

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VELMA BURKEY and DEPARTMENT OF JUSTICE,  
METROPOLITAN CORRECTION CENTER, San Diego, Calif.

*Docket No. 95-2310; Submitted on the Record;  
Issued August 19, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof in establishing that she developed an emotional condition and aggravation of her preexisting asthma due to factors of her federal employment.

The Board has duly reviewed the case on appeal and finds that it is not in posture for decision.

Appellant, a senior correctional officer, filed a claim on December 21, 1993 alleging that she developed an emotional condition and aggravation of her asthma due to factors of her federal employment. By decision dated April 4, 1994, the Office of Workers' Compensation Programs denied appellant's claim. Appellant requested reconsideration on April 15, 1994 and by decision dated July 20, 1994, the Office found that appellant had submitted sufficient evidence to establish a medical condition but that she had not established factors of her federal employment contributing to that condition. Appellant requested reconsideration on October 10, 1994 as well as January 26, 1995 and the Office denied modification of its July 20, 1994 decision on January 3 and March 31, 1995, respectively.

On October 5, 1992 an inmate escaped from the employing establishment and his cell mate made allegations that appellant aided in the escape. Appellant attributed her stress-related conditions to investigations undertaken by the U.S. Attorney General in relation to this incident. Appellant stated on January 27, 1993 Assistant Attorney General Sherri Walker as well as Federal Bureau of Investigation (F.B.I). Agent Willie Sessions interrogated her and threatened her with a 30-year prison sentence. In support of her claim, appellant's attorney submitted a statement dated March 18, 1994 and asserted that on January 28, 1993 Ms. Walker and Agt. Sessions attempted for two hours to convince appellant to accept a plea bargain. In a statement dated March 18, 1994, appellant's husband described the meeting with Ms. Walker and Agt. Sessions. Appellant also alleged that the F.B.I. parked in front of her home for four

months and followed her family activities. Appellant alleged that she developed an emotional condition waiting to see if Ms. Walker would prosecute her.

Appellant alleged that on October 9, 1992 the employing establishment supervisors and agents from the F.B.I. yelled at her and threatened her for one and one half hours. Appellant stated that her supervisor, Lt. Longley, as well as Lt. Easton were performing an internal investigation and that F.B.I. agents were present. She stated that she was accused of helping the inmate escape. Appellant stated that Lt. Easton screamed at her and that he should not have been allowed to ask her questions as it was an F.B.I. investigation. Appellant also alleged that she was not allowed a union representative and that she was detained illegally as she was required to stay beyond her duty tour. Appellant stated she was interrogated and threatened for five hours on October 11, 1992. Lts. Easton and Longley, supervisors of the employing establishment escorted her to the F.B.I. offices. Appellant stated the supervisors denied her a union representative and that Agt. Sessions questioned her, threw things at her and badgered her for three hours. Appellant stated on November 13, 1993, the internal investigator, O. Lee, Brandhagen, and Lt. Chili questioned her for two hours regarding her role in the escape.

The employing establishment did not dispute that appellant was investigated by the F.B.I. and the United States Marshals Service. Capt. J.L. Harden stated that the United States Attorney for the Southern District of California determined that there was insufficient evidence to criminally prosecute appellant on September 28, 1993. Capt. Harden also stated that the employing establishment conducted an investigation into allegations of official misconduct on the part of appellant.

Appellant was on home duty for 14 months beginning in October 1992 and returned to regular duty on December 14, 1993. Appellant's husband stated appellant was on home duty and required to be at home between 7:30 a.m. and 4:00 p.m. He stated that appellant had to notify the employing establishment when she left home during those hours and that the employing establishment called during those hours to insure appellant was at home. Appellant's attorney alleged that appellant's home duty contributed to her emotional condition as appellant was assigned to be at home during certain hours of the day and await orders and instructions and to cooperate with the ongoing investigation. Appellant had no other duties.

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>1</sup>

The Board has held that investigations into alleged illegal or improper acts are not within an employee's performance of duty. However, error or abuse on the part of the employing

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<sup>1</sup> *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

establishment in conducting an investigation can be compensable.<sup>2</sup> In this case, the Board finds that after the U.S. Attorney determined that there was insufficient evidence to continue a criminal investigation on September 28, 1993, the employing establishment continued to question and investigate appellant, specifically on November 13, 1993 after the finding had been made. O. Lee Brandhagen and Lt. Chili questioned appellant about her alleged role in the escape. Such actions after both the F.B.I. and the employing establishment had conducted investigations amounts to abuse on the part of the employing establishment and is considered a work factor.<sup>3</sup>

Further, under the circumstances of the case, appellant was removed from her day to day duties and specially assigned to stay at her home and to be on call between 7:30 a.m. and 4:00 p.m. without specific duties for a period of 14 months. This act on the part of the employing establishment constituted a special assignment and as such amounted to specially assigned work duties and any disability resulting from an emotional reaction to such duties would come within coverage of the Federal Employees' Compensation Act.<sup>4</sup>

As appellant has established compensable factors of employment, the next issue is whether the medical evidence establishes that her emotional or medical conditions are causally related to these factors.

In a report dated January 28, 1994, Dr. Michael Wilder, an internist, noted that appellant worked at a prison and noted the physical requirements of her position. He also stated that there was a direct relationship between stress and airway tightness. He concluded, "Her asthma is severe enough that any kind of subtle irritant can have a major impact on the quality of her life. Emotional stress which tended to occur with her job at the prison was an aggravating feature to her asthma. And further, she was physically unable to confidently and reproducibly manage the physical demand of the work at the prison."

Although this report offers an opinion that there is a causal relationship between stress and appellant's asthma, Dr. Wilder did not indicate that he was aware of the accepted factors of employment to which appellant attributed her condition nor did he offer medical rationale in support of his opinion. Therefore, this report is not sufficient to meet appellant's burden of proof.

Appellant also submitted medical records detailing her treatment for asthma. As these record do not address the causal relationship between appellant's asthma and her federal employment they are insufficient to meet appellant's burden of proof.

In support of her claim for an emotional condition, appellant submitted notes from a licensed clinical social worker. As a social worker is not a physician for the purposes of the Act,

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<sup>2</sup> *Richard J. Dube*, 42 ECAB 916, 920 (1991).

<sup>3</sup> See *Patricia A. English*, 49 ECAB \_\_\_\_ (Docket No. 96-226, issued May 26, 1998); *Norman A. Harris*, 42 ECAB 923 (1991).

<sup>4</sup> *Brenda Getz*, 39 ECAB 245, 252 (1987); *Cutler*, *supra* note 1; *Paul Kuyoth*, 27 ECAB 253, 255 (1976).

these notes do not constitute medical evidence and are not sufficient to meet appellant's burden of proof.<sup>5</sup>

Dr. Don E. Miller, a clinical psychologist, completed a report on March 25, 1994 and diagnosed major depression, recurrent, with psychotic features, and post traumatic stress disorder. He provided an extensive history noting appellant's statements regarding the investigation by the employing establishment in concert with the F.B.I. He listed appellant's psychosocial stressors as "fourteen months of horrible trauma, threat of imprisonment, long sessions of threat and interrogation."

This report is supportive of appellant's claim, but does not attribute appellant's emotional condition to the accepted employment factors discussed herein. Nor does it give medical rationale explaining how and why these factors resulted in her diagnosed conditions.

In a subsequent report dated January 22, 1995, Dr. Miller noted that appellant was assigned to home duty. He stated that appellant had a very strong negative psychological reaction to the home-duty assignment. Dr. Miller stated that if not for the home-duty assignment, appellant would not have had such an intense and disabling reaction to the investigation. He stated that the assigned duty to do nothing and do it all by herself caused much of appellant's psychological and physical disability. He also noted that in November 1993 the employing establishment called appellant for "one last effort to intimidate her into a confession."

These reports are not sufficient to establish appellant's claim as Dr. Miller failed to provide the necessary medical rationale to explain how or why appellant's emotional condition resulted from the accepted employment factors of her specially assigned duty at home and the employing establishment's investigation, but they do contain uncontroverted evidence of a causal relationship between appellant's diagnosed condition and the accepted employment factors. As such Dr. Miller's reports are sufficient to require the Office to undertake further development of appellant's claim.<sup>6</sup>

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<sup>5</sup> *Arnold A. Alley*, 44 ECAB 912 (1993).

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989).

The decisions of the Office of Workers' Compensation Programs dated March 31 and January 3, 1995 and July 20, 1994 are hereby set aside and remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.  
August 19, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member