

**United States Department of Labor
Employees' Compensation Appeals Board**

L.G., Appellant

and

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Miami, FL, Employer

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**Docket No. 09-276
Issued: August 11, 2009**

Appearances:

*Edward L. Daniel, for the appellant
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 November 7, 2008 appellant, through his representative, filed a timely appeal from a November 19, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of appellant's emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On April 16, 2007 appellant, then a 61-year-old air traffic control specialist, filed a traumatic injury claim alleging that his anxiety was due to three separate incidents of air craft coming in close proximity to each other on April 12, 2007. He stopped working April 16, 2007 and has not returned.

On April 25, 2007 the Office conducted a telephone conference with Mark Palazzo, support manager for safety, and Lisa Griffith, personnel manager at the employing establishment. Mr. Palazzo provided information on the difference between a near mid-air collision and operational error. He noted that the facility at which appellant worked handled aircraft at a cruising altitude of approximately 60,000 feet between airports. Mr. Palazzo noted that there were two occurrences on April 12, 2007 not three as alleged by appellant and that appellant had not been “assigned to an operational position at that time.” He noted a proximity event occurred at about 11:20 a.m. and a Category C operational error occurred at 11:40 a.m. Although Mr. Palazzo was not involved in the operational error alleged by appellant, it involved employees other than appellant. He stated that there was no danger of airplanes colliding in the operational incident.¹ Neither Ms. Griffith nor Mr. Palazzo knew whether appellant had been in the air traffic control room at the time of the incident but, at the time of the incident, he had not been assigned to work in the control room. Appellant’s duty hours that day in the operational position were 7:02 a.m. to 2:46 p.m. and from 11:49 a.m. to 12:35 p.m. and 12:57 p.m. to 1:56 p.m. He was decertified from all radar positions on April 5, 2007 due to multiple performance deficiencies.

In a letter dated April 25, 2007, the Office advised appellant that he needed to submit additional information in support of his claim. Appellant was provided a copy of the telephone conference with the employing establishment. The Office asked him to provide information within 30 days to substantiate that he was working in the control room at the time of the incidents he alleged.

In a May 1, 2007 report, William Beecham, Ph.D., a clinical psychologist, diagnosed acute anxiety disorder. Appellant related witnessing three incidents on April 12, 2007 involving aircraft he was responsible for pass in close proximity and below separation, such that a mid-air collision seemed possible. He informed Dr. Beecham that the aircraft did not collide and they all continued on their way without harm.

In a letter dated May 1, 2007, appellant submitted medical and factual evidence, including witness statements and a May 1, 2007 attending physician’s report (Form CA-20) from Dr. Beecham. He related that at the time of the 11:10 a.m. incident he was standing behind Jorge C. Rivera, a coworker, when he saw that Mr. Rivera “had descended an aircraft to the altitude of another aircraft.” Appellant tried to get Mr. Rivera’s attention by tapping him on the shoulder, but Mr. Rivera had “noticed it at the same moment and tried unsuccessfully to separate the aircraft. An alarm went off and he stated that at this point he “felt an adrenaline rush, a knot in the pit of his stomach, and nausea.” Subsequently appellant was assigned with Chuck Reininger, the radar controller for sector R24 and had a clear view of sector R25 from his position in sector R24. At approximately 11:40 a.m., he related hearing Larry say that two aircraft were head on and saw the actions Larry took to prevent any collision. After seeing there was no collision, appellant felt nausea, a knot in the pit of his stomach and an adrenaline rush. He stated that “[A]ll the sector R25 controllers were relieved of their positions to write written statements about the incident.” Appellant was directed to assist Pam Lessor in D5 and, at this point, he noticed that a Coast Guard aircraft was descending towards another aircraft at 6,000

¹ This error involved two aircraft which had proximity of 700 feet vertically and 3.04 miles laterally.

feet. He told a Coast Guard controller to immediately move the military aircraft to 7,000 feet. Appellant again felt nauseous, a knot in the pit of his stomach and an adrenaline rush. He finished his shift, went home and worked his Sunday shift. Appellant woke up in the middle of the night on Friday, Saturday and Sunday with the symptoms he had experienced earlier in the day on April 12, 2007. On Monday morning he filed his traumatic injury claim.

In an April 30, 2007 statement, William P. Knost, a coworker, stated that at approximately 11:20 a.m. on April 12, 2007 he had been working in D07 when Mr. Rivera was involved with a proximity incident due to aircraft losing separation. He related seeing appellant standing behind Mr. Rivera in the control room during the proximity incident and working in the D sides later.

In a May 1, 2007 statement, Mr. Rivera noted that during a busy period on April 12, 2007 he was working R07 and recalled that appellant had been standing in the control room behind D07. At about 11:10 a.m., he frantically separated an aircraft that had descended to the altitude of another aircraft and appellant witnessed this event. At approximately 11:40 a.m., Mr. Rivera stated that the alarm went off because of an R25 sector loss of separation. He stated that appellant “had a clear view of the near tragedy that had just occurred at the sector right smack next to them.”

In a May 1, 2007 statement, Kurt Aberhorn, controller-in-charge, noted that between 11:45 a.m. and 11:50 a.m. on April 12, 2007 appellant was present in the control room after he went to investigate a loss of separation. He had been instructed to assign appellant to the D-side duties of the control room by Ivonne Toledo of the watch desk. Appellant was at the D24 position when a loss of separation occurred at R25. He had a clear view of this near tragedy. Mr. Aberhorn stated that appellant was relieved of his duties to write up statements regarding the two separation incidents which had recently occurred.

In a May 1, 2007 CA-20 form, Dr. Beecham diagnosed acute stress disorder and checked “yes” to the question of whether it was employment related. He indicated that appellant was totally disabled beginning April 12, 2007.

In a May 29, 2007 memorandum, Mr. Palazzo noted that Mr. Rivera had been assigned to the operational error in R7 which occurred at 11:10 a.m. on April 12, 2007. He stated that it was physically impossible to have a clear view of the R25 radar scope from a D24 radar associate position as this position was located approximately six feet from the R25 position. The R25 controller was responsible for the less than standard separation incident and that an investigation revealed that the R25 controller took actions to maintain standard separation. Mr. Palazzo disagreed with Mr. Aberhorn in characterizing the R25 incident as a near tragedy since the aircraft involved were never closer than 3.04 miles.

In a statement dated May 30, 2007, Angela LaVangie, operations supervisor, indicated that she was appellant’s supervisor and that he had been decertified from performing all radar positions on April 5, 2007.

On June 8, 2007 appellant submitted an undated witness statement by Charles Reininger who stated that appellant observed an operational error at sector 24 on April 12, 2007. He

advised that sectors 24 and 25 were adjacent to each other. At the time of the operational error, appellant had been his assistant controller and witnessed the event.

By decision dated June 12, 2007, the Office denied appellant's claim, finding that he failed to establish any compensable factors of employment and thus fact of injury was not established. Specifically, it found that appellant was not the air traffic controller responsible for handling the claimed incidents.

In a letter dated June 20, 2007, appellant requested reconsideration. He contended that he worked at radar positions on April 12, 2007, supported by the submitted witness statements. Appellant noted that he was part of an en route team and that as a radar associate at D24 he was responsible for the safety of aircraft in his sector.

In a June 21, 2007 attending physician's report (Form CA-20), Dr. Daniel R. Collins, a treating psychiatrist, diagnosed post-traumatic stress disorder. He noted that on April 12, 2007 appellant was on radar duty when he "witnessed three hair-raising events within a 45-minute time frame." Dr. Collins checked "yes" to the question of whether appellant's condition was employment related. He found that appellant was totally disabled beginning April 12, 2007. On June 19, 2007 Dr. Collins reiterated that appellant was totally disabled.

By decision dated November 19, 2007, an Office hearing representative affirmed the June 12, 2007 decision.

LEGAL PRECEDENT

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee has an emotional condition and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.² Workers' compensation law is not applicable to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. 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 Federal Employees' Compensation Act.³

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

² See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

(3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.⁴

ANALYSIS

Appellant alleged that he developed an anxiety condition on April 12, 2007 as the result of witnessing three incidents of aircraft coming into close proximity with one another. The question to be resolved is whether appellant has established that the incidents arose in the course of employment.

With respect to the first two incidents involving a proximity event in sector R07 which occurred at 11:20 a.m. and an operational error in sector R25 which occurred at 11:40 a.m., the employing establishment stated that appellant did not have any operational responsibilities for the aircraft involved. The evidence submitted by appellant establishes he was present in the control room at the time the incidents occurred, but did not have any operational responsibility for the aircraft involved. The record does not establish that he was the responsible air traffic controller involved in the 11:20 a.m. proximity event in sector R07 or the 11:40 a.m. operational error in sector R25. Therefore, these incidents did not arise out of the course of his assigned duties. Appellant's reaction is not in the performance of duty.

Appellant also alleged that he became anxious as a result of a third incident involving a Coast Guard aircraft. The incident occurred when he was assigned to assist Ms. Lessor in D-5. Appellant noticed that a Coast Guard aircraft was descending towards another aircraft at 6,000 feet. He instructed a Coast Guard controller to immediately move the military aircraft to 7,000 feet. Following this incident, appellant experienced nausea, a knot in his stomach and an adrenaline rush. The record contains no evidence from the employing establishment disputing appellant's account regarding this incident. The evidence establishes that appellant was acting as the responsible controller in D-5, at a place he was expected to be. This incident is found a compensable factor of employment under *Cutler*.

The Office found that appellant did not establish any compensable factors of employment. Therefore, it did not review the medical evidence regarding the claimed emotional condition. Since appellant has established a compensable factor of employment with respect to the incident involving the Coast Guard aircraft, the case will be remanded to the Office for review of the medical evidence and issuance of an appropriate decision.

CONCLUSION

The Board finds that appellant has established a compensable factor of employment with respect to the incident involving the Coast Guard aircraft.

⁴ *R.M.*, 60 ECAB ___ (Docket No. 07-1066, issued February 6, 2009); *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2007 decision of the Office of Workers' Compensation Programs be affirmed, in part, set aside, in part and the case remanded for further proceedings consistent with this decision.

Issued: August 11, 2009
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