

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

D.B., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Westbury, NY, Employer)

**Docket No. 13-2047
Issued: May 12, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 5, 2013 appellant filed a timely appeal from the June 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish an emotional condition as a result of a July 25, 2012 employment incident.

FACTUAL HISTORY

On July 25, 2012 appellant, then a 47-year-old air traffic controller, filed a traumatic injury claim alleging that on that date he sustained an acute stress reaction, anxiety and elevated blood pressure in the performance of duty due to a near midair collision. He stopped work on that date. The employing establishment indicated that appellant was in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

By letter dated August 6, 2012, OWCP advised appellant that additional factual and medical evidence was needed. It explained that a physician's opinion was crucial to his claim and allotted him 30 days to submit the requested information.

In a July 27, 2012 duty status report, Dr. Bruce Herman, a clinical psychologist, indicated that appellant related acute stress, anxiety and high blood pressure at work on July 25, 2012. He diagnosed post-traumatic stress disorder and indicated that appellant was unable to return to work. In a September 4, 2012 attending physician's report (Form CA-16), Dr. Herman advised that appellant was anxious, depressed, ruminative sleepless and diagnosed acute nonspecific reaction to stress.² He checked a box "yes" in response to whether he believed that the condition was caused or aggravated by the employment activity. Dr. Herman recommended a return to regular duty on September 5, 2012.

In a September 12, 2012 decision, OWCP accepted that incident, but found the medical evidence insufficient to establish that a medical condition was caused by this incident. It noted that Dr. Herman's reports did not contain a history of injury or a rationalized explanation of how the loss of separation between the aircraft caused the diagnosed condition.

Thereafter, appellant submitted a July 27, 2012 narrative report from Dr. Herman who noted that appellant was referred for evaluation by his supervisor. Dr. Herman indicated that, at the time of the incident on July 25, 2012, appellant was working as an air traffic controller during a very busy session. He advised that appellant related that a Cessna 206 propeller plane was flying at 2,000 feet and directed to land at the same time that a Citation Jet (CJ) was climbing to 2,000 feet and turning to 160 degrees. Dr. Herman noted that appellant contacted the CJ but he was unable to communicate with it as the frequency had not been transferred. He advised that he had to contact the Morrison Tower to have the frequency code adjusted to allow him to speak to the CJ and order it to make a right turn to avoid a collision with the Cessna plane. Dr. Herman noted that appellant indicated that there was a significant loss of separation and he felt that he could no longer function at his position and stopped working. He gave his work to another handler or controller. Dr. Herman explained that the employer temporarily stopped all departures at the airport and appellant was released from his position after three or four minutes. He examined appellant and found signs of depression, anxiety and preoccupation with the incident. Dr. Herman also noted that testing responses to the Cornell Medical index were remarkable and determined that appellant scored a 90 on the modified post-traumatic stress disorder symptoms scale. He noted that appellant was experiencing many of the symptoms characteristic of individuals who had been exposed to or involved in a traumatic incident or event. Dr. Herman advised that appellant reported recurrent and intrusive distressing thoughts about the event that included nightmares, flashbacks and becoming emotionally upset when reminded of the event. He advised that appellant showed symptoms of depression and anxiety and was preoccupied with the incident. Dr. Herman diagnosed acute nonspecific reaction to stress. He indicated that appellant had difficulty sleeping and was negative about his current situation, especially at work and required leave and psychotherapeutic intervention to help him recover from the incident.

On April 3, 2013 appellant requested reconsideration. He explained his duties as an air traffic controller, which included assigning radiofrequencies that allowed him to communicate

² The Form CA-16 issued by appellant's supervisor on July 25, 2012, authorized Dr. Herman to furnish treatment for up to 60 days.

with aircraft. Appellant advised that radar coverage enabled air traffic controllers to determine the position of any nonstealth aircraft that was high enough to be detected. He noted that at the time of the incident he was working two combined radar positions, "EWR Departure and EWR Satellite Departure." Appellant explained that he "was responsible for every instrument flight (IFR) departure that took off from any of the four controlled airports in Northern New Jersey as well as any other aircraft that needed to be in the airspace. EWR Departure Hand-off was staffed by another controller to assist the operation."

Appellant explained that the incident on July 25, 2012 involving the two aircraft caused him tremendous stress as he had to quickly react to prevent a midair collision. He noted that anxiety symptoms began, his heart was racing and it was no longer a normal session. This was a crisis where appellant had to do everything to prevent a midair collision. He stated that, as he was trying to avert the crisis, he called the arrival controller to ask if N23215 could be moved out of harm's way but another controller was also on the landline and the arrival controller could not understand what he was saying. Appellant alleged that his chest was about to explode and he could literally feel the pressure of the blood circulating through his neck and head. He stated that he called again and the planes were less than three miles apart and radar separation was lost. Appellant advised that his anxiety continued increasing. He noted that, although they were only two miles away, there was no communication. Appellant indicated that he finally made radio contact with OPT710 and instructed it to turn right. He stated that he felt like he had avoided a car crash by two feet but still had to make sure that 0P1710 would not collide with the next arrival from a nearby airport. Appellant noted that, once everything returned to near normal, he asked to be relieved from his position. He advised that "two hours later I was still agitated, still shaking and that is when I filed my claim."

By decision dated June 25, 2013, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every illness that is somehow related to an employee's employment. There are situations where an injury or 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 or her regular or specifically assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

An employee has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which he or she claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed

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 126 (1976).

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

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, OWCP 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 the 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, OWCP 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 the matter establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, 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 compensable employment factors identified by the claimant.⁹

ANALYSIS

The Board finds this case is not in posture for decision.

The evidence supports the occurrence of the July 25, 2012 work incident. Appellant was in the performance of duty as an air traffic controller on duty at the time of a near midair collision. In *Lillian Cutler*,¹⁰ 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 FECA.

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 FECA. To establish his claim for an emotional condition, he must also submit rationalized medical evidence establishing

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

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

⁸ *Id.*

⁹ *M.D.*, 59 ECAB 211 (2007); *Gary J. Watling*, 52 ECAB 278 (2001); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁰ 28 ECAB 125 (1976).

that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹¹

The medical evidence, although it is insufficiently rationalized to establish that appellant sustained a work-related emotional condition, is generally supportive of causal relationship. The record contains several reports from Dr. Herman. In his July 27, 2012 narrative report, Dr. Herman noted the July 25, 2012 work incident and related that appellant felt that he could no longer function at his position because of the significant loss of separation. Appellant stopped working and gave his work to another handler or controller. He examined appellant and determined that he had signs of depression, anxiety and was preoccupied with this incident and diagnosed acute nonspecific reaction to stress. Dr. Herman indicated that appellant had difficulty sleeping and was negative about his current situation, especially at work and required leave and psychotherapy to help him recover from the incident. He also supported causal relationship in his September 4, 2012 report. While these reports are not completely rationalized, they are consistent in indicating that appellant sustained an employment-related emotional condition and relay the emotional reaction to the loss of separation incident.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹² While Dr. Herman's reports do not contain sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that his emotional condition was caused or aggravated by factors of his employment, these reports raise an inference of causal relationship sufficient to require further development of the case record by OWCP.¹³

The Board, therefore, finds that the case must be remanded for further development of the medical evidence. OWCP shall refer appellant to an appropriate Board-certified specialist for a reasoned opinion regarding whether appellant has an emotional or psychiatric disorder and whether such disorder is causally related to the accepted compensable employment factor. Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.

The Board also notes that the employing establishment issued a properly completed Form CA-16 to appellant on July 25, 2012 authorizing treatment by Dr. Herman as medically necessary for the effects of his injury. Where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.¹⁴ The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP.¹⁵ The record is silent

¹¹ See *William P. George*, 43 ECAB 1159, 1168 (1992). See also *supra* note 9.

¹² *William J. Cantrell*, 34 ECAB 1223 (1983).

¹³ See *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

¹⁴ *R.S.*, Docket No. 13-1670 (issued October 25, 2013). See *Elaine M. Kreyborg*, 41 ECAB 256, 259 (1989).

¹⁵ See 20 C.F.R. § 10.300(c).

as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form. On return of the case record, OWCP should review whether he has been reimbursed for any incurred medical expenses.¹⁶

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant met his burden of proof to establish an emotional condition as a result of the July 25, 2012 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: May 12, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁶ See *R.S.*, *supra* note 14.