

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

ROBERT J. BENETTI, Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION AGENCY,
Des Plaines, IL, Employer**

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**Docket No. 05-1963
Issued: July 7, 2006**

Appearances:

*Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 26, 2005 appellant, through counsel, filed a timely appeal from a March 31, 2005 decision of the Office of Workers' Compensation Programs denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this emotional condition appeal.

ISSUE

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

FACTUAL HISTORY

On September 29, 2001 appellant, a 40-year-old air traffic control specialist, filed a traumatic injury claim alleging that on September 24, 2001 he experienced vertigo, trouble focusing and pain in the left side of his head, face, neck and upper back after turning left to

communicate with a colleague. In a letter dated December 10, 2001, the Office requested that appellant submit additional medical and factual information.

In a report dated December 15, 2001, Dr. Richard Alford, a licensed clinical psychologist, diagnosed panic disorder without agoraphobia and moderate work stress.

In a January 14, 2002 decision, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that his emotional condition was caused or aggravated by the identified incident. The Office accepted that on September 24, 2001 appellant turned his neck to communicate with a coworker. However, it found that the medical evidence was insufficient to establish that appellant sustained an injury as a result of this incident.

In a January 10, 2002 letter, appellant described how his injury was sustained, noting that he had been diagnosed with trigeminal neuralgia and panic/anxiety disorder. Appellant attributed his condition to work stress. He stated:

“Prior to the attacks of September 11, [2001,] I was exhibiting symptoms that showed I was showing signs of stress related to my position as an [a]ir [t]raffic [c]ontroller. I was having trouble working the normal rotation of shifts that we are required to work. I was having great difficulty making the quick turnarounds from one shift to another. I was always fatigued. I was confrontational with my supervisors and the staff in the Traffic Management Unit. This was behaviour that was very unlike my self normally. The numbers of aircraft were increasing while our staffing was decreasing. We were constantly required to work with staffing numbers that did not meet the designated needs of the area. I was overtime the day the incident occurred. After the attacks on the [September 11, 2001,] I took my position very seriously. I always wanted to be on position and frequently passed breaks so I could stay and keep an ever watchful eye on the aircraft in the system. After the attacks on the [September] 11, [2001,] we implemented new procedures for the monitoring and reporting of suspect aircraft. We were on high alert. There were several instances where I overreacted to aircraft that I thought I had lost communications with or ones that I thought had made turns that were not issued by myself. I was fearful that one of the aircraft under my control would or could possibly repeat the events of September 11, [2001].”

In a January 2, 2002 report, Dr. Alford noted treating appellant since November 26, 2001, for anxiety and “physical sensations of pressure on one side of his face.” The psychologist stated that appellant related: “he felt additional pressure at work, particularly since the attack on the World Trade towers in New York.” He stated that “[t]hese fears and concerns seem to have contributed to some degrees to this man's current symptoms of anxiety.”

In a January 2, 2002 report, Dr. Richard A. Feely, a Board-certified osteopath, agreed with Dr. Alford that appellant was unable to perform his job duties due to job stress. Dr. Feely treated appellant on September 25, 2001 for complaint “of dizziness to the point where he thought he was going to blackout while at work.” Appellant described symptoms of neck pain and stiffness, dizziness, temple pain and disorientation. A magnetic resonance imaging scan was

obtained on September 26, 2001 and no vascular impingement of the cranial nerve V or masses was found. Dr. Freely related that appellant's symptoms became worse and appellant returned on October 2, 2001 with increased complaints, particularly in the frontal area. Appellant was seen by an ear, nose and throat specialist and treated for a sinus infection. Based on his complaints, appellant was referred for a neurological consultation. After a November 13, 2001 visit, Dr. Freely noted that appellant "displays and admits to some depression as well as the inability to control his emotions." In a subsequent December 18, 2001, visit, Dr. Freely indicated that appellant's trigeminal neuralgia had improved, but that he experienced depression with panic attacks and anxiety with some somatic dysfunction. Dr. Freely advised that appellant was physically able to perform his duties but was unable to work due to stress.

Appellant requested an oral hearing on January 29, 2002, which was held on July 23, 2002.

In a September 18, 2001 memorandum, the employing establishment noted many regional facilities "have been working 24/7 since Tuesday." The memorandum also acknowledged "[m]any of you have been working very long hours, coming in over the weekend, bringing in food for others, doing whatever was needed." In an October 29, 2001 memorandum, the employing establishment thanked the employees for taking on extra assignments, sacrificing personal time and staffing new posts.

In a May 14, 2002 report, Dr. V. Paul Bertrand stated that he had treated appellant since October 26, 2001. He noted that appellant may very well have post-traumatic stress disorder following symptomatology that he experienced on September 24, 2001, the added stress following September 11, 2001 and performing his duties. Dr. Bertrand stated:

"I feel that the patient very likely suffers from a post[-]traumatic stress disorder along with multiple neurosomatic symptomatology, which is now improving. This is very likely related to his experience as an air traffic controller on duty on September 24, [2001]. The patient had gone through rehabilitation. He [ha]s had a few setbacks, one around April 10 due to experiencing anxiety and pressure while at work. These episodes may occur intermittently where he may need to be on limited[-]duty intermittently."

In a report dated June 18, 2002, Dr. Alford opined that appellant experienced significant stress as an air traffic controller following the events of September 11, 2001 and his subsequent worry and concern about how he should respond to a situation, which he feared might occur.

By decision dated November 12, 2002, the Office hearing representative affirmed the January 14, 2002 decision. The hearing representative found that appellant failed to establish any work factors and did not identify the stressful events that may have taken place on September 24, 2001.

In a letter dated November 10, 2003, appellant's counsel requested reconsideration and submitted additional medical evidence. In a report dated September 30, 2002, Dr. Allison Reddinger, a Board-certified internist, diagnosed post-traumatic stress disorder. She indicated that Dr. Alford was an expert in treating air traffic controllers who sustained injuries while in the

performance of duty and that he had been treating appellant for his injury since October 2001 and for a similarly recognized injury in June 1999. Dr. Reddinger noted that appellant had been treated by Dr. Alford for post-traumatic stress disorder in June 1999 and was treated by Dr. Bertrand for an injury on September 24, 2001. Dr. Reddinger stated that “[t]he stress of the atmosphere of his normal duties would not provide an environment that is conducive to [appellant] making progress in his recovery.” She recommended that appellant not be involved in the separation of live air traffic.

In an April 1, 2003 report, Dr. Alford addressed his treatment of appellant. On November 26, 2001 appellant had described peculiar symptoms including vertigo, headache, pressure on the right side of his face and an incident in which he nearly passed out while at work on September 24, 2001. Appellant related to the psychologist “how he felt overwhelmingly concerned and panicked about the events of September 11 2001,” which included the correct protocols and his specific responsibilities in monitoring aircraft. Dr. Alford noted that, while there was discussion that the stress level at work was increasing prior to the events of September 11, 2001, it seems that this became an overwhelming event that triggered an acute stress reaction. Dr. Alford stated that “it became clearer that the symptoms were the result of exposure to activities that had to do with directing live traffic and feeling overwhelmed with the responsibilities.” He added:

“[W]hile to my knowledge, there is a lack of interfering thoughts, flashbacks or dreams about the events of September 11, [2001] or any particular operational error, near collision, *etc.* the symptoms did indeed start and are related to events that occurred while working in the radar room at that time. The description of feelings and thinking that accompanied the original trauma is directly related to events at the time of September 11, [2001]. In my opinion, this cluster of symptoms does compromise a post[-]traumatic stress disorder.”

On September 25, 2002 Dr. Reddinger diagnosed post-traumatic stress disorder, which she attributed to appellant’s employment as an air traffic controller. She noted that appellant sustained a recurrence on August 15, 2002 due to the anxiety of returning to a full-duty status and becoming actively engaged in the separation of live air traffic.

In a March 10, 2003 report, Dr. Quay C. Snyder, Board-certified in family medicine, noted that appellant had been disqualified by the employing establishment for post-traumatic stress disorder based on several evaluations. He stated:

“The results of these evaluations were not available to the Department of Labor when they did their initial determination. We feel the medical records clearly support a diagnosis of Anxiety Disorder that is clearly related to your work environment and triggered by thoughts of returning to work. Secondly, because of the nature of your work, it is unlikely that you will be able to withdraw from psychotropic medications in the foreseeable future. This would (and has) rendered you ineligible for FAA medical qualification.”

By decision dated February 11, 2004, the Office denied modification of the November 12, 2002 decision. The Office found that appellant’s reaction to the September 11,

2001 airline hijackings and anticipatory fear concerning his ability to handling his work duties in a similar situation were not compensable factors.

In a letter dated October 28, 2004, appellant's counsel requested reconsideration. He submitted an article on stress prevention for air traffic controllers by Professor Giovanni Costa and an October 8, 2004 report from Dr. Alford. The psychologist attributed appellant's emotional condition to the stress inherent in working as an air traffic control specialist. Dr. Alford noted that the amount of traffic and the expectations on air traffic controllers was considerable and that appellant had documented that he assumed a rather high degree of work-related stress and responsibility as an air traffic controller. He indicated that appellant's condition was also due to the events of September 11, 2001, which placed considerable stress on appellant to function in a manner for which he felt unprepared.

In an August 19, 2004 statement, appellant attributed his stress to a rotating shift work, providing on-the-job training to new employees, the responsibilities of his job as an air traffic control specialist, his first shift back after September 11, 2001 and setting off an operations error detection system, which was later deemed not to be an error. Appellant noted that he was regularly called in for overtime work and was working overtime on September 24, 2001. He stated that there were a reduced number of controllers pershift and he was "required to work the more complex sectors all day long to cover for the controllers who could not handle the workload." Appellant also alleged harassment by Melvin Smith and Lynette Yeary, both operation managers, during March 2002. He addressed the changes in working conditions after September 11, 2001. Appellant described harassment because he had to request leave without pay (LWOP) and provide documentation for each request. He noted that during the summer of 2001 he was regularly called to come in for overtime.

In response to appellant's allegations, Mr. Smith denied that he had harassed appellant over his LWOP requests. He stated that the Chicago Center set a staffing number for the shifts (day/swing/mid) that would accommodate all aspects of the operation for each area (training, official business, team meeting, refresher training, operational error processing and investigation). Occasionally, an employee's use of leave would reduce the number of available controllers below the target number for optimum staffing. At these times, the supervisor and operations manager would make a determination whether overtime was appropriate or whether they could rely on other resources to accommodate the operational needs. Sometimes overtime was the answer or the discontinuation of training might be the answer. Mr. Smith stated that, during the time period in question, appellant as well as the other controllers in the East Area normally worked an operational position less than three hours in an eight-hour shift. The other 4.5 hours, the controllers were on break.

By decision dated March 31, 2005, the Office denied modification of the February 11, 2004 decision.

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or

incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.¹

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,² the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees Compensation Act.³ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁴ When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁵ 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.⁶

In emotional condition claims, 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. 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.⁷

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is

¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

² 28 ECAB 125 (1976).

³ 5 U.S.C. §§ 8101-8193.

⁴ *See Robert W. Johns*, 51 ECAB 137 (1999).

⁵ *Lillian Cutler*, *supra* note 2.

⁶ *Kim Nguyen*, 53 ECAB 127 (2001).

⁷ *Dennis J. Balogh*, 52 ECAB 232 (2001).

whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.⁸

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of stress related to his position as an air traffic controller. In a January 10, 2002 statement, appellant addressed the rotation of shifts and “having great difficulty making the quick turnarounds from one shift to another.” He noted new procedures for monitoring and reporting air traffic put in place after the September 11, 2001 attacks. Appellant also stated that there were decreased staff levels to monitor the air traffic. Appellant was on overtime duty on September 24, 2001 when he experienced vertigo, trouble focusing and pain in the left side of his head, face, neck and upper back. This occurred when he turned his neck to the left to communicate with a colleague. He also alleged harassment by his supervisors with regard to his requests for LWOP. He stated that Mr. Smith had harassed him by requiring documentation to support each of his requests.

The Board has held that actions of a manager which the employee characterizes as harassment or discrimination may constitute a factor of employment giving rise to coverage under the Act; however, there must be evidence that harassment or discrimination did in fact occur.⁹ Mere perceptions or feelings of harassment will not support an award of compensation.¹⁰ Appellant’s allegations of harassment pertain to administrative and personnel matters, unrelated to his regular or specially assigned work duties and do not fall within the coverage of the Act absent evidence of error or abuse.¹¹ Appellant did not submitted evidence to support his contention that his supervisors improperly required him to provide documentation to support his LWOP requests or harassed him in the processing of the leave requests. Mr. Smith denied any harassment of appellant. The Board finds that appellant has not established that he was subjected to harassment by his supervisors in this regard and his allegations do not rise to constituting a compensable factor of employment.

Appellant also attributed his emotional condition to the stress of providing on-the-job training to new employees, his responsibilities as an air traffic control specialist in monitoring air traffic and to new procedures for the monitoring and reporting of suspect aircraft following the attacks of September 11, 2001. The Board has held that emotional reactions to situations in which an employee is trying to meet the regular or specially assigned duties of his job requirements are compensable.¹² Appellant’s supervisor did not dispute that appellant’s job duties consisted of monitoring airplanes, training new employees or in implementing new procedures for monitoring and reporting suspect aircraft after September 11, 2001. Under *Cutler*, where a claimed disability results from an employee’s reaction to his regular or specially

⁸ *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004).

¹⁰ *Id.*

¹¹ *Charles D. Edwards*, 55 ECAB ____ (Docket No. 02-1956, issued January 15, 2004).

¹² *Trudy A. Scott*, 52 ECAB 309 (2001).

assigned duties or to an imposed employment requirement, the disability comes within coverage of the Act.¹³ The Board finds that appellant has established compensable factors of employment under *Cutler* with regard to these job duties and responsibilities of an air traffic controller.

Appellant also attributed stress to the work schedule and shift changes required as part of his air traffic controller position. The Board has held that a change in work shift may constitute a compensable employment factor.¹⁴ Appellant described a 2-2-1 work schedule and that he was called in on days off to perform overtime work. Mr. Smith noted that the Chicago Center set staffing levels to accommodate various aspects of operations but that, occasionally, the number of available controllers was reduced and operations would be accommodated by overtime work of use of other resources. Although noting that appellant generally worked in the operational position less than three hours in an eight-hour work shift, Mr. Smith did not dispute that appellant experienced shift changes or performed overtime work. Appellant has shown that he was subject to shift changes as alleged. He has, therefore, established a compensable factor of employment in this regard.

The Board finds that the record supports compensable employment factors pertaining to appellant's regular and specially assigned job duties, shift changes and overtime. However, his burden of proof is not discharged by the fact that he has established compensable work factors which may give rise to a compensable disability under the Act. To establish his claim, appellant must also submit rationalized medical evidence supporting that he had an emotional condition caused or aggravated by the accepted employment factors.¹⁵ As the Office did not accept any compensable factors it did not address the medical evidence. The case will be remanded for further consideration of the medical evidence in light of the Board's finding in this appeal.

CONCLUSION

The Board finds that appellant's compensable work factors pertain to his regular and specially assigned job duties, shift changes and overtime work. The case will be remanded to the Office for consideration of the medical evidence. After any further development it deems necessary, the Office should issue a *de novo* decision on appellant's claim.

¹³ *Lillian Cutler*, *supra* note 2; *see also Robert Bartlett*, 51 ECAB 664 (2000); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁴ *Virginia Dorsett*, 50 ECAB 478 (1999); *Dodge Osborne*, 44 ECAB 849, 857-58 (1993).

¹⁵ *Kathleen D. Walker*, 42 ECAB 603 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated March 31, 2005 be set aside and the case remanded for further proceedings consistent with this opinion.

Issued: July 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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