U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW J. BUNGO and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Kansas City, MO

Docket No. 01-2116 Submitted on the Record;
Issued August 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

On October 27, 2000 appellant, then a 42-year-old air traffic controller, filed a claim for compensation alleging that he sustained an emotional condition due to factors of his federal employment.

In support of his claim, appellant submitted diagnostic tests, medical reports and statements.

In a May 14, 2000 report, Dr. Shaheed G. Kalloo,[1] Board-certified in internal medicine, noted appellant's history of present illness as that of a "very stressful lifestyle." He indicated that appellant recently started to drink alcohol secondary to increased stress in his life.

In a May 29, 2000 inpatient hospitalization report, Dr. Bhadreah Parikh, a psychiatrist, diagnosed major depressive disorder, single episode severe, alcohol dependency, marital separation.

In a November 3, 2000 memorandum, the employing establishment controverted the claim.

In a November 22, 2000, report, Lisa Friedman, a licensed psychotherapist, indicated that appellant was referred to her upon recovery from alcohol dependency, major depression and increasing coping skills. She stated that the underlying issues were extreme stress reactions as a result of his job duties as an air traffic controller including the duties of: investigating major and minor crashes, listening to tapes of people wounded and or dying as a result of crashes,

[1] The physical was performed by Dr. Martin Stone, Board-certified in internal medicine.

supervising other controllers that were careless and or not qualified to supervise human lives and investigating other controllers possibly responsible for accidents. Ms. Friedman indicated that appellant had major depressive disorder, recurrent and alcohol dependence along with occupational problems and primary support problems. She recommended that appellant not return to his job, due to the stressful nature and the traumatic events he investigated.

In a November 28, 2000 report, Dr. Gary Fishman, an osteopath, indicated that appellant's cause of illness was negatively impacted by stresses related to his working conditions. He stated that appellant continued to be placed in situations involving life and death and the cumulative effects of repeated exposure to such situations was a significant factor in both his initial bout with alcoholism and his recent relapse. Dr. Fishman stated that appellant responded to a mood stabilizer which might indicate an underlying Bipolar II problem. He opined that it was well documented that Bipolar disorder could be aggravated by severe stresses as well as contribute to an increased incidence of drug and alcohol use.

In an undated statement received by the Office on December 26, 2000, appellant indicated that his last exposure to conditions of his employment was on October 21, 2000. He advised that he was employed by the employing establishment since June 18, 1982. In a 12 page statement, appellant described in detail the conditions that he believed were responsible for his illness: his basic air traffic control duties; including the safety and separation of aircraft; on-the-job training; handling and witnessing emergency situations; investigating emergencies, errors, near collisions and aviation disasters; covering up wrongful acts; asking for assistance due to being overwhelmed with duties and being ignored; alleged violations of the employing establishment's drug testing policy; failure to follow the employing establishment's directives; lack of support when identifying controller deficiencies and lack of adequate staffing during busy periods.

In a December 10, 2000 memorandum, Dr. Walter D. Davis, a Board-certified family practitioner[2] and the deputy regional flight surgeon, noted appellant's history of injury and treatment. He was unable to conclude with scientific certainty that appellant's medical condition was the direct result of his employing establishment's occupation. Dr. Davis further stated that he was unable to conclude that appellant's condition was aggravated and made worse by his employing establishment's occupation.

In a February 5, 2001 statement, appellant reiterated the stressful conditions of his job as an air traffic controller were responsible for his symptoms. He discussed a January 19, 1985 aircrash which resulted in the fatalities of both pilots on board. Appellant stated that it "was also the first time in my life I actually witnessed a 'death' situation." He described training an employee whom he felt should not be allowed to continue as he was irresponsible and dangerous. He alleged that his alcohol dependence was due to the stressful nature of his job. He stated that the most critical stress causing factor remained the fact that the air traffic controllers were required to "push everything to the limit" and that he was always in the busiest systems because he always performed well. Appellant stated that after four years of working he was worn down and admitted himself into a rehabilitation program. Appellant indicated that he

[2] Also Board-certified in preventive medicine.

returned to work in an administrative role until he was cleared by the employing establishment's flight surgeon in August 1990. He returned in a different position that did not require him to work the previously required shift work. Appellant stated that another factor causing him stress was the new responsibility of dealing with conduct issues. He described witnessing another fatal accident while working in the tower where a pilot and his wife were killed in the crash. Appellant noted that when he left the Fort Lauderdale Executive Tower (FXE) in 1997, he was replaced by Bonnie Schultz. Appellant also described his reaction after being required to put his life on the line while walking through a building looking for a bomb, indicating that it was a frightening experience. He stated that in October 1996, a controller, James Keane was involved in an incident that involved a near miss and pilot error and Mr. Keane refused to correct the mistake. Appellant stated that the "nonchalant attitude of Mr. Keane was unacceptable." He stated that he was instructed to cover up a safety-related performance issue, disregard a crime (firearms in an FAA building) and ignore government fraud by allowing controllers to be paid for work when they were not there. Appellant described his position as a quality assurance specialist, which entailed many deadlines and stated he was given no assistance despite numerous pleas to management. On August 7, 1997 a crash occurred of a DC-8 cargo jet and the crewmembers and one person on the ground were killed. Appellant stated that his investigation included listening to the pilot/controller tapes, over and over and over, to find any detail, cause or clue that may have caused this accident. He described other crashes, alleged cover-ups and a drug scandal.

In a February 14, 2001 memorandum, the employing establishment again controverted appellant's claim. Additionally, the employing establishment supplied a detailed response from the operations manager of Miami airport, Bobby Price.

In a February 9, 2001 statement, Mr. Price indicated that he first met appellant in August 1986, when he was promoted to the Palm Beach Tower as an air traffic control specialist. He noted that appellant was certified rather quickly and shortly thereafter, was requested to train others and that this was normal for most controllers. Mr. Price addressed appellant's statement that he was chosen to train those who were having trouble with other instructors, citing Mike Fountain and Harold Turner in particular. He explained that Mr. Fountain resigned when he realized his employment would be terminated as a training failure and supervisor Don Houlihan, terminated Mr. Turner's training. Mr. Price indicated that training was part of the performance expectations of an air traffic controller. He further stated that appellant "never" made a request not to provide training. Mr. Price stated that appellant bid on a quality assurance training specialist position and was selected because his performance was excellent. Mr. Price stated that appellant never mentioned that he was experiencing stress during the performance of his duties. Appellant's job was to listen to voice recordings, copy tapes, evaluate performance and assist in the investigation of accidents and incidents. With the loss of one person from his department and an injury to the other, there was a very heavy workload demand on appellant.

Mr. Price stated that appellant informed him shortly after his arrival to Miami that his goal was to become a first level supervisor at the Miami Tower. He encouraged appellant to go to the radar room and become certified. Mr. Price stated that after the other person in his department was injured, he did not pressure appellant to attain certification. Shortly thereafter, three facilities (Pompano Beach, North Perry and Key West Towers) were contracted to private

industry and reduced the workload on appellant. He stated that appellant continued to perform his duties with excellence and maintained his professionalism.

Mr. Price addressed appellant's allegations of incidents where he believed aviation safely was jeopardized and not reported. He explained that in most cases, it was clear-cut when separation standards were violated, however; some cases required an in-depth investigation and were sometimes decided by seconds or tenths of a mile and others are inconclusive. Mr. Price also explained that the initial reporting responsibility was charged to the controller and or supervisor in charge. He explained that the supervisor was responsible for the initial investigation without the benefit of radar tracking data. Those that were inconclusive or borderline required a more in-depth investigation and a final decision was management's responsibility and the regional level was also involved in the decision. He, explained that you could not be fired for reporting an operational error, yet you could be for covering one up. Mr. Price stated, "I can [not] imagine others taking this chance, especially to the degree that [appellant] alleges." He referred to the case of Rick Denton and stated that most of the people who reviewed the incident agreed that Mr. Denton could have done a much better job of separating all aircraft after the event was initiated by the errant pilot. Mr. Price explained that Mr. Denton was counseled by his supervisor concerning his performance and not charged with an operational error. Mr. Price addressed appellant's statements concerning listening to tapes involving crashes and last transmissions from pilots, but never heard him mention these incidents as disturbing him and indicated that they talked on a daily basis.

Mr. Price indicated that he was appellant's first level supervisor. He stated that during the first six months following appellant's selection as a supervisor he was very happy in his position. However, he separated from his wife and children. As far as air traffic density and limited overtime allocations, every supervisor at the Miami Tower was faced with the same challenge. In April 2000, appellant went out on sick leave and it was his understanding that appellant was suffering severe stress and depression relating to his pending divorce. In August 2000, appellant returned to duty without a medical clearance. He could not perform his supervisory duties and was assigned the duty of teaching a course (Controller-in-Charge). Mr. Price stated that this did not require appellant to have any direct involvement with air traffic control. He stated that one Wednesday in October 2000, appellant did not show up for work to teach his class and he had not contacted anyone. Mr. Price stated that this was the first time in 15 years that appellant failed to perform his assigned duties. He stated that the employing establishment did not concur with appellant's allegations. Mr. Price noted that appellant experienced significant changes and difficulties in his private life, including separation from his wife and kids and the financial hardships of a divorce.

In a February 13, 2001 letter, appellant provided additional information. He stated that in 1998, Mr. Gary suddenly died of a heart attack and that Fred Bruner, a long time supervisor at Miami, committed suicide. On October 30, 1998 he was responsible for quality assurance efforts at Key West, however, the report he completed after his eva1uation was sent to all involved parties within the air traffic system, yet nothing was done. He stated that he went from reviewing accidents to witnessing cover-ups of wrong doings. Appellant added that as a supervisor, he was exposed to things of which he did not approve, then began doing the things that he was opposed to. He noted that the Southern Region and Washington Offices of Air

Traffic sent special teams down to evaluate and investigate the facility but nothing changed. He addressed the "Elian" situation and said that it encompassed an enormous amount of media attention, including news helicopters, bomb threats, additional security, all of which took place at or around the airport, yet extra staffing was not authorized. It was not until Sunday morning, when controllers and supervisors were paid an additional 25 percent of their salary for working that staffing increased. Appellant stated that as his work became more stressful, so did his home life. He indicated that during his tenure as an Miami supervisor, he was separated from his wife of 18 years and finally divorced.

In a February 22, 2001 statement, Larry Wilson, the support manager for the Miami airport and appellant's supervisor from February 1997 to February 1999 indicated that appellant worked as a quality assurance specialist during his first two years at the Miami Tower. He stated his work was consistently excellent and of the highest caliber. Mr. Wilson noted that appellant was a hard worker; well organized and focused on whatever task was before him. He also believed that appellant was a low maintenance employee, who required little supervision and who was thoroughly familiar with job function expectations. Mr. Wilson described appellant's duties which included: evaluation of air traffic services through direct observation and tape recording monitoring, investigating and processing incidents and accidents with associated written reports, responding to Freedom of Information Act inquiries, participating in facility and HUB facility evaluations and identifying opportunities for improvement in the services they provided. He confirmed that there were times when appellant's workload was heavy. However, Mr. Wilson stated that he "never" received a request for assistance which was unheeded by management. He addressed appellant's allegation regarding being held responsible for listening to every air traffic control voice recording of every accident or mid-air incident and stated that it was simply not so. Mr. Wilson explained that when another facility experienced one of these events, they would sometimes assist in the investigation. However, he noted that it was the responsibility of that facility's management team to conduct their own investigation, listen to their own tapes and produce their own reports. Mr. Wilson denied appellant's allegations that he was told not to worry about instances concerning aviation safety and instructed to cover up serious and life threatening air traffic control problems. He stated that he could not imagine, nor had he seen such a reckless act in his career. Mr. Wilson addressed the crash in August 1997 in Miami but noted that he was on detail at the Fort Lauderdale Tower at that time and did not participate in the investigation. After his return to Miami several months later, he wrote an award to appellant for his work in preparing that particular accident package. Mr. Wilson advised that several managers and staff members participated in that effort and experienced many stressful moments, noting that was a part of their service to the American people.

In an April 19, 2001 report, Dr. Erica Stovall, indicated that appellant was seen in her office on March 13, 2001 for an initial psychiatric evaluation. She reported that appellant was seeking treatment for several reasons including that his employer was requiring treatment for alcohol abuse and that he was seeking treatment to address his concerns with depression and work-related stress. Dr. Stovall diagnosed: major depressive disorder, recurrent alcohol dependence-early full remission; hypertension and occupational problems.

In a July 16, 2001 decision, the Office denied appellant's claim on the grounds that he had not established that he sustained an emotional condition in the performance of duty.

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 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 employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[3] 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.[4]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[5] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[6]

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 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.[7] 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.[8]

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated July 16, 2001, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

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[3] 5 U.S.C. §§ 8101-8193.

[4] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[5] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[6] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[7] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[8] *Id.*

Appellant has alleged that the following working conditions caused his emotional disability: witnessing a crash in 1985, again when a pilot and his wife were killed in a crash; and again on August 7, 1997 when a DC-8 Cargo jet crashed. He also alleged that he conducted the investigation and it was very disturbing. Additionally, appellant had to deal with employee conduct issues. He alleged that he had to place his life in danger during a bomb scare. Further, appellant indicated that shift work affected his sleep patterns. He alleged that on occasion, he would be short staffed and would have to work with a skeleton crew. The employing establishment confirmed that at times his workload was heavy and he did work with a short staff on occasion. Appellant described some of his training responsibilities, including training Mr. Denton. The employing establishment did not dispute this. As these allegations relate to the performance of his regular and specially assigned duties and are not disputed, appellant has established compensable factors of employment under *Cutler*.

The actions of appellant's supervisors with respect to other air traffic controllers' conduct, although generally related to employment, are considered administrative actions of the employer rather than duties of the employee.[9] Similarly, appellant's general allegations regarding administrative policy toward air traffic controllers, discipline of air traffic controllers and drug policies, would relate to administrative or personnel matters of the employer. An administrative or personnel matter will not be considered a compensable factor of employment unless the evidence discloses that the employing establishment erred or acted abusively.[10] In this case, appellant has not submitted sufficient evidence establishing error or abuse by the employing establishment. While appellant disagreed with the agency's actions and policies there must be probative evidence of error or abuse to establish a compensable factor. The record does not contain any findings of error by an administrative agency or other evidence establishing error or abuse. Accordingly, the Board finds that appellant has not established a compensable factor with respect to administrative policies toward air traffic controllers.

Appellant also stated that he created a story that he was dying of cancer to avoid going to work. He indicated that after 18 years, he was dissatisfied with his work experience. Appellant stated that when he would report to work after being off for two days, a knot would appear in his chest, as he was fearful that something bad might occur on his shift. He stated on every shift there was potential for disaster and that air traffic safety was jeopardized when there was a near collision and incidents known as incursions (when planes come within 100 feet of each other). The Board notes that appellant's reaction to such conditions and incidents at work must be considered self-generated in that it resulted from his frustration in not being permitted to work in a particular environment[11] or to hold a particular position.[12]

Appellant alleged that he had guilty feelings over the loss of a coworker whom he believed died due to a demanding replacement for him once he left the Fort Lauderdale Tower.

[9] *Anne L. Livermore*, 46 ECAB 425 (1995).

[10] *See Sharon R. B*owman, 45 ECAB 187 (1993).

[11] In this matter, a less stressful environment.

[12] *Tanya A. Gaines*, 44 ECAB 923, 934-35 (1993).

He also alleged that two coworkers, one whom committed suicide and one who died of a heart attack caused him to feel shock upon their deaths. Appellant also feels that he was affected about cases of other employees when they suffer heart attacks, seizures or even died. These allegations do not relate to the performance of his day-to-day activities and are not compensable.

Appellant also alleged that he began doing things as a supervisor that he did not approve of and then that he was opposed to because he was going with the flow. The Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[13]

In the present case, appellant has established compensable factors of employment with respect to the performance of his day-to day duties as an air traffic control specialist. However, appellant's burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.[14]

As appellant has implicated a compensable employment factor, the Office must base its decision on an analysis of the medical evidence. As the Office found there were no compensable employment factors, it did not analyze or develop the medical evidence. The case will be remanded to the Office for this purpose.[15] The Office should prepare a statement of accepted facts and refer appellant to an appropriate medical specialist for an opinion on whether he sustained an emotional condition in the performance of duty causally related to a compensable factor of employment. After such further development as deemed necessary, the Office should issue an appropriate decision on this matter.

[13] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[14] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[15] *See Lorraine E. Schroeder*, 44 ECAB 323, 330 (1992).

The July 16, 2001 decision of the Office is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
August 12, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member