United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
	)	**Docket No. 07-2398**
and	)	**Issued: April 15, 2008**
	)	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Everett, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 24, 2007 appellant filed a timely appeal of a July 2, 2007 merit decision of the Office of Workers' Compensation Programs, finding that he did not sustain an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this appeal.

ISSUE

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

FACTUAL HISTORY

On August 24, 2006 appellant, then a 51-year-old air traffic controller, filed an occupational disease claim. On April 7, 2005 he first realized that his generalized anxiety disorder was caused by his federal employment. Appellant stated that he had a highly demanding stressful occupation and that he worked in a stressful environment for over 30 years.

His stress and anxiety levels caused his health to deteriorate to the point that he could no longer work in his position.

In an April 7, 2005 medical report, Timothy M. Reisenauer, Ph.D., a licensed clinical psychologist, reviewed a history that on September 8, 2001 appellant was involved in a near "loss of separation" incident and thereafter requested a transfer. He witnessed an aircraft crash on December 18, 2004 and believed that the pilot had died but later found out he had survived. Dr. Reisenauer noted that appellant's emotional and physical symptoms related to the stated incidents and his family and social background. He reported findings on physical and mental examination. Dr. Reisenauer stated that appellant sustained generalized anxiety disorder, acute stress disorder due to involvement in a plane crash that was largely resolved and adjustment disorder with anxious mood. He opined that appellant's generalized anxiety disorder and acute stress disorder were either caused or aggravated by his employment as an air traffic controller.

By letter dated October 12, 2006, the Office advised appellant that the medical evidence submitted was insufficient to establish his claim. It addressed additional factual and medical evidence he needed to submit. The Office also requested that the employing establishment respond to appellant's allegations and provide a description of his position.

In an undated narrative statement, appellant described his emotional condition and employment. On September 8, 2001, since there was no loss of separation, he was not required to report the incident but it greatly affected his stress and anxiety levels. Appellant experienced difficulty sleeping over the next few nights. On September 11, 2001 his work environment became very stressful following the terrorist acts. In mid-October 2001, Bob Strong, an instructor, became demanding and overly aggressive towards appellant during training in a radar simulator class which caused him to leave the room. Later that day, Mr. Strong had an emotional explosion and stormed into a manager's office demanding that appellant be fired. After appellant heard about this, his request for a transfer to Paine Field was granted by the employing establishment.

Appellant stated that in August 2004 Don Korzep, a coworker, accused him of failing to properly prepare a watch schedule and told him that he better start wearing a flak jacket. He contended that Mr. Korzep was very unstable and was known to be a collector of guns. Appellant took the threat seriously and reported it to Sheri Kasen, his manager. He was on edge for several weeks with worry for the safety of himself, his family and coworkers. Appellant related that Mr. Korzep never showed up for work after he filed the complaint. Mr. Korzep went on extended sick leave and retired.

Regarding the December 18, 2004 crash, appellant stated that the aircraft had just departed and was approximately 200 feet in the air, swerved towards the control tower and then crashed nose first into the pavement. He experienced stress and anxiety during this incident and later on while watching a news broadcast of the crash.

On December 22, 2004 appellant sought medical treatment for his emotional symptoms. On May 17, 2005 Dr. Christopher S. Taylor, an employing establishment flight surgeon, reviewed Dr. Reisenauer's findings and temporarily revoked appellant's medical certificate which allowed him to perform his air traffic control duties. Appellant was assigned to

administrative duties. In August 2005, a mid-air collision between two aircraft resulted in two fatalities and, in October 2005, an aircraft crashed at the airport resulting in three fatalities. He alleged that these incidents greatly affected him. On October 11, 2005 Dr. Taylor permanently revoked appellant's medical certificate. Appellant's request for disability retirement was approved on October 28, 2005. He stated that prior to the above-noted incidents he had never suffered a similar emotional condition. Appellant had no other sources of stress in his personal life and no outside employment. He enjoyed many hobbies.

Appellant submitted Dr. Taylor's October 11, 2005 memorandum which advised him that he was medically disqualified from his air traffic control position. He stated that his generalized anxiety disorder and chronic use of disqualifying medication precluded him from safe performance of his air traffic control duties under any condition that reasonably could be perceived based on his review of his medical information. In an October 18, 2005 report, Dr. Reisenauer reiterated his prior diagnoses. He also diagnosed recurrent primary insomnia that was related to anxiety. Dr. Reisenauer opined that appellant was unable to return to his job as an air traffic controller because he would never completely recover from his generalized anxiety condition. He stated that appellant's condition was largely static and the prognosis was poor that he would return to a level of pre-morbid functioning which allowed a return to his high pressure job.

In a December 4, 2006 letter, the employing establishment stated that appellant filed a traumatic injury claim assigned number 142036112 regarding the December 18, 2004 airplane crash which was accepted by the Office for acute stress reaction on November 7, 2005. Regarding the September 8, 2001 incident, the employing establishment explained the meaning of a loss of separation situation and stated that no such incident occurred. It stated that, if this incident had occurred, appellant's work performance would have been rigorously scrutinized and he would have likely been required to undergo additional training. The employing establishment contended that his reaction to a possible loss of separation was self-generated. It related that appellant was not at work on September 11, 2001. Appellant was on annual leave from September 9 through 17, 2001 and returned to work on September 20, 2001.

The employing establishment stated that appellant did not provide specific details regarding the mid-October 2001 training incident. It noted the findings of its investigation of the August 2004 threat by Mr. Korzep. Both appellant and Mr. Korzep reported that they initially were joking. Mr. Korzep apologized to appellant for making the comment about wearing a bullet proof vest. Appellant's comment to Mr. Korzep that he would be lucky to make it past retirement could have been considered threatening and provocative. He waited 12 days after Mr. Korzep made the comment before reporting it to management. Mr. Korzep was on extended medical leave and it was not known if he would be returning to work and there was no imminent danger based on interviews management documented and consultation with the supervisor.

The employing establishment contended that appellant's reaction to the news report of the December 18, 2004 incident was self-generated. It stated that a November 27, 2005 report of Dr. Larry S. Bornstein, a Board-certified psychiatrist, found that his acute stress reaction had resolved. The employing establishment also stated that appellant did not witness the August and October 2005 airplane crashes because he was assigned administrative duties unrelated to air traffic control duties.

By letter dated April 13, 2007, the Office requested that the employing establishment submit a statement from Mr. Strong regarding appellant's allegation of harassment.

In a May 15, 2007 narrative statement, Mr. Strong related that he greeted appellant at the training session and encouraged him to relax and have fun working with aircraft in a simulator. He noted that, while appellant was working on a problem, he made an error in vectoring two aircraft together. Mr. Strong asked the other trainers to stop the problem so that appellant could see his error. He quietly and calmly told him how he could have avoided the error. Appellant responded "If you want them separated then do it yourself!" Mr. Strong stated that appellant walked out of the room saying that he was going on break. He commented that in his 30 years as a trainer, he had never seen a trainee respond like appellant. Mike Xaviar, a coworker, asked Mr. Strong what he did to appellant. Mr. Strong explained what happened and Mr. Xaviar stated that appellant wanted to return to Paine Field control tower. Mr. Xaviar accused Mr. Strong of wanting to fire appellant which he denied. Mr. Strong advised appellant that, if he was not going to try to perform better, he should return to Paine Field control tower.

By decision dated July 2, 2007, the Office denied appellant's claim, finding that he did not sustain an emotional condition in the performance of duty. It found that the September 11, 2001, October 2001 and August 2004 incidents did not constitute compensable factors of his employment. The Office further found that appellant's transfer following the October 2001 incident and the withdrawal of his medical certificate constituted administrative matters and he failed to establish error or abuse. Appellant also failed to establish that the September 8, 2001 incident occurred as alleged.

LEGAL PRECEDENT

A claimant 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 factors of his federal employment.[1] To establish that he sustained an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.[2]

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*,[3] the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[4] There are situations where an injury or an illness has some connection with the employment but

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

[2] *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

[3] 28 ECAB 125 (1976).

[4] 5 U.S.C. §§ 8101-8193.

nevertheless does not come within the concept or coverage under the Act.[5] When an employee experiences emotional stress in carrying out his employment duties and the medical evidence establishes that the disability resulted from his 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 his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of his work.[6] 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 under the Act.

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]

Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to 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.[9] Generally, actions of the employing establishment in administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties, do not fall within coverage of the Act.[10] However, an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.[11]

ANALYSIS

Appellant attributed his emotional condition to a near loss of separation incident on September 8, 2001 between two aircraft under his control. He did not report this incident and he did not submit any witness statements. The employing establishment stated that this incident did

[5] *See Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

[6] *Lillian Cutler*, *supra* note 3.

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

[8] *Id.*

[9] *Lillian Cutler*, *supra* note 3.

[10] *Michael L. Malone*, 46 ECAB 957 (1995).

[11] *Charles D. Edwards*, 55 ECAB 258 (2004).

not occur because appellant's work performance would have been rigorously scrutinized and he would have likely been required to receive additional training. Appellant's unsupported allegation alone is insufficient to establish a factual basis for this incident.[12] As he failed to establish a factual basis for the September 8, 2001 incident, he did not establish that it occurred as alleged. The Board finds that appellant has not established a compensable factor of employment under the Act with respect to this allegation.

Appellant also attributed his emotional condition to the September 11, 2001 terrorist attacks. He stated that his work environment became very stressful following this incident. Appellant further attributed his emotional condition to an August 2005 mid-air collision between two aircraft and an October 2005 aircraft crash which resulted in several fatalities. The employing establishment stated that he did not witness any of these incidents. It related that appellant was not at work on September 11, 2001. Appellant was on annual leave from September 9 through 17, 2001 and he returned to work on September 20, 2001. The employing establishment further stated that at the time of the August and October 2005 crashes appellant was assigned administrative duties unrelated to air traffic control duties. The Board finds that appellant's reaction to the September 11, 2001 terrorist attacks and August and October 2005 aircraft crashes involves a fear of future injury which is not compensable under the Act.[13]

Appellant alleged that his emotional condition was caused by unwarranted harassment by Mr. Strong. He stated that Mr. Strong was demanding and overly aggressive towards him during a radar simulator training class which caused him to leave the room. Appellant further stated that he heard that Mr. Strong exploded as he asked a manager to fire him. The Board has held that actions of an employer which the employee characterized as harassment may constitute a factor of employment giving rise to coverage under the Act, but there must be some evidence that the harassment did in fact occur.[14] Mere perceptions and feelings of harassment or discrimination will not support an award of compensation.[15] Appellant did not submit any witness statements in support of his allegation of harassment by Mr. Strong. Mr. Strong stated that he greeted appellant at the training class and encouraged him to relax and have fun. He quietly and calmly explained to appellant how he could have avoided an error he was making while working on aircraft during the training class. Mr. Strong stated that appellant responded that Mr. Strong should perform the task himself and walked out of the room. He denied Mr. Xaviar's accusation that he was trying to have appellant fired following this incident. Appellant failed to provide any probative evidence that harassment occurred as alleged and based on Mr. Strong's statement, the Board finds that he did not establish a compensable employment factor with respect to harassment.

Regarding appellant's allegation that he was threatened by Mr. Korzep with bodily harm, the Board has recognized the compensability of physical threats or verbal abuse in certain circumstances. This does not imply, however, that every statement uttered in the workplace will

[12] *See Charles E. McAndrews*, 55 ECAB 711 (2004).

[13] *Virginia Dorsett*, 50 ECAB 478, 482 (1999).

[14] *James E. Norris*, 52 ECAB 93 (2000).

[15] *Reco Roncoglione*, 52 ECAB 454, 456 (2001).

give rise to coverage under the Act.[16] The employing establishment's investigation of the alleged threat by Mr. Korzep revealed that both he and appellant reported that they were initially joking. Mr. Korzep apologized to appellant for making the comment about wearing a bullet proof vest. The employing establishment stated that appellant's comment to Mr. Korzep that he would be lucky to make it past retirement could have been considered threatening and provocative. It found, however, that appellant waited 12 days after Mr. Korzep made the threat before reporting it to management. The employing establishment stated that Mr. Korzep was on extended medical leave and it was not known if he would be returning to work and there was no imminent danger based on interviews management documented and consultation with the supervisor. The Board finds that there is no probative evidence that appellant was ever threatened by Mr. Korzep. Therefore, he has failed to establish a compensable employment factor.

The employing establishment's investigation[17] and removal of appellant from his air traffic control duties[18] relate to administrative and personnel matters that may constitute compensable employment factors only if error or abuse is established. Dr. Taylor initially revoked appellant's medical certificate for a temporary time period based on Dr. Reisenauer's findings that his emotional conditions were caused or aggravated by his work duties. He later permanently revoked appellant's medical certificate because his emotional condition and use of disqualifying medication precluded him from performing the duties of his air traffic controller position. Appellant has not substantiated that the employing establishment erred or acted abusively with regard to his removal from his air traffic control position. Thus, the Board finds that he did not establish a compensable factor of employment.[19]

The Board finds that appellant has not established that his claimed emotional condition is causally related to a compensable employment factor.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty.

[16] *Charles D. Edwards*, *supra* note 11.

[17] *Jimmy B. Copeland*, 43 ECAB 339 (1991).

[18] *See Robert Breeden*, 57 ECAB ___ (Docket No. 06-734, issued June 16, 2006); *Artice Dotson*, 41 ECAB 754 (1990).

[19] As to the December 18, 2004 aircraft crash, the Board notes this was subject of a traumatic injury claim accepted by the Office as claim No. 142036112.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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