

FACTUAL HISTORY

On June 25, 2004 appellant, then a 49-year-old registered nurse, filed an occupational disease claim (Form CA-2) alleging that she sustained an emotional condition with aggravation of preexisting diverticulosis in the performance of duty on or before May 17, 2004. Joy Barnett, appellant's supervisor, noted that appellant first reported the claimed emotional condition on June 16, 2004 and was last exposed to work factors on June 28, 2004.¹

In a June 30, 2004 letter, the Office advised appellant of the type of additional evidence needed to establish her claim, including a description of the implicated work factors and medical evidence explaining how those factors caused the claimed condition.

Appellant responded in a series of undated letters and notes. She explained that she developed post-traumatic stress syndrome and anxiety attacks prior to her federal employment. In September 2001, three months after beginning full-time federal employment, she had a severe episode of previously undiagnosed diverticulosis, managed with diet and exercise. Ms. Barnett became appellant's supervisor in October 2002. She alleged that on unspecified dates, Ms. Barnett criticized her nursing practice, told her she would be watched, assigned other nurses to spy on her, called appellant into her office when it was reported she had "done something wrong," told her she should not become a nurse practitioner or she would hurt someone, that she should pursue another line of work and that she would not be able to make her house payments on unemployment. Appellant asserted that Ms. Barnett thus created a hostile work environment. She alleged that she did not receive in-house training on charting procedures and so Ms. Barnett repeatedly criticized her charting skills. She also alleged that Ms. Barnett interfered with her union representative. Appellant also attributed her condition to an unfavorable performance rating from Ms. Barnett. She alleged that Ms. Barnett "made up some mistakes" to justify reassigning appellant from the night shift to the day shift in December 2003, to accommodate a personal friend who wanted appellant's night shift position. Appellant asserted that the schedule change disrupted her circadian cycle and worsened her diverticulosis. She alleged that after her reassignment, Ms. Barnett's friend, the newly transferred night nurse, verbally attacked her and sent a disturbing email about her to other employees.² She noted that she may have had a small stroke on May 18, 2004 and sustained a "nervous breakdown" on approximately June 15, 2004 as she could not bear to speak to Ms. Barnett again regarding a prior incident. On July 16, 2004 appellant underwent a bilateral oophorectomy and a colon resection to treat ovarian cysts and diverticulosis.³

¹ In a June 22, 2004 note, Crista Y. Johnson, an occupational health nurse at the employing establishment, noted that appellant presented that day, asserting that she had been experiencing severe stress due to being transferred from the night shift to the day shift and alleged harassment by Ms. Barnett. Ms. Johnson stated that at appellant's request, she filed an emotional condition claim.

² The record contains a March 5, 2004 "notice of right to file a discrimination complaint" regarding an unspecified Equal Employment Opportunity (EEO) matter. There are no EEO findings or decisions of record.

³ Appellant submitted hospital records dated from July 10 to 20, 2004 regarding the July 16, 2004 surgeries. These records do not address an emotional condition claim or the cause of appellant's diverticulosis.

Appellant submitted evidence relating to performance and disciplinary issues. In an undated letter, appellant commented that she hoped Ms. Barnett had “seen an improvement in [her] work as [she was] much more conscious of what [she was] doing.” In March 5 and November 29, 2003 emails, Ms. Barnett advised appellant that she could obtain union representation for scheduled meetings regarding her job performance. Ms. Barnett noted that this was a routine advisement. In a December 4, 2003 memorandum of written counseling, Ms. Barnett asserted that following verbal counseling, appellant continued to use poor judgment, including prepouring medications, not properly recording narcotic medications, giving an unauthorized injection, performing chart checks for patients in other units and performing an unauthorized irrigation procedure. She stated that ongoing concerns necessitated a permanent reassignment to the day shift, effective December 18, 2003. Appellant signed the memorandum, contending that she did not prepour medications but admitting that the other allegations were true. She sought union representation on December 11, 2003, sending an email message regarding the December 4, 2003 memorandum to Steven A. Best, a union official. Appellant alleged that in a December 10, 2003 meeting, Ms. Barnett threatened to notify the human resources department and revoke her license if her performance did not improve.

In a January 7, 2004 email message, appellant asked supervisor Marie Anderson if she could transfer to the mental health unit from the terminal care unit as she was “so burnt out on death.” In a February 25, 2004 email message, appellant asked Ms. Anderson if she needed a “noc[turnal] nurse” as she felt “more in [her] element” on the night shift.

In a March 23, 2004 letter, appellant advised Ms. Barnett that she could not afford to return to school to obtain a nurse practitioner license. She asserted that she was “trying very hard to live up to [her] expectations” and asked that Ms. Barnett let her know what she needed to improve. Appellant acknowledged that she made occasional mistakes.

In an April 17, 2004 pain management competency evaluation, Catherine Thomas, a licensed practical nurse and one of appellant’s coworkers, found no deficiencies in appellant’s practice. A June 8, 2004 performance appraisal shows that Ms. Barnett gave appellant a “low/satisfactory” performance rating.

Appellant also submitted medical evidence in support of her claim. In a March 9, 2004 note, Dr. Dom J. Ludwig, an attending physician,⁴ stated that appellant was a “long-time night-shift nurse” and that her “biorhythms [are] set to that shift. For her mental and physical health please ... allow ... her to return to night shift duty.”⁵

⁴ Dr. Ludwig is not listed in the on-line physician databases maintained by the American Medical Association or the American Board of Medical Specialties. Therefore, his area of specialization cannot be ascertained.

⁵ Appellant submitted several reports from Aimee Hansen and Allyson Meither Myers, both attending nurse practitioners. However, lay persons such as nurse practitioners are not competent to render a medical opinion as they are not considered physicians under the Federal Employees’ Compensation Act. *Ricky S. Storms*, 52 ECAB 349 (2001); *Joseph N. Fassi*, 42 ECAB 677 (1991).

By decision dated August 27, 2004, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable factors of employment. The Office further found that appellant's allegations of harassment and a hostile work environment were uncorroborated. The Office further found that there was no evidence of administrative error or abuse regarding disciplinary matters, work assignments, transfer of work shifts or formulation of performance appraisals. The Office further found that appellant had not submitted competent medical evidence diagnosing an emotional condition.

Following the issuance of the August 27, 2004 decision, the employing establishment submitted additional evidence.

In a September 14, 2004 statement, Ms. Barnett asserted that appellant's claim was precipitated by a June 9, 2004 discussion regarding an incident where appellant knowingly violated regulations by divulging a patient's address and telephone number to another patient. She noted that appellant was hospitalized previously for a suicide threat in a conflict involving her ex-husband. Ms. Barnett explained that in December 2003, she changed appellant's schedule from night shift to the day shift due to multiple nursing practice issues which threatened patient safety. She stated that appellant performed unauthorized procedures, dispensed medications improperly and used inaccurate documentation. Working the day shift provided appellant greater supervision and allowed her time to improve her performance. She noted that appellant's diverticulosis could be accommodated on the day shift schedule, including taking a daily walk and a longer lunch break. Ms. Barnett denied that she reassigned appellant to give a personal friend her night shift position. Ms. Barnett also denied appellant's allegations of threats, harassment, spying or unfair criticism. She noted informing appellant that she would be watched "closely for improvements in her nursing practice" and that her colleagues would be asked for feedback, a standard nursing evaluation practice. Ms. Barnett confirmed that she gave appellant a less than satisfactory performance rating and encouraged her to seek counseling. She emphasized that when speaking to appellant about her performance, she made clear that it was "not a personal issue but an effort to improve her nursing practice." Ms. Barnett denied interfering with appellant's union representation but noted that one of the representatives appellant used was her nursing school classmate although not a personal friend. Ms. Barnett denied that appellant was verbally accosted by a night shift nurse. She acknowledged that the nurse sent an unauthorized email to the entire staff but that it did not mention appellant. Ms. Barnett noted that appellant had not approached her about getting "burned out on death" in the terminal care unit.

In a form dated and postmarked October 31, 2004, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review.⁶ She did not submit additional evidence.

By decision dated December 17, 2004, the Office denied appellant's request for an oral hearing on the grounds that it was not timely filed. The Office found that appellant's request was

⁶ In an undated letter addressed to the Office's London, Kentucky address and received on October 12, 2004, appellant requested an oral hearing. In an October 25, 2004 letter, the Office's London, Kentucky office advised appellant that it had received her undated request for an oral hearing. The Office advised appellant to follow the instructions for requesting an oral hearing that accompanied the August 27, 2004 decision.

postmarked October 31, 2004, more than 30 days after the issuance of the August 27, 2004 decision denying her emotional condition claim. The Office also denied appellant's request for an oral hearing on the additional grounds that the issue in the case could be pursued equally well by submitting new, relevant evidence establishing that she "experienced a compensable factor of employment which resulted in a medical condition."⁷

LEGAL PRECEDENT -- ISSUE 1

The Act provides for payment of compensation for personal injuries sustained while in the performance of duty.⁸ Where disability results from an employee's reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.⁹ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.¹⁰ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.¹¹

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing 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.¹² If a claimant implicates 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.¹³

ANALYSIS -- ISSUE 1

In the present case, appellant alleged that she sustained a stress-related emotional condition with a consequential aggravation of diverticulosis as a result of a number of employment incidents and conditions which the Office found to be noncompensable. Therefore, the Board must review whether these alleged incidents and conditions are covered employment factors under the terms of the Act.

⁷ Following issuance of the Office's December 17, 2004 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁸ 5 U.S.C. § 8102(a).

⁹ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Ruthie M. Evans*, 41 ECAB 416 (1990).

¹¹ *Effie O. Morris*, 44 ECAB 470 (1993).

¹² See *Norma L. Blank*, 43 ECAB 384 (1992).

¹³ *Marlon Vera*, 54 ECAB ____ (Docket No. 03-907, issued September 29, 2003).

Appellant alleged that a pattern of harassment by her supervisor, Ms. Barnett and an unnamed night shift nurse caused or contributed to her claimed stress-related condition. She asserted that Ms. Barnett created a hostile work environment, belittled her, unfairly criticized her work, fabricated “mistakes” to unjustly accuse her of incompetence, threatened to revoke her license, sent other employees to spy on her, interfered with her union representative and transferred her to the day shift to give a personal friend appellant’s night shift position. Appellant also alleged that the new night shift nurse verbally accosted her and sent a derogatory email about her to the staff. Incidents of harassment by supervisors and coworkers, if established as occurring and arising from the employee’s performance of his or her regular duties, could constitute employment factors.¹⁴ For harassment or discrimination to give rise to a compensable disability under the Act, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹⁵ Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁶

Appellant did not submit evidence supporting her allegations of harassment and a hostile work environment. She did not submit witness statements or other documentation corroborating her account of events. Also, Ms. Barnett, appellant’s supervisor, denied appellant’s allegations. In her September 14, 2004 statement, Ms. Barnett explained that appellant committed numerous nursing practice violations necessitating ongoing monitoring, including peer evaluations. These violations also resulted in letters of counseling and a low/satisfactory performance rating in June 2004. She denied belittling or harassing appellant at any time, noting that she explained to appellant that the performance discussions were not personal but “an effort to improve her nursing practice.” The Board notes that in response to the December 10, 2003 memorandum of counseling, appellant acknowledged that several nursing practice errors alleged by Ms. Barnett were true. She also admitted in a March 23, 2004 letter that she made occasional mistakes in nursing practice. Also, Ms. Barnett denied that the night shift nurse verbally accosted appellant or that the email she sent mentioned her. She also denied interfering with appellant’s union representative. Regarding appellant’s allegation that she was reassigned her to the day shift to give a personal friend appellant’s night shift position, Ms. Barnett explained that the shift change was necessitated by appellant’s poor nursing practice and need for additional supervision. Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment.

Appellant also attributed her condition, in part, to the December 4, 2003 memorandum of counseling and the June 8, 2004 “low/satisfactory” performance appraisal, separate and apart from her allegations that these administrative actions constituted harassment. Administrative functions such as performance evaluations¹⁷ and disciplinary actions¹⁸ are not considered compensable employment factors in the absence of error or abuse. In determining whether the

¹⁴ *Janice I. Moore*, 53 ECAB 777 (2002). See *David W. Shirey*, 42 ECAB 783 (1991).

¹⁵ *Marlon Vera*, *supra* note 13.

¹⁶ *Kim Nguyen*, 53 ECAB 127 (2001).

¹⁷ *Beverly R. Jones*, 55 ECAB ____ (Docket No. 03-1210, issued March 26, 2004).

¹⁸ *Sherry L. McFall*, 51 ECAB 436, 440 (2000).

employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁹ Ms. Barnett explained in her September 14, 2004 statement that the memorandum of counseling and low performance appraisal were necessitated by numerous, ongoing nursing practice violations. As set forth above, appellant admitted making such errors. In this case, the Board finds that Ms. Barnett's statement is sufficient to establish that the employing establishment acted reasonably regarding the memorandum of counseling and performance appraisal. Thus, appellant has not established a compensable factor of employment in this regard.

Appellant also attributed her condition, in part, to being reassigned from the night shift to the day shift in December 2003. The Board has held that a change in work shift may constitute a compensable factor of employment.²⁰ However, a change in duty shift does not arise as a compensable factor *per se*.²¹ If a shift change causes an inability to perform the newly assigned duties, this is a compensable factor arising out of and in the course of employment. However, frustration over not being permitted to work a particular shift or to hold a particular position is not compensable.²² Generally, the assignment of a work schedule or tour of duty is recognized as an administrative function of the employing establishment and, absent any error or abuse, does not constitute a compensable factor of employment.²³ In this case, appellant expressed her frustration over being removed from the night shift, alleging that this stress aggravated her diverticulosis. However, appellant did not allege that she could not perform the day shift position, only that she preferred the night shift. The Board notes that she performed the position from mid-December 2003 through mid-June 2004, indicating that she was able to do so. Also, Ms. Barnett stated that appellant was given accommodations for her diverticulosis, including an extended lunch break and being able to take a walk during the day. The Board finds that appellant's frustration over not being allowed to work the night shift was self-generated and not compensable.

Appellant alleged that she did not receive in-house training on charting skills and that her lack of ability in this area caused Ms. Barnett to criticize her. The Board has held that an employee's emotional reaction to being made to perform duties without adequate training may be compensable.²⁴ However, appellant did not submit sufficient evidence to corroborate that she needed the training to perform her duties or that such training was denied her. Therefore, the Board finds that appellant has not established a compensable factor of employment in this regard.

¹⁹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

²⁰ *Penelope C. Owens*, 54 ECAB ____ (Docket No. 03-1078, issued July 7, 2003); *Virginia Dorsett*, 50 ECAB 478 (1999).

²¹ *Penelope C. Owens*, *supra* note 20.

²² *Id.*

²³ *Helen Allen*, 47 ECAB 141 (1995).

²⁴ *Donna J. Dibernardo*, 47 ECAB 700 (1996).

Appellant also attributed her emotional condition, in part, to her reaction to working on the terminal and palliative care unit, that she was “burned out” about death. She also requested a transfer to another unit. While appellant may have been unsatisfied in her job, the Board has held that self-generated frustration arising from not being allowed to work in a particular position or to hold a particular job is not compensable under the Act.²⁵ Denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment absent a showing of error or abuse as they do not involve the employee’s ability to perform his or her regular or specially assigned work duties but rather constitute his or her desire to work in a different position.²⁶ The Board finds that under the circumstances of this case, appellant has not established error or abuse regarding her assignment to the terminal and palliative care unit.

The Board therefore finds that appellant has not established that she sustained an emotional condition in the performance of duty as she failed to establish any compensable factors of employment.²⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that “a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”²⁸ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.²⁹ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.³⁰

ANALYSIS -- ISSUE 2

In the present case, pursuant to the Office’s August, 27, 2004 denial of her emotional condition claim, appellant requested an oral hearing on a form postmarked October 31, 2004. Section 10.616 of the federal regulations provides that a request for a review of the written

²⁵ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004); see *Katherine A. Berg*, 54 ECAB ____ (Docket No. 02-2096, issued December 23, 2002).

²⁶ *Hasty P. Foreman*, 54 ECAB ____ (Docket No. 02-723, issued February 27, 2003).

²⁷ As appellant did not establish any compensable factors of employment, the medical evidence need not be considered. *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992).

²⁸ 5 U.S.C. § 8124(b)(1).

²⁹ 20 C.F.R. §§ 10.616, 10.617.

³⁰ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

record or an oral hearing “must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision, for which a hearing is sought.”³¹ Appellant’s request for an oral hearing was not postmarked until October 31, 2004, significantly more than 30 days after issuance of the August 27, 2004 decision. Thus, it is clear that appellant’s request for a review of the written record was not timely filed.

As appellant did not request a hearing within 30 days of the August 27, 2004 decision, she is not entitled to a hearing as a matter of right. The Office must then exercise its discretion to determine whether appellant’s request for a review of the written record should be granted. In its December 17, 2004 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration. Therefore, the Board finds that the Office properly exercised its discretion in denying appellant’s request for a review of the written record.

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 as alleged. The Board further finds that the Office properly denied appellant’s October 31, 2004 request for an oral hearing on the grounds that it was untimely filed.

³¹ 20 C.F.R. § 10.616(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 17 and August 27, 2004 are affirmed.

Issued: July 26, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board