United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 14-711**
	)	**Issued: March 18, 2015**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Westbury, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On February 12, 2014 appellant filed a timely appeal from an August 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 in the performance of duty on December 20, 2011.

FACTUAL HISTORY

On December 30, 2011 appellant, then a 31-year-old air traffic control specialist, filed a claim for traumatic injury (Form CA-1) alleging that on December 20, 2011 he suffered "stress"

[1] 5 U.S.C. §§ 8101-8193.

as a result of an "aircraft accident." He stopped work on December 20, 2011 and received continuation of pay beginning that date.

On January 4, 2012 OWCP requested that appellant provide further description of the December 20, 2011 accident and indicate whether he was responsible for controlling the aircraft involved in the accident. Appellant was also asked to submit a detailed medical report from a psychiatrist or clinical psychologist.

In a January 13, 2012 statement, appellant indicated that on December 20, 2011 he was involved with the crash of aircraft N731CA which departed Teterboro airport at approximately 2:50 p.m. and crashed at approximately 3:05 p.m. The aircraft was switched to his frequency when it had climbed to 10,000 feet and he aided the pilot of the aircraft to 14,000 feet. Appellant issued reports of icing at 14,000 feet, and between 15,000 and 17,000 feet, and aided the pilot of the aircraft to 17,000 feet after the next controller from the New York Air Route Traffic Control Center (hereinafter New York Center) "took the handoff."[2] Another controller came to relieve him of his position "almost right after" the handoff so that he could go on break. Appellant stated that, when he returned from his break, his supervisor advised him about the crash of an aircraft he had been assisting, and he stated that "it was all over the news with definite fatalities." His supervisor placed appellant in a data position after witnessing his reaction to learning about the crash. Appellant then watched the radar replay and learned that the aircraft "fell right out of the sky" while the New York Center was assisting the pilot climb above 17,000 feet. He found out from newscasts that five people were killed in the crash, including a mother and three children, and that icing had been reported as the probable cause of the crash. Appellant stated that since the crash he has been overwhelmed by feelings of guilt, anxiety, doubt, and sleeplessness.

In a December 22, 2011 report of initial examination, Dr. Bruce S. Herman, an attending clinical psychologist, provided a description of the December 20, 2011 aircraft crash. Appellant reported that he ruminated about the crash which occurred shortly after he handed off responsibility for the aircraft. Dr. Herman diagnosed acute nonspecific reaction to stress and indicated that appellant would be seen in psychotherapeutic sessions to help him recover from the effects of the December 20, 2011 incident. The record contains other reports of Dr. Herman, including a form for authorization for examination and/or treatment (Form CA-16) completed on January 26, 2012. Dr. Herman indicated that appellant could return to his regular work on January 27, 2012.[3]

By letter dated January 19, 2012, an employing establishment official indicated that on December 20, 2011 appellant worked the aircraft in the space of the New York Terminal Radar Approach Control (TRACON) and transferred control of the aircraft to the New York Center. The official stated that, prior to any known issues concerning the aircraft, appellant was relieved by another controller who actually spoke to the New York Center with regard to the aircraft's descent.

[2] Appellant indicated that he advised the pilot about the handoff before he carried it out and the pilot responded that "it would not be a problem."

[3] The record reflects that appellant returned to full duty on January 27, 2012.

By decision dated February 8, 2012, OWCP denied appellant's emotional condition claim because he had not established a compensable employment factor. It noted that on December 20, 2011 the aircraft did not crash while it was under his control and, therefore, he was not in the performance of duty at that time. OWCP stated, "[l]earning that a plane you were controlling crashed after you were no longer responsible for controlling the plane does not involve the performance of your duties."

Appellant requested a hearing with an OWCP hearing representative. During the May 30, 2012 hearing, he testified that he had instructed the aircraft to climb to 14,000 feet, put the pilot on course, and issued him reports of light icing at 14,000 feet and moderate icing at 15,000 to 17,000 feet. Appellant discussed his communications with the pilot and described how he handed off responsibility for the aircraft to the New York Center and then aided the pilot's climb to 17,000 feet.[4] He noted that, several moments after carrying out these actions, he was relieved of his position and went on break. Appellant stated, "I came back from break later on and my supervisor broke the news to me…. He told me there was [*sic*] definite fatalities and they crashed on Route 287." He indicated that he later learned that the aircraft climbed to 18,000 feet and then "dropped straight out of the sky."

In a June 26, 2012 statement, Peter Goodwin, operations manager of the New York TRACON, stated that appellant was on break and was not working the radar position at the time of the aircraft accident on December 20, 2011. He noted that, although appellant did work the aircraft prior to the incident, he had already transferred the aircraft to a radar controller at the New York Center prior to the crash. Mr. Goodwin stated that the New York Center was actually working the aircraft at the time of the accident and that another air traffic controller at the New York TRACON, Tanya Soni, was working the radar position that appellant had left. Appellant transferred communications with the aircraft to the New York Center at 2:58 p.m. and 23 seconds and the pilot acknowledged this transfer 5 seconds later. Mr. Goodwin indicated that, shortly thereafter, appellant transferred responsibility for the radar position to the second radar controller and he went on break. Ms. Soni then began communications with the other aircraft in the airspace. She was working the radar position when the New York Center called to ask about the aircraft. Ms. Soni observed the radar scope as the aircraft descended during the time appellant was on break and the accident occurred at approximately 3:05 p.m.

In a June 26, 2012 letter, appellant's representative at the time argued that he had established a compensable work factor because he was on duty at the time that he learned of the aircraft crash on December 20, 2011. In a letter dated June 29, 2012, the employing establishment official stated that appellant was not working the aircraft at the time the December 20, 2011 accident occurred and asserted that, therefore, he did not sustain an injury in the performance of duty.

In an August 8, 2012 decision, the hearing representative affirmed its February 8, 2012 decision on the basis that, although appellant was performing duties related to the aircraft shortly before the accident occurred, he was performing those duties and was not present at the time of the crash, did not witness the crash, and was only told of the crash after it occurred.

[4] Appellant indicated that the New York Center was responsible for the airspace above 17,000 feet.

In a May 17, 2013 letter, appellant requested reconsideration of his claim and argued that coverage of his claimed injury was supported by the Board case of *A.C.*[5] in which the claimant was working on a radar and became aware of a potential conflict with two aircraft converging on the radar.

By decision dated August 19, 2013, OWCP denied modification of its August 8, 2012 decision, noting that the evidence of record showed that appellant was not in the performance of duty on December 20, 2011. It noted that the facts of *A.C.* could be distinguished from the facts of appellant's case and stated:

> "You were not responsible for monitoring the radar, you were not in the control room, you did not witness the crash, and you were not even aware of the crash when it occurred. You were only told of the crash after the fact. When you were relieved of the responsibility of guiding the planes that crashed, there were no known issues."

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

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*,[8] the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[9] When an employee experiences emotional stress in carrying out his or her 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

[5] Docket No. 12-1050 (issued December 28, 2012).

[6] *J.B.*, Docket No. 14-993 (issued January 27, 2015).

[7] *R.C.*, Docket No. 14-1964 (issued January 22, 2015).

[8] 28 ECAB 125 (1976).

[9] *Robert W. Johns*, 51 ECAB 137 (1999).

results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[10] In contrast, disability is not covered when it results from such factors as an employee's frustration in not being permitted to work in a particular environment or to hold a particular position.[11]

Congress, in providing for a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness, or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of any employee/employer relation.[12] FECA provides for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty; the term in the performance of duty has been interpreted to be the equivalent of the commonly found prerequisite in workers compensation law, arising out of and in the course of employment.[13] In addressing this issue, the Board has stated:

In the compensation field, to arise out of and in the course of employment, in general, an injury must occur --

> (1) at a time when the employee may reasonably be said to be engaged in his employer's business;
>
> (2) at a place where he may reasonably be expected to be in connection with the employment;
>
> (3) while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[14]

This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury arising out of the employment must be shown and this encompasses not only the work setting but also a causal concept, the requirement being that the employment caused the injury. In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[15]

[10] *See supra* note 8.

[11] *S.B.*, Docket No. 14-1423 (issued November 21, 2014).

[12] *Christine Lawrence*, 36 ECAB 422 (1985).

[13] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[14] *S.L.*, Docket No. 14-1591 (issued December 24, 2014).

[15] *C.M.*, Docket No. 14-116 (issued July 2, 2014).

ANALYSIS

The Board finds that appellant's claimed traumatic injury on December 20, 2011 did not occur in the performance of duty. Appellant alleged that he developed an emotional condition following the crash of an aircraft he had directed and handed off to another control tower. On December 20, 2011 he was not responsible, as part of his job duties, for monitoring the airplane at the time of the crash. Appellant did not witness the airplane crash as he was on break at the time and he only learned of the crash after the fact. At the time, he was relieved of responsibility for monitoring the airplane, he had no outstanding responsibilities with respect to the airplane. While he earlier had responsibility for the airplane, appellant was not carrying out any work duties with respect to the airplane at the time of the crash on December 20, 2011.

The facts of this case are similar to but distinguishable from *M.L.*,[16] in which an air traffic controller alleged that he sustained an emotional condition when an aircraft, over which he had relinquished control to another airport, crashed. In *M.L.*, the employee was on duty, was monitoring the radar screens, and observed airplane squawking and emergency code activity on the radar screen regarding the plane over which he had just relinquished control. He called the other airport to question what he just saw. Following the incident, appellant was required to complete paperwork. The Board found that, although he had relinquished control, he was actively involved in trying to locate the distressed airplane and offering assistance to the other airport. The employee's emotional condition was found to be a reaction to regular or specially assigned duties. The Board noted that it was not a situation where the employee was simply standing near the radar and witnessed a stressful incident. In the present case, unlike in *M.L.*, appellant had no further contact with the plane, did not witness any activity on the radar screen regarding the distress of the aircraft prior to its crash, and was on break at the time of the crash. The Board finds that this case is distinguishable from *M.L.*

The facts in this current case are also distinguished from *A.C.*,[17] in which the claimant was working on radar and became aware of a potential conflict with two aircraft converging on radar. The employee took action to separate them. The Board noted the potential for a collision based on the speed and direction of two planes and the employee's responsibility for monitoring live aircraft traffic on radar. The employing establishment later informed the claimant in a disciplinary letter that it was his obligation to take action even if the ultimate responsibility for such action was with another radar center. The Board found that the claimant was performing his regular duties under *Cutler*[18] when the potential collision arose. The incident arose in the performance of duty and was a compensable employment factor. In the present case, there is no evidence of record that appellant had responsibility to take any action regarding the plane that subsequently crashed while attempting to land. There is no evidence that he was in contact with the other tower or the pilot or that his duties required him to assist.

[16] Docket No. 12-354 (issued February 26, 2013).

[17] *See supra* note 5.

[18] *See supra* note 8.

In *L.G.*,[19] an employee, as in the instant case, had no operational responsibilities for the aircraft involved in a potential crash situation. He was present in the control room, but was not operating the radar or responsible for the operation of the radar at the time of the incident involving two aircraft. The Board held that the incident was not in the performance of duty or a compensable factor of employment. As noted, appellant had no operational responsibilities for the aircraft and was not the responsible air traffic controller at the time of the crash. While he learned of the crash during his shift on December 20, 2011, this knowledge was reported to him by his supervisor after the fact and the nexus to performance of duty was not present. The Board found that, as in the case before the Board, the incident did not arise out of his assigned duties and his emotional reaction was not in the performance of duty.

The facts of the present case are also similar to those of *M.P.*,[20] in which the Board did not find a compensable factor in the performance of duty. The employee cleared a departing aircraft out of Fort Pierce Airport, climbed the aircraft to the requested altitude, and turned the plane on course. She handed the aircraft off to Orlando Approach Control. The airplane then crashed killing all three persons on board. The employee's supervisor informed the employee of the crash during her shift on the date of the crash and she continued working until the end of her shift. Several days later, the employee completed an official statement regarding the aircraft that crashed and learned additional details about the persons involved in the crash. In the present case, appellant also handed the aircraft off to another responsible party prior to the crash. He, like the employee in *M.P.,* was not handling the aircraft at the time of the crash and was not in the performance of duty at that time.

The Solicitor of the Department of Labor submitted a May 23, 2014 memorandum in justification of OWCP's August 19, 2013 decision. The Solicitor argued that the December 20, 2011 accident did not constitute a work factor because appellant had handed off responsibility for the aircraft that crashed and was not on duty at the time of the accident. The Board notes that the Solicitor properly characterized the relevant precedent and applied it to the facts and circumstances of the present case.

For these reasons, appellant did not meet his burden of proof to establish an injury in the performance of duty on December 20, 2011.[21] He may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[19] Docket No. 09-276 (issued August 11, 2009).

[20] Docket No. 14-1172 (issued October 14, 2014).

[21] The Board notes that 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 CA-16 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. *See Tracy P. Spillane*, 54 ECAB 608 (2003). 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. *See* 20 C.F.R. § 10.300(c). The record is silent as to whether OWCP fulfilled its obligation to pay for the cost of appellant's examination or treatment for the period noted on the form.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an emotional condition in the performance of duty on December 20, 2011.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board