

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHAWN I. BUNNEY, claiming as administrator of the estate of  
ROBERT E. BUNNEY and DEPARTMENT OF COMMERCE, NATIONAL  
OCEANIC & ATMOSPHERIC ADMINISTRATION, Anchorage, AK

*Docket No. 99-1910; Submitted on the Record;  
Issued January 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether the employee sustained an emotional condition in the performance of duty.

The case has been on appeal previously.<sup>1</sup> In the prior appeal, the employee claimed that his emotional condition was due to tension with a supervisor who was located in Washington, D.C., incessant overtime work in 1986 and 1987 and stress in meeting deadlines and supervising employees. The employee died on December 18, 1993.

In a June 10, 1994 decision, the Office of Workers' Compensation Programs denied the employee's claim on the grounds that Dr. Susan Fazekas, who had treated the employee, had not responded to inquires by the Office on whether she was a clinical psychologist and, therefore, qualified as a physician under the Federal Employees' Compensation Act.<sup>2</sup> The employee's representative submitted additional medical evidence and requested reconsideration.

In an August 15, 1995 decision, the Office denied the request for reconsideration on the grounds that the medical reports submitted had diminished probative value and, therefore, was insufficient to require further review of the case. In a February 18, 1998 decision, the Board found that the Office had used an improper standard in denying the request for reconsideration on the merits. The Board, therefore, set aside the Office's August 15, 1995 decision and remanded the case for a merit review.

In a May 18, 1998 merit decision, the Office denied appellant's claim but modified its June 10, 1994 decision to reflect that the employee had not established that the factors which he identified as causing his emotional condition occurred within the performance of duty.

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<sup>1</sup> Docket No. 96-448 (issued February 18, 1998).

<sup>2</sup> 5 U.S.C. § 8101(2).

The Board finds that the case is not in posture for decision.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are distinctions as to the type of situation giving rise to an emotional condition, which will be covered under the Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.

Disabling conditions resulting from an employee's feeling of job insecurity or the desire for a different job do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.<sup>3</sup> When the evidence demonstrates feelings of job insecurity and nothing more, coverage will not be afforded.<sup>4</sup> In these cases, the feelings are considered to be self-generated by the employee as they arise in situations not related to his assigned duties. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse cannot be considered self-generated by the employee but caused by the employing establishment.<sup>5</sup>

The employee managed a research program to assess the environmental effects of oil and gas development and the Alaska continental shelf. He indicated in a statement, that, in September 1986, he had a new supervisor, Dr. Andrew Robertson. Tensions between Dr. Robertson and the employee quickly increased to the point where they talked on the telephone daily. He took away funds that had been allocated to him by the previous supervisor. He would not support his ideas or efforts to develop new programs and keep the present one open. Dr. Robertson leaked information about his proposals in an effort to sabotage the agency's mission and undermine him. His evaluation of the employee's performance showed a decline.

The employee stated that Dr. Robertson assigned some of his staff to make sure that the employee completed his proposals on time. The actions of the employee's supervisor in reallocating funds and monitoring the employee's work were administrative actions that were not part of the employee's assigned duties but were part of Dr. Robertson's duties. Absent a showing of error or abuse, his actions cannot be considered compensable factors of employment. The employee believed that Dr. Robertson was undermining his authority and attempting to force him to resign. Such actions if proven might constitute abuse, but the employee did not present any evidence in support of his allegations or perceptions.

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<sup>3</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Artice Dotson*, 41 ECAB 754 (1990); *Allen C. Godfrey*, 37 ECAB 334 (1986); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984); *Dario G. Gonzalez*, 33 ECAB 119 (1982); *Raymond S. Cordova*, 32 ECAB 1005 (1981); *John Robert Wilson*, 30 ECAB 384 (1979).

<sup>5</sup> *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

The employee indicated that he was under stress when he was investigated for the way in which he approved some contracts and for his travel expenses, which eventually resulted in the suspension of his travel privileges. The investigation of an employee is not part of his assigned duties and, therefore, is not a compensable factor of employment.<sup>6</sup> The employee indicated that he was instructed to cooperate with the investigations and, therefore, considered his actions in providing information to the investigators to be part of his duties. However, since his actions in cooperating with investigators arose out of an investigation of his activities, his cooperation cannot be considered in this situation to be a compensable factor of employment.

The employee indicated that he felt stress because information from anonymous sources accusing him of misconduct led to the investigations. He stated that he suspected that one or a group of his employees were drafting letters or making telephone calls with allegations of fraud and abuse in an effort to harass him. The employee indicated that none of the allegations resulted in any negative personnel actions or formal accusations of wrongdoing. He commented that from 1986 until his resignation in December 1987 his anxiety and fear of managing his employees grew. The employee stated that he was bothered to know that, by doing his job in being fair in performance evaluations, salary increases and promotions, he was promulgating a never-ending problem of harassment for himself. The actions that an employee characterizes as harassment may constitute factors of employment giving rise to coverage under the Act. However, there must be some evidence that such acts of harassment did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. A claimant must establish a factual basis for allegations that the claimed emotional condition was caused by factors of employment.<sup>7</sup> The employee did not submit any evidence to establish a factual basis for his belief that he was being harassed by his employees but only presented his suspicions and speculations. He, therefore, did not establish that the alleged harassment actually occurred.

The employee indicated that in 1986 as the problems grew with shrinking budgets, pressure from his supervisor, ongoing investigations and difficulty in managing employees, he began working more hours. He stated that he was working to keep the office mission on track, solve problems with the programs of the employing establishment and meeting the objectives set forth in his merit plan. The employee noted that he often worked until 7:00 or 8:00 p.m., went home and then worked until 11:00 p.m. or midnight. He commented that on weekends he would work several hours each day. As he worked at such a pace, he found himself becoming more fatigued and disoriented. The employee commented that he could not take a break from such a pace because he feared the employing establishment he managed would fall apart. He stated that when he resigned, he was working or worrying about work almost every waking moment. Yet he also noticed that his productivity per hour had decreased.

The employee also indicated that he had stress due to the requirement to meet deadlines in his job. He commented that his supervisor also set up additional deadlines on a day to day basis. The employee noted that the deadlines were not a problem in and of themselves but, as he became absorbed in keeping up with his other responsibilities, it became more difficult to meet deadlines. He stated that it was the pressure of not having enough time to meet all deadlines that

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<sup>6</sup> *Manuel W. Vetti*, 33 ECAB 759 (1982).

<sup>7</sup> *Joan Juanita Greene*, 41 ECAB 760 (1990).

bothered him. The employee commented that he did not have enough time every deadline and still perform his other functions.

The employee's actions in working extra hours and in meeting deadlines were compensable factors of his employment. These actions arose directly out of the employee's assigned duties.<sup>8</sup> The Office found that the overtime taken by the employee was voluntary and not required by the employing establishment and, therefore, was not a compensable factor of employment because the work taken was self-imposed. The focus, however, is not on the reasons why the employee worked extra hours but on whether he worked extra hours to perform his assigned duties. As the employee was the manager of the employing establishment, it was within his discretion to determine whether he needed to work long hours to perform his assigned duties.

In a May 28, 1995 report, Dr. Hyman Silver, a psychologist, cited several factors as the cause of the employee's emotional condition, including supervisory pressure, incessant overtime and demanding deadlines, problems as a manager, difficulty with investigations and altered relationships with colleagues. Dr. Silver diagnosed major depression and an anxiety disorder due to clinically significant stress at work. He also made a provisional diagnosis of post-traumatic stress disorder. Dr. Silver stated that any one of the stresses cited by the employee would have been sufficient to cause his emotional condition. He indicated that, taken all together, these factors, in interaction, made a compelling case for causality.

Dr. Silver stated that the employee experienced a demoralizing level of scrutiny and relentless criticism from Dr. Robertson. He noted that the withdrawal of funds and the requirement to cooperate with investigators contributed to the stress. Dr. Silver commented that there was no allowance or alteration in duty load to accommodate the employee's intrusive and time-consuming duties in working with investigators. He stated that the employee's increasing time at work was an effort to deal with the increasing stress but created further injury in reducing the employee's time for sleep, recreation and relaxation. Dr. Silver concluded that, after the employee's resignation, he was totally disabled for any work up to the time he died. He, therefore, related the employee's emotional condition in part to the long hours of work he performed and the deadlines he had to meet.

This report, while insufficient to sustain the employee's burden of proof, is sufficient to require further development of the medical evidence. On remand the Office should prepare a statement setting forth what factors of employment exist in this case and specifying which factors are considered to be compensable and which factors are not considered to have occurred in the performance of duty. The Office should then refer the statement and the case record to an appropriate physician and request his opinion on whether the employee's emotional condition and disability after his resignation was causally related to compensable factors of his employment. After further development as it may find necessary, the Office should issue a *de novo* decision.

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<sup>8</sup> *Ezra D. Long*, 46 ECAB 791 (1995).

The decision of the Office of Workers' Compensation Programs dated May 18, 1998 is hereby set aside and the case is remanded for further action as set forth in this decision.

Dated, Washington, DC  
January 2, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member