United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 07-727**
	)	**Issued: July 19, 2007**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AIR ROUTE TRAFFIC CONTROL CENTER, Miami, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 17, 2007 appellant filed a timely appeal of a January 19, 2006 decision by the Office of Workers' Compensation Programs denying his claim of an emotional condition and a November 3, 2006 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this claim.

ISSUES

The issues are: (1) whether appellant sustained an emotional condition as a result of a March 3, 2005 employment incident; and (2) whether the Office properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 3, 2005 appellant, then a 44-year-old air traffic control specialist, filed a traumatic injury claim alleging that on that date two aircrafts lost separation and that this caused

an "operational error" to occur while he was in the performance of his federal duties. He became distracted from his primary duties by looking away from the radar scope while organizing flight progress strips. Appellant stated that he felt uneasy that he did not notice one aircraft was descending right through another aircraft in the north part of his sector. He stated: "The possibility of these aircraft colliding and causing a loss of life caused me to have concern for all those passengers, the crews and their families."

By letter dated March 18, 2005, the Office requested that appellant submit additional evidence in support of his claim. In response, appellant submitted an attending physician's report dated March 10, 2005 with an illegible signature. It indicated that he suffered from an acute distress disorder as a result of working in air traffic when a near miss occurred. He also submitted a witness statement from Jorge Rivera, a coworker, who advised that on March 3, 2003 he was paged and informed of the incident. Mr. Rivera noted that appellant stated: "I can't believe I didn't see that." He was later asked to accompany appellant to review the tapes of the incident and that appellant seemed openly distressed about the situation.

In an undated letter received by the Office on April 18, 2005, the employing establishment contended that the incident was an example of something experienced by controllers in the normal course of their duties. The representative for the employing establishment stated that, although a loss of standard separation occurred, the aircraft were never in jeopardy of colliding.

By decision dated April 27, 2005, the Office denied appellant's claim finding that he failed to establish that an event occurred, as alleged. The Office noted that, as the two aircrafts did not collide, no incident occurred. The Office also noted that appellant had not submitted rationalized medical evidence relating the diagnosed condition to the alleged employment incident.

In a report dated May 6, 2004, Joseph L. Romance, a licensed social worker, indicated that appellant suffered from post-traumatic stress disorder which he opined was "clearly work related." He stated: "The panic [and] shock that two planes full of passengers nearly colliding with his watch traumatized him and produced his [post-traumatic stress disorder] symptoms."

By letter dated May 18, 2005, appellant requested an oral hearing. At the hearing held on November 16, 2005 he testified as to the circumstances of the near miss and indicated that in 25 years as an air traffic controller this was his first near mid-air collision. The hearing representative informed appellant that medical evidence was necessary to support his claim and that a licensed social worker is not a physician under the Federal Employees' Compensation Act. The hearing representative provided appellant with an opportunity to submit medical evidence.

On November 17, 2005 Mr. Romance sent a copy of his *curriculum vitae* to the Office. In an accompanying letter, he noted that he had a doctorate in clinical social work and that his training was identical to that of clinical psychologists with the exception of psychological testing. Mr. Romance contended that 80 percent of the mental health services provided to individuals in this country are provided by clinical social workers.

In a decision dated January 19, 2006, the hearing representative found that appellant had established a compensable factor of employment but that he had not provided sufficient medical evidence to establish that he developed an emotional condition as a result of the accepted work incident. Accordingly, the hearing representative affirmed the Office's decision as modified to reflect that appellant had established a compensable factor of employment.

By letter dated October 18, 2006, appellant requested reconsideration. He contended that the Office improperly discounted his doctor's opinion and that, in other claims, the Office accepted his opinion. In a decision dated November 3, 2006, the Office denied appellant's request without merit review. The Office noted that it could not consider the adjudicatory process involved in deciding other claims as a basis for a merit review of his claim. The Office noted that appellant had not submitted any new and relevant evidence nor raised substantive legal questions and accordingly, merit review was denied.

LEGAL PRECEDENT -- ISSUE 1

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment; liability does not attach merely upon the existence of an employee-employer relationship.[1] Instead, Congress provided for the payment of compensation for disability or death of employees resulting from personal injury sustained while in the performance of duty.[2]

The Board has interpreted the phrase while in the performance of duty to be the equivalent of the commonly found requisite in workers' compensation law of arising out of and in the course of employment. In the course of employment deals with the work setting, the locale and time of injury whereas arising out of the course of employment encompasses not only the work setting but also a causal concept, the requirement being that an employment factor caused the injury. In addressing this issue, the Board has stated that in the compensation field, to occur in the course of employment, in general an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[3]

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

[1] *Vitaliy Y. Matviiv*, 57 ECAB ___ (Docket No. 05-1328, issued October 26, 2005).

[2] *Id.*

[3] *Id.*

related to his emotional condition.[4] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor.[5] The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factor identified with the claimant.[6]

ANALYSIS -- ISSUE 1

The evidence supports the occurrence of the March 3, 2005 employment incident. Appellant was in the performance of duty as an air traffic controller on duty during a near miss of two aircraft. In *Lillian Cutler*,[7] the Board explained that, where an employee experiences emotional stress in carrying out employment duties and the medical evidence established that the disability resulted from his or her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and would, therefore, come within coverage of the Act.

In this case, however, the Board finds that the record is devoid of any rationalized medical evidence in support of appellant's claim. Appellant did submit a report by a licensed social worker, however, this report is not considered medical evidence. Section 8101(2) of the Act provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Only medical evidence from a physician as defined by the Act will be accorded probative value. Health care providers such as social workers, nurses, acupuncturists, physician's assistants and physical therapists are not physicians as defined under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[8] Consequently, as appellant did not submit rationalized medical evidence in support of his claim, he did not meet his burden of proof to establish an injury as alleged.[9]

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee who refuses an adverse decision. The employee may obtain this

[4] *Marlon Vera*, 54 ECAB 834 (2003).

[5] *Conrad Hightower*, 54 ECAB 796 (2003).

[6] *Jasmel A. White*, 54 ECAB 224 (2002).

[7] 28 ECAB 125 (1976).

[8] *See Jan A. White*, 34 ECAB 515, 518 (1983).

[9] With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). The Board notes that this decision does not preclude appellant from filing a reconsideration request with the Office and submitting additional evidence in support of his request.

relief through a request to the district Office. The request, along with the support statements and evidence, is called the application for reconsideration.[10]

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulation provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[11]

A timely request for reconsideration may be granted if the Office determines that the employee has represented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.[12]

ANALYSIS -- ISSUE 2

In the instant case, appellant did not meet any of the criteria for requiring the Office to reopen his case for merit review. He did not argue that the Office erroneously applied or interpreted a specific point of law, nor did he raise legal arguments not previously considered. Furthermore, appellant did not submit any relevant and pertinent new evidence. He contended that the Office improperly refused to credit his doctor's report, noting that this doctor had been used in other workers' compensation cases. However, this is not grounds for reopening a case for merit review, as it has not reasonable color of validity.[13]

The Board finds that the Office properly determined that appellant was not entitled to a review on the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition as a result of the March 3, 2005 employment incident. The Board further finds that the Office properly denied appellant's request for reconsideration.

[10] 20 C.F.R. § 10.605.

[11] 20 C.F.R. § 10.606.

[12] 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen),* 55 ECAB 390 (2004).

[13] *See Arlesa Gibbs,* 53 ECAB 204 (2001); *Norman W. Hanson,* 40 ECAB 1160 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 3 and January 19, 2006 are affirmed.

Issued: July 19, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board