United States Department of Labor
Employees' Compensation Appeals Board

GEORGE H. CLARK, Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, OVERTON BROOKS VETERANS ADMINISTRATION MEDICAL CENTER, Shreveport, LA, Employer	)	**Docket No. 04-1572** **Issued: November 30, 2004**

Appearances:
George H. Clark, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 1, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 6, 2004 which denied his claim. Pursuant to 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 his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment.

FACTUAL HISTORY

On October 2, 2003 appellant, then a 54-year-old housekeeping aide, filed a Form CA-2, occupational disease claim, alleging that he experienced psychological and physical stress when his shift was changed from the 3:30 p.m. to midnight shift to a 6:00 a.m. to 2:30 p.m. shift. He

noted that this created a financial burden and that his blood pressure medication had been increased. He did not stop work. In an attached statement, appellant noted that on August 21, 2003 Roy L. Pearson, Environmental Management Services (EMS) General Foreman, gave him a memorandum informing him that effective September 14, 2003 his shift would be changed. He noted that he responded in writing to Mr. Pearson but was informed that the change would take place, and on September 15, 2003 appellant began the new tour. He stated that this led to increased stress, tension headaches, muscle soreness, fatigue, dizziness, chest pains, insomnia, irritability, depression and increased blood pressure. Appellant stated that on October 2, 2003 he met with Paul Loudermilk, chief of EMS, regarding the shift change and expressed his concerns. Appellant stated that Mr. Loudermilk made him very angry due to his lack of concern and alleged that he was being punished by the shift change.

Appellant also submitted medical reports from the employing establishment health unit which included a September 11, 2003 myocardial effusion test to screen for coronary artery disease that was interpreted by Dr. Filipinas Alfelor, a Board-certified radiologist, as normal. In a September 22, 2003 note, Jesse Jones, a physician's assistant, diagnosed hypertension, degenerative joint disease, history of cancer of the prostate with prostatectomy, history of bladder spasm and chronic obstructive pulmonary disease. In a September 29, 2003 treatment note, Dr. Perry Duane Nichols[1] diagnosed an upper respiratory infection. Appellant also submitted laboratory reports and a September 30, 2003 adenosine stress test with resting electrocardiogram, both reported as normal.

By letter dated December 9, 2003, the Office informed appellant of the evidence needed to support his claim. In response, he submitted earnings and leave statements, copies of the August 21, 2003 memorandum informing him of the shift change, his response and an August 27, 2003 reply in which Mr. Pearson explained that appellant had not been guaranteed a specific work shift and had been given proper notice regarding the shift change. In an August 28, 2003 statement, Thomas Gadson, a union steward, advised that he had no authority to approve shift changes. Emma Prescott and Katherine Weber, co-workers, submitted statements noting that appellant drove them to work and it would be a hardship to them if the shift was changed. In a memorandum dated October 22, 2003, Mr. Pearson informed appellant that he would return to the night shift effective November 9, 2003. Appellant also submitted a document titled "fact finding with Roy Pearson *via* telephone on March 29, 2003 at 9:45 a.m."[2] The document states that the shift change was made so that the employees could be retrained as their areas were not up to standard.

In a January 16, 2004 statement, appellant reiterated that the shift change had caused increased stress and increased his blood pressure. He noted that he was "suddenly thrust" onto the day shift after 18 years of working nights and worked the day shift 7 weeks while only one other night shift employee was changed, and he only worked 4 weeks on the day shift.

In an undated statement, received by the Office on April 2, 2004, Mr. Loudermilk advised that appellant was notified of the shift change according to contract requirements; that

[1] Dr. Nichols' credentials are not known.

[2] The author of this document is unknown.

the purpose of the shift change was to train employees in housekeeping duties; that prior to the official notification, appellant had been told that some changes were needed in his housekeeping practices and his schedule would be adjusted to provide training. Mr. Loudermilk stated that the union was informed regarding the purpose of the change, that appellant was given proper notice, and was informed that he would return to the 3:30 p.m. to midnight shift when the training was completed. He noted that while appellant was on the day shift he went to employee health and took 16 hours of sick leave and after his return to the midnight shift he had taken 8 hours sick leave.

By decision dated May 6, 2004, the Office found that the change to appellant's shift from night to day for mandatory training for the period September 14 to November 8, 2003 was a compensable factor of employment. The Office, however, denied the claim, finding that the medical evidence did not establish that appellant sustained a stress-related condition causally related to this accepted factor.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[3]

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*,[4] 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.[5] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[6] When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that 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.[7]

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

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

[4] 28 ECAB 125 (1976).

[5] 5 U.S.C. §§ 8101-8193.

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

[7] *Lillian Cutler, supra* note 4.

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.[8] 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.[9]

ANALYSIS

Appellant alleged that a change in his work shift from nights to days caused increased stress, increased hypertension and other medical conditions. The Office found that the shift change constituted a compensable factor of employment.

The record establishes that appellant's regular tour of duty was 3:30 p.m. to midnight. For the period of September 14 to November 9, 2003 his work shift was changed to 6:00 a.m. to 2:30 p.m. in order to effectuate training in housekeeping duties. Appellant attributed emotional stress and an increase in his blood pressure and other physical symptoms to this change in his work shift. The Board finds that appellant's change in duty shift from night to day constitutes a factor of employment to be considered in determining whether he sustained an injury in the performance of duty.[10]

In *Gloria Swanson*,[11] the Board addressed case precedent which distinguished allegations concerning when changes in an employee's work shift would give rise to a compensable factor of employment. To the extent that appellant has alleged that the change in shift constituted punishment or was inconvenient due to his commute to work with other employees this would be analogous to emotional frustration in not being allowed to work specific hours. It is well established that when disability results from an employee's frustration over not being permitted to work in a particular environment, to hold a particular position, or to secure a promotion, such disability does not arise in the performance of duty.[12] To this extent, appellant has not submitted sufficient evidence to establish that the administrative change in his tour of duty for training purposes constituted administrative error or abuse by employing establishment management.[13] The record establishes that his supervisors properly advised appellant of the change in his tour of duty, the reason for such change and advised the local union regarding the purpose for the

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

[9] *Id.*

[10] *See John J. Granieri,* 41 ECAB 916 (1990).

[11] 43 ECAB 161 (1991).

[12] *See Lillian Cutler, supra* note 4.

[13] An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. *Charles D. Edwards,* 55 ECAB ___(Docket No. 02-1956, issued January 15, 2004).

change of tours. The Board finds that the evidence does not establish that the change in appellant's tour of duty from night to day was a form of punishment, as alleged, or otherwise constitutes a form of harassment or discrimination. Any inconvenience to appellant's daily commute to work with his coworkers is not a factor arising in the performance of duty.[14]

To the extent that appellant has alleged the change of work shift caused an increase in his blood pressure and other physical symptoms, the Board finds that the medical evidence is not sufficient to establish that the accepted shift change caused or contributed to these medical conditions. The September 11, 2003 myocardial effusion test, interpreted by Dr. Alfelor as being normal, is not relevant to appellant's claim as this diagnostic study was obtained prior to the effective date of the change in shift on September 14, 2003. The September 23, 2003 note of Mr. Jones, a physician's assistant who commented appellant's medical conditions, does not constitute competent medical evidence from a physician. Section 8101(2) of the Act defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[15]

The Board has noted a physician's assistant is not a physician as defined under the statute and therefore any report from such individual does not constitute competent medical evidence which, in general, can only be given by a qualified physician.[16] On September 29, 2003 Dr. Nichols diagnosed an upper respiratory infection, a condition which was not attributed in any way to the accepted change in work shift. The remaining diagnostic studies and health unit medical records did not address appellant's complaints of an increase in blood pressure, insomnia or other physical symptoms. Appellant has the burden of proof to establish that the conditions for which he claims compensation were caused or adversely affected by his federal employment.[17] Part of this burden includes the necessity of presenting rationalized medical evidence, based on a complete factual and medical background, establishing a causal relationship. An award of compensation may not be based upon surmise, conjecture or upon appellant's belief that there is a relationship between his medical conditions and his employment. The Board finds that appellant has not submitted sufficient probative medical evidence and, therefore, failed to discharge his burden of proof.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an employment-related injury.

[14] *See Linda S. Jackson*, 49 ECAB 486 (1998).

[15] 5 U.S.C. § 8101(2).

[16] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[17] *See Calvin E. King*, 51 ECAB 394 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2004 be affirmed.

Issued: November 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member