

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

L.B., Appellant and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Olathe, KS, Employer))))))))))	Docket No. 14-911 Issued: September 3, 2014
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 PATRICIA HOWARD FITZGERALD, Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2014 appellant filed a timely appeal from a September 16, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her emotional condition claim. 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 sustained an emotional condition in the performance of duty causally related to factors of her federal employment.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated June 25, 2013, the Board set aside a January 25, 2012 nonmerit decision denying appellant's request for

¹ 5 U.S.C. § 8101 *et seq.*

reconsideration under section 8128.² The Board noted that an OWCP hearing representative, in a February 7, 2011 decision, determined that appellant had established as a compensable work factor that she experienced stress on April 29, 2010 while performing her assigned duties as a training instructor. The hearing representative found, however, that the medical evidence was insufficient to meet appellant's burden of proof as it attributed her stress-related condition to her belief that a coworker accused her of an operational error on April 29, 2010 in retaliation for her accusing him of harassment. Appellant submitted statements on reconsideration from coworkers supporting her contention that the coworker retaliated against her when he accused her of an operational error on April 29, 2010. The Board found that this evidence was sufficient to warrant reopening her case under section 8128 and remanded the case for OWCP to conduct a merit review. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

On May 6, 2010 Dr. Daniel K. Berry, an osteopath with the employing establishment, opined that appellant was unable to perform her safety duties due to medical incapacity.

In a report dated May 13, 2010, Dr. Michael I. Gruenebaum, a Board-certified internist, noted that appellant had experienced stress at work for months. He diagnosed sinus tachycardia and acute anxiety disorder. On May 28, 2010 Dr. Gruenebaum stated, "A revised diagnosis for [appellant] is post-traumatic stress disorder. We have arrived at this diagnosis due to the direct association between the reported workplace intimidation and [her] symptoms of anxiety and gastrointestinal symptoms."³

On June 24, 2010 Dr. Gruenebaum diagnosed "post-traumatic stress disorder due to a direct association between the reported workplace intimidation and [her] symptoms of anxiety and gastrointestinal symptoms."

In a report dated October 21, 2010, Dr. Gruenebaum noted that appellant related that she had experienced harassment and intimidation by four men at work. She filed a complaint against the men on April 27, 2010. Dr. Gruenebaum stated:

"[Appellant] explained that two days following her formal report to management, the workplace intimidation escalated to include a specific incident, manipulated by one of the accused men, designed to make it appear as though she had performed her job incorrectly. This man reported to management that she had deviated [into] his work sector with an aircraft. Immediately following the individual reporting the incident, [appellant] suffered an acute anxiety attack, her

² Docket No. 12-1617 (issued June 25, 2013). On May 5, 2010 appellant, then a 46-year-old air traffic control specialist, filed a traumatic injury claim alleging that on April 29, 2010 she experienced post-traumatic stress disorder due to harassment in the performance of duty. She maintained that on April 29, 2010 a coworker falsely accused her of an operational error in retaliation for her accusing him of harassment. OWCP adjudicated the claim as an occupational disease claim.

³ In a progress report dated June 3, 2010, Dr. Gruenebaum diagnosed acute anxiety disorder, palpitations, diarrhea, abdominal pain, sinus tachycardia and borderline hypertension. On June 10, 2010 he noted that appellant wanted a note regarding her disability after "an alleged sexual harassment at work" and to contact him with questions.

emotional distress was severe and evidence and she was dismissed by management to leave the facility on medical leave. During her appointment on May 4th, [she] repeatedly stressed her fear that her accusers had crossed the line from intimidation to a dangerous activity, that of using actual aircraft with live persons on board to prove a point to her. She noted that her fear is directly related to the safety of flying passengers.”

Dr. Gruenebaum described appellant’s work duties and indicated that communication between the team members was essential to the position. He stated, “When [she] took action to separate aircraft and a member of her assigned team took action against her, she suffered her first medically defined anxiety attack.” Dr. Gruenebaum diagnosed post-traumatic stress disorder and noted that he had treated appellant for years. He related, “Given her lack of previous symptoms, it is our reasoned medical opinion that the acute anxiety that she suffered as a result of the incident on April 29, 2010 was the mechanism that produced this disorder.”

In a report dated December 20, 2010, Dr. Debra F. Johnson, a clinical psychologist, related that appellant’s December 15, 2010 statement about the events on April 29, 2010 correlated with her description of the incident in her initial evaluation in January 2010. She stated:

“As described in [appellant’s] statement, the onset of the symptoms occurred immediately following the incident in which a coworker allowed aircraft to aim at each other in order to give the impression that she had made a performance error. Two days prior to the incident, an investigation of this man and three other coworkers had resulted from a formal complaint filed by [appellant]. The complaint addressed increasingly provocative workplace harassment by the four men.”

“I believe the life-threatening dangerousness of the behavior in the incident on April 29, 2010 pushed [appellant] from irritation and indignation into a psychiatric diagnosis.”

Dr. Johnson diagnosed post-traumatic stress disorder. She noted that appellant had greatly improved and returned to work in September 2010. Dr. Johnson opined that she could resume her regular employment without restrictions.

By letter dated July 17, 2013, OWCP requested that the employing establishment review the statements by Neal Thigpen and Scott Barnes.⁴ It noted that their statements supported that Brad Schwartz, a manager, found that Greg Stephen’s action toward appellant on April 29, 2010 appeared retaliatory in nature. OWCP asked that Mr. Schwartz or another individual with the employing establishment address the accuracy of the statements.

In a decision dated September 16, 2013, OWCP denied modification of its February 7, 2011 decision. It noted that the employing establishment had not responded to its request to comment on whether Mr. Schwartz told Mr. Thigpen and Mr. Barnes that Mr. Stephens acted in

⁴ See *supra* note 2.

a retaliatory way on April 29, 2010. OWCP accepted appellant's allegation as factual and found that she established as a compensable work factor that Mr. Stephens harassed and retaliated against her by publically alleging that she was involved in an operational error. It determined, however, that the medical evidence was insufficient to establish a causal relationship between the April 29, 2010 work factor and a diagnosed emotional condition.

On appeal appellant relates that she experienced a panic attack immediately after being informed that she had committed an operational error. She noted that the finding that there was no operational error does not mean that the incident did not occur but instead that she did not commit an error. Appellant asserts that Mr. Stephens did not properly feed aircraft into her sector but rather allowed aircraft to aim at each other and then accused her of an operational error. She noted that Mr. Schwartz confirmed her version of the events at the December 15, 2010 hearing.

LEGAL PRECEDENT

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 or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.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 or her frustration from not being permitted to work in a particular environment or to hold a particular position.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 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, 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 record 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.⁹ The opinion of the

⁵ 5 U.S.C. § 8101 *et seq.*; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁶ *Gregorio E. Conde*, 52 ECAB 410 (2001).

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

⁸ *Id.*

⁹ *John J. Montoya*, 54 ECAB 306 (2003).

physician must be based on a complete factual and medical background of the claimant,¹⁰ must be one of reasonable medical certainty¹¹ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹²

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹³ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁴

OWCP procedure manual provides as follows:

“In psychological/emotional stress claims, the SOAF [statement of accepted facts] is particularly important since the physician's opinion on causal relationship must be based on accurate identification of the implicated work factors. The SOAF is required in these claims even if the CE [claims examiner] decides not to send the claimant for a second opinion medical examination at the time of adjudication. The complex nature of the issues inherent in this type of claim necessitates that the facts be established and documented in a SOAF.”¹⁵

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP found that appellant established as compensable work factors that she experienced stress on April 29, 2010 while performing her work duties under *Cutler*. Further, Mr. Stephens harassed and retaliated against her on April 29, 2010 when he publically asserted that she had committed an operational error. It noted that the employing establishment had not responded to its request to review statements by Mr. Thigpen and Mr. Barnes supporting that Mr. Schwartz, a manager, found that Mr. Stephens' actions on April 29, 2010 seemed retaliatory. OWCP denied appellant's claim after finding that the medical evidence was insufficient to show a causal relationship between the compensable work factor and a diagnosed emotional condition. It found that Dr. Johnson attributed her condition to a coworker aiming aircraft at each other to make it look like she had made an error, which it noted was not established by the record. OWCP further determined that Dr. Gruenebaum also attributed appellant's condition to her belief that her coworkers were endangering passengers.

¹⁰ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹¹ *John W. Montoya*, *supra* note 9.

¹² *Judy C. Rogers*, 54 ECAB 693 (2003).

¹³ *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁴ 20 C.F.R. § 10.121.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.2(d)(3) (September 2009).

The Board notes that OWCP failed to prepare a statement of accepted facts describing the accepted compensable work factors. Its procedures require a statement of accepted facts be prepared in emotional condition claims even if it does not refer a claimant for a second opinion examination as a physician's opinion on causal relationship must accurately identify the implicated work factors.¹⁶ Consequently, OWCP did not comply with its procedures and prepare a statement of accepted facts prior to adjudicating the medical evidence.

In reports dated May 28 and June 24, 2010, Dr. Gruenebaum diagnosed post-traumatic stress disorder which he attributed to intimidation at work. On October 21, 2010 Dr. Gruenebaum noted that appellant had filed a formal complaint of harassment against four men at work. Two days later, one of the men reported that one of her aircraft deviated into his work sector. Appellant experienced an acute anxiety attack immediately after the accusation. She told Dr. Gruenebaum that she was afraid for the safety of passengers because the men were using aircraft to get to her. Dr. Gruenebaum diagnosed post-traumatic stress disorder and opined that her acute anxiety attack resulted from the April 29, 2010 employment incident.

On December 20, 2010 Dr. Johnson indicated that appellant began experiencing symptoms immediately after a coworker allowed aircraft to aim at each other to make it look like she had committed an operational error. He attributed her post-traumatic stress disorder to the dangerous actions taken by the coworker on April 29, 2010.

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.¹⁷

The Board finds that the reports of Dr. Gruenebaum and Dr. Johnson provide support that appellant sustained post-traumatic stress disorder due to the events of April 29, 2010 sufficient to warrant further development of the medical evidence.¹⁸ OWCP has accepted as compensable work factors that she experienced stress while performing her regular work duties on April 29, 2010 when she was accused of an operational error. Mr. Stephens also harassed and retaliated against her when he alleged that she committed an operational error on that date. It found that appellant had not established that Mr. Stephens' actions were life threatening to the passengers on an aircraft; however, his accusation that she had committed an operational error while she was in the midst of performing her work duties and in the presence of other air traffic controllers escalated the situation in a manner that involved the passengers on the aircraft being routed through the affected airspace. Although Dr. Gruenebaum and Dr. Johnson did not provide sufficient medical rationale explaining how the compensable work factors occurring on April 29, 2010 caused or aggravated an emotional condition, their reports are generally supportive of appellant's claim and raise an uncontroverted inference of causal relationship sufficient to require further development by OWCP.¹⁹ On remand, OWCP should prepare a statement of

¹⁶ *Id.*

¹⁷ *See Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁸ *Id.*

¹⁹ *See P.B.*, Docket No. 13-1092 (issued June 19, 2014); *R.H.*, Docket No. 13-1193 (issued May 29, 2014).

accepted facts and refer appellant for a second opinion examination by an appropriate specialist. Following such further development as deemed necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 3, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board