite the fact that Ms. Bailey assured her that he was only present to help students with language issues. She felt that she was wrongly accused of not leaving her lesson plan in a proper place for a substitute teacher to retrieve it and that her belongings were improperly boxed up before she left the employing establishment. Appellant asserted that she received improper written performance evaluations and that Ms. Bailey did not adequately address her concerns about this matter. She claimed that she was unfairly denied leave on several occasions despite the fact that she submitted proper medical documentation in support of her leave requests. Appellant believed that she was subjected to improper disciplinary actions pertaining to her use of leave, possible termination from the employing establishment and other matters.

These allegations all relate to administrative or personnel matters, such as the evaluation of employee performance, the management of leave usage and the handling of disciplinary matters. Although generally related to the employee's employment, these are administrative or personnel functions of the employer rather than the regular or specially assigned work duties of the employee and generally are not covered under the Act. Such coverage will be afforded only for administrative or personnel actions when the evidence establishes error or abuse on the part of the employing establishment.[14] The Board finds that appellant did not establish error or abuse by management with respect to any of the above-described administrative or personnel matters. Appellant alleged that wrongdoing occurred but she did not submit probative evidence, such as the holding of a complaint or grievance, showing that error or abuse occurred with respect to

[12] *Id.*

[13] *See Cutler, supra* note 2.

[14] *See supra* notes 3 and 4.

these matters. Therefore, she has not established the occurrence of an employment factor with respect to administrative or personnel matters.

Appellant also claimed that she was subjected to harassment by coworkers and managers. She asserted that Ms. Guerrero, a coworker, got upset during a lunch break, "asked her what was funny and told her that she can throw a table." Appellant also claimed that Ms. Bailey spoke to her rudely on several occasions, including an instance on March 15, 2009 when she and her brother met with Ms. Bailey and Ms. Bailey addressed her with "an authoritative voice" and told her to make notations in connection with her concerns about her performance evaluation. She felt that Ms. Bailey's words and actions were designed to intimidate her into leaving the employing establishment.

In the present case, appellant has not submitted sufficient evidence to establish that she was harassed by her supervisors or coworkers.[15] She alleged that supervisors and coworkers made statements and engaged in actions which she believed constituted harassment. However, appellant did not provide adequate corroborating evidence to establish that the statements actually were made, that the actions actually occurred or that the statements or actions, even if established, rose to the level of harassment.[16] Thus, she has not established a compensable employment factor under the Act with respect to the claimed harassment.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained a stress condition in the performance of duty.[17]

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

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

[15] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment with probative and reliable evidence).

[16] *See William P. George*, 43 ECAB 1159, 1167 (1992). In an undated statement, Mr. Santos stated that he was present when appellant met with Ms. Bailey on or about February 24, 2009 and he observed that Ms. Bailey's voice became louder when she told appellant to document her concerns about her performance evaluation. This statement does not establish harassment as Mr. Santos did not describe the meeting with any specificity and the mere fact that Ms. Bailey's voice might have become louder would not rise to the level of harassment.

[17] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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