

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Administrative Hearings Division



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IN THE MATTER OF,)

ELSIE LESANE,)

Claimant,)

v.)

VERIZON,)

and)

SEDGWICK(CMS),)

Employer/Carrier.)

AHD No. 07-140

OWC No. 602533

Appearances

JOSEPH H. KOONZ, JR., ESQUIRE
For the Claimant

CURTIS B. HANE, ESQUIRE
For the Employer/Carrier

Before:

AMELIA G. GOVAN
Administrative Law Judge

COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§32-1501 *et seq.* (2001) (hereinafter, the Act).

After timely notice, a full evidentiary hearing

was held on May 2, 2007, before Amelia Govan, Administrative Law Judge (hereinafter, ALJ). Elsie LeSane (hereinafter, Claimant) appeared in person and by counsel. Verizon/Sedgwick (CMS) (hereinafter, Employer) appeared by counsel. Claimant testified on her own behalf. Employer did not present any witnesses. Claimant Exhibit (hereinafter, CX) Nos. 1-11 and Employer Exhibit (hereinafter, RX) Nos. 1-5, described

in the Hearing Transcript (hereinafter, HT), were admitted into evidence. The record closed on May 24, 2007, the date HT was filed with this Division.

BACKGROUND

Claimant has worked in clerical positions for employer since 1973. Since 1999, she has been under the care of a medical professional, and has taken prescribed medication, for stress-related symptoms. Claimant was off work for almost one year, beginning September 15, 2004; during that year she was paid short term disability benefits. When claimant returned to work on August 4, 2005, after fewer than three hours her supervisor told her to leave the building. The following week, claimant received a letter of termination, which has not been rescinded. Her medical benefits ended three weeks after the letter of termination. Ultimately, claimant was allowed to retire and began receiving Social Security disability benefits, which are her only current source of income.

CLAIM FOR RELIEF

Claimant seeks an award under the Act for temporary total disability benefits from August 9, 2005 to the present and continuing, interest on accrued benefits, and causally related medical costs.

ISSUES

1. Whether Claimant sustained a compensable injury on August 4, 2005 arising out of and in the course of her employment.
2. The nature and extent of disability, if any.

FINDINGS OF FACT

The parties have stipulated, and I accordingly find, there is an employer-employee relationship; that jurisdiction is vested in the District of Columbia; that Claimant provided timely notice of injury and timely filed the claim for benefits; controversion was timely; the average weekly wage is \$866.00; and, there have been no voluntary payments of compensation.

I find that Claimant, at the time of the hearing on May 2, 2007, had been working for Employer as a clerical dispatcher and payroll clerk, for more than 32 years. During her tenure with employer, claimant has had a perfect attendance record and has received "satisfactory" to "outstanding" performance ratings.

For twenty to twenty-five of those years, claimant worked as employer's payroll supervisor, responsible for tracking time and attendance records to ensure timely pay checks for the one hundred fifty workers in the district claimant handled. Claimant became angry, frustrated and upset when she had difficulty obtaining information, from employees and/or supervisors, to timely complete their payroll records.

On an ongoing basis, between 1985 and 1999, claimant participated in an Employee Assistance Program (EAP) for counseling related to workplace stress. Since 1998, claimant has filed more than six workers' compensation claims related to both physical and non-physical injuries. Beginning in 1999, she began professional psychological treatment under the aegis of Kaiser Permanente, her HMO. Claimant was also treated for stress depression by a Kaiser

psychiatrist, Dr. Genova, and a Kaiser psychologist, Stefan A. Lund, Ph.D. Since 1999, claimant has taken three medications, prescribed by Dr. Genova, for stress symptoms.

Claimant participated in a class action lawsuit filed against employer in 1995 by more than 150 other employees. After the lawsuit was resolved, which was in the year 2001, claimant received no promotion; she did receive a monetary settlement related to the lawsuit.

There came a time, prior to the lawsuit settlement, when a former supervisor twice offered claimant a position working for him. When claimant refused after the second offer, he threatened her with loss of her job. Claimant filed a union grievance against this supervisor.

I find that on or about January 17, 2003 Claimant came under the care of her treating psychologist, Stefan Lund, Ph.D. Consistent with Dr. Lund's diagnosis, I find claimant has a very low tolerance for stress.

On two occasions during her tenure with employer, claimant was provided an opportunity for promotion. She was assigned to another employee for training, but received no formal instruction for performance of the new job duties. On each occasion, the promotion attempt was unsuccessful, and claimant returned to her previous assignment.

Claimant stopped working for employer in September or October of 2004, and began receiving short term disability benefits. The reason for this absence was disabling symptoms of stress, depression and anxiety which claimant believed to be related to her

job. In November of 2004, claimant began to believe employer was tapping her work and home telephones and that persons were following her in the street per employer's orders.

Under the terms of employer's short-term disability policy, remaining off duty for fifty-two consecutive weeks would result in termination from the payroll. During her absence, claimant had submitted an application for long term disability, which was not approved. Claimant reported to work, at her old desk, on August 4, 2005 to "stop the clock" so that she would not be terminated.¹

At five o'clock on Friday, August 4, 2005, claimant reported to her former workplace and met with the supervisor on duty, Richard Walker.² Mr. Walker told claimant she could work that day, and claimant worked more than two hours. While claimant was working at her desk that evening, another supervisor, Michelle Barnes, telephoned claimant. Ms. Barnes told claimant to leave the premises, and also told her she would be removed from the payroll on the following day. Mr. Walker told claimant she could continue to work, and she continued to work until her hours were up. At the end of her tour of duty that evening, claimant left the workplace.

On Monday of the following week, claimant began receiving telephone calls from co-workers regarding an 8X10 inch photograph of her which was prominently displayed on

¹Employer's disability policy is provided through another carrier, MedLife. (HT 47-50).

²Claimant's normal duty hours were ten o'clock a.m. to seven o'clock p.m.

the security desk at work.³ Her co-workers questions, about her work status, were upsetting to claimant. By Wednesday of the following week, claimant had been separated from her employment with employer via a letter.

Claimant was scheduled for a psychiatric IME with Bruce Smoller, M.D. on March 11, 2005. The day of the appointment, Dr. Smoller talked with claimant for a few minutes, then put her in a cubicle with a computer to complete a computerized psychological profile form which required responses to 567 questions. Completing this test took claimant three hours; she was permitted one break during that time. Claimant left Dr. Smoller's office without completing the computer questionnaire; it was mailed to her, and she never returned it as requested.

I find that there is insufficient evidence to support the contention that Claimant suffered an emotional injury on August 4, 2005.

DISCUSSION

Following a thorough review of the parties' arguments, I have determined, to the extent an argument is consistent with the findings and conclusions herein, the argument is accepted; to the extent an argument is inconsistent therewith, it is rejected.⁴

WHETHER CLAIMANT SUSTAINED A COMPENSABLE INJURY ON AUGUST 4, 2005

³Security was instructed not to allow claimant to enter the building.

⁴While each documentary exhibit received in evidence is not specifically referenced in the discussion, all evidence of record was reviewed as part of this deliberation.

WHICH AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

Pursuant to the Act, a claimant is provided with a presumption that her claim comes within the provisions of the D.C. Code §32-1521(1). In order for the presumption of compensability to arise, a claimant has the initial burden of introducing persuasive evidence of basic facts tending to establish coverage of the Act before other facts necessary to establish the claimant's coverage under the Act are presumed. Thus, in order for the presumption of compensability to arise, the claimant must establish by reliable, credible and probative evidence, the existence of an injury and the fact that it occurred during the course of employment. Once these two basic facts are established, the statutory presumption arises that the injury rose out of the employment. *Dailey v. 3M*, H&AS No. 85-259; OWC No. 0066512 (May 19, 1988).

When an emotional injury is alleged, however, a second prong must be met in order invoke the presumption of compensability. In order for a claimant to establish that an emotional injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his emotional injury. The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury. *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C.1990), citing *Dailey* at 5, *supra*.

At the hearing, Claimant presented evidence of an incident which exacerbated her pre-existing stress disorder while performing her work duties on August 4, 2005. However, Claimant, through counsel, has not adduced any contemporaneous medical evidence to support the contention that on or about August 9, 2005, her stress disorder became disabling. There is no examination report from a medical care provider, after the events in August, which provides sufficient medical evidence to support a finding that Claimant suffered a disabling injury or aggravation within the ambit of the Act. Claimant does not meet the first prong needed to establish the statutory presumption that injury arose out of her employment.

In cases of a work-related psychological injury, however, a claimant must also show that the actual conditions of employment, *as determined by an objective standard and not merely the claimant's subjective perception of his working conditions*, were the cause of the emotional injury. Claimant has also failed to provide sufficient evidence to invoke the second prong of the compensability presumption. Claimant testified that her injury was caused by a series of work-related events that began in 1985 (when she began to participate in ongoing EAP sessions), became more stressful in 1999 (such that she sought medical treatment), and became disabling in August of 2005.

Specifically, Claimant related, and Employer did not refute, that she was given conflicting directives from two supervisors on August 4, 2005 - one directive to continue working, and the other directive to leave the work premises. This was followed, on the next workday, with telephone calls from co-workers describing

her photo at the security desk and publication of the edict barring her from employer's premises. Claimant further stated that these events were upsetting to her and that she has had frightening dreams about returning to the workplace. Employer did not dispute this testimony.

Claimant asserted that she had been dwelling on the actions of Employer and the lack of wages, and that the injury of August 4, 2005 was caused by the cumulative effect of these circumstances. In sum, Claimant claimed that she was feeling aggravation of her longstanding stress disorder.

In support of her claim that she suffered a disabling stress injury on August 4, 2005, Claimant presented evidence in the form of physicians' reports dating back to 2002. Those reports reflect a history of low tolerance for stress in the workplace, to which claimant reacted with symptoms of anxiety, depression and tension. The record medical records make repeated reference to Claimant's unresolved issues with employer. However, there are no contemporaneous records to support the period for which benefits are claimed. In fact, there are no medical records in evidence, other than Dr. Smoller's March 2007 IME report, for any time after July of 2005 (when claimant applied for long term disability benefits).

Dr. Smoller, in his March 11, 2007 examination report, opined that Claimant, has a psychiatric disease "quite a part from her work." Stating that receipt of objective psychological test results would not change his opinion, Dr. Smoller concluded claimant has an inborn, "probably biochemical" condition, and that her symptoms of long term anxiety/depression would not have

emerged in a person “in whom there was no psychiatric diathesis as exists in Ms. Lesane”(RX 1).⁵

(S)ome courts have suggested,...that in assessing the weight of competing medical testimony in worker compensation cases, attending physicians are generally preferred as witnesses to those doctors who have been retained solely for purposes of litigation. *Stewart v. District of Columbia Department of Employment Services*, 606 A.2nd 1350, 1353 (D.C. 1992). Dr. Smoller proffered a medical opinion based on a single, incomplete (lacking psychological test results) evaluation. Accordingly, more weight will be given to the reports of claimant’s treating experts, which reflect depression/stress in the workplace environment going back to November of 1999. However, those reports do not address the period pertinent to the instant claim for benefits. Assuming, *arguendo*, that claimant’s testimony were sufficient to invoke the presumption and that Dr. Smoller’s report rebutted the presumption, there is no medical evidence to weigh regarding the period at issue.

The mere fact that a doctor states his opinion that an emotional injury is work-related does not automatically establish legal causation. *Dailey, supra*. The Dailey opinion further supports this assertion by citing language from *Wenzel v. British Airways*, H&AS No. 84-308 (Director’s Order dated October 6, 1986), which notes

...the undesirability of relying solely on psychiatric evidence;

for often physicians who find a work-connection in the occurrence of an injury are not necessarily concerned about whether the condition in the workplace of which a patient complains actually existed. What seems to be important to the physician is the perception the patient has of the workplace...

For purposes of satisfying the statutory requirement that an employee’s injury arise out of the employment, however, an employee’s subjective perception of the work environment cannot be sufficient.

Under the law of the District of Columbia, a claimant may recover for a work-related psychological injury upon a showing of job conditions, as seen from an objective point of view, not just from the claimant’s subjective perception, that are so stressful that an average, non-predisposed worker might have suffered similar harm. *Dailey, supra; Spartin, supra*.

Claimant has not presented any medical evidence that satisfies the objective standard. There is no medical evidentiary basis to conclude that claimant’s actual working conditions, on August 4, 2005, caused a disabling emotional injury, let alone that those conditions could have caused a similar emotional injury in a person who was not significantly predisposed to such injury.

Based on the foregoing, Claimant did not satisfy all elements necessary to establish the

⁵Dr. Smoller did note that claimant’s condition “did exhibit itself in the work environment and seems focused on that environment”. (RX 1).

presumption of compensability. Having so found, the second issue will not be addressed.

CONCLUSION OF LAW

I hereby find and conclude that, based on a review of the record evidence as a whole, Claimant did not show that she sustained a compensable injury on August 4, 2005 arising out of and in the course of her employment.

ORDER

It is hereby **ORDERED** claimant's claim for relief be, and hereby is, **DENIED**.



AMELIA G. GOVAN
ADMINISTRATIVE LAW JUDGE

September 28, 2007
Date