

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

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S.M., Appellant )

and )

DEPARTMENT OF TRANSPORTATION, )  
FEDERAL AVIATION ADMINISTRATION, )  
Santa Rosa, CA, Employer )

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**Docket No. 16-0990  
Issued: February 8, 2017**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 8, 2016 appellant filed a timely appeal from a March 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 was disabled from October 20, 2010 through June 26, 2015 causally related to his accepted employment injury.

**FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated May 16, 2013, the Board set aside a November 14, 2012 nonmerit decision which had denied appellant's request for

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

reconsideration under 5 U.S.C. § 8128.<sup>2</sup> The Board found that appellant had raised a new legal argument and submitted relevant, pertinent and new evidence and thus remanded the case for OWCP to conduct a merit review.

On appeal for the second time, in a decision dated April 23, 2014, the Board set aside OWCP's October 3, 2013 decision denying appellant's emotional condition claim as he had not established a hostile work environment.<sup>3</sup> The Board found that appellant established compensable work factors. The factors were the performance of his work duties as a manager, including negotiating with union representatives and making daily managerial decisions. The case was remanded for OWCP to analyze the medical evidenced to determine whether appellant sustained an emotional condition due to the compensable employment factors identified in the remand decision. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.

In a report dated February 15, 2011, Dr. Donald T. Apostle, a Board-certified psychiatrist, diagnosed "an adjustment reaction with anxiety and depression secondary to [appellant's] work situation." He advised that the condition started in 2010 and that he was currently and permanently "unable to function as a frontline manager..."

On March 3, 2011 Dr. Apostle related that he had initially evaluated appellant on February 10, 2011 for "complaints of problems with both labor and management" in his work as a front line manager. He diagnosed situational adjustment disorder with anxiety and depression as a result of his employment.

Dr. Apostle, in a report dated February 23, 2012, found that appellant had anxiety and depression due to his work as an air traffic controller and interpersonal relationships difficulties "on the job." He opined that he was disabled from work as an air traffic controller but could perform administrative employment.

On July 16, 2012 Dr. Apostle diagnosed situational adjustment disorder with anxiety and depression. He reviewed the work factors to which appellant attributed his condition. Dr. Apostle noted in his work as a manager he had "two especially disruptive employees," and that J.P. "made an allegation of psychological rape" against him. Appellant continued to work with J.P. Dr. Apostle related, "When his physician put him on Lexapro for stress, he was medically disqualified and unable to return to work. [Appellant] asked for administrative work but was told by the district manager that none was available." Dr. Apostle related that appellant was disabled for work as an air traffic controller, but could work in an administrative position. In a July 21, 2012 work capacity evaluation (Form OWCP-5c), he advised that appellant was disabled for work as an air traffic controller.

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<sup>2</sup> Docket No. 13-400 (issued May 16, 2013). On March 11, 2011 appellant, then a 48-year-old supervisory air traffic control specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained stress causally related to factors of his federal employment.

<sup>3</sup> Docket No. 14-0224 (issued April 23, 2014).

OWCP prepared a statement of accepted facts on September 24, 2014, accepting as compensable that appellant worked beginning in March 2008 in a location that handled hundreds of grievances under a national collective bargaining agreement and that he had a difficult relationship with two union representatives with whom he had to negotiate.<sup>4</sup> One of the union representatives told appellant that he made her feel like she was being raped.

In a report received December 15, 2014, Dr. Sara Epstein, Board-certified in psychiatry and psychosomatic medicine, reviewed the September 24, 2014 statement of accepted facts and the Board's April 23, 2014 decision. She related that J.P. used "hyperbole and metaphor, which were unfortunately taken quite literally by the department on up the ranks, resulting in investigations, expense, and trauma for all concerned." Dr. Epstein discussed J.P.'s contention that she felt that appellant and another manger had raped her and advised that it was "ultimately determined that none of the rape/beating-up allegations merited a security investigation-but not before much furor, effort, and time were spent on these catastrophizations." She diagnosed major depression and post-traumatic stress disorder (PTSD) due to appellant's conflicts with J.P. and found that he was unable to work in air traffic control.

Counsel, in a December 22, 2014 letter, maintained that Dr. Epstein's report, as bolstered by the February 23 and July 16, 2012 reports from Dr. Apostle, established that appellant was disabled as a result of his employment-related emotional condition.

OWCP referred appellant on January 14, 2015 to Dr. Sam Michael Sasser, a Board-certified psychiatrist, for a second opinion examination. It requested that the physician address whether he sustained a diagnosed condition due to the compensable work factors and, if so, whether he had any residuals of the emotional condition or required any medical treatment.

In a report dated February 4, 2015, Dr. Sasser discussed appellant's work history and reviewed the September 24, 2014 statement of accepted facts. He noted that appellant took Lexapro for anxiety in 2011 and 2012 and retired in July 2012. On examination Dr. Sasser found that appellant was not in any emotional or physical distress other than experiencing an increase in anxiety due to the examination. He diagnosed an employment-related adjustment disorder with anxiety that had resolved. Dr. Sasser opined that conflicts with union officials together with noncompensable work factors caused a "reactive emotional state that was treated by [appellant's] physician with the medicine that excluded him from being able to participate in his job duties. That emotional state is no longer present." He found that appellant had no current disability. In a February 6, 2015 work capacity evaluation, Dr. Sasser advised that he could return to his usual employment.

Dr. Epstein, in a March 22, 2015 supplemental report, diagnosed major depression and PTSD as a result of appellant's "contentious relationship with his subordinate employees without any other intervening causation." She opined, "[Appellant] continues to be disabled as a direct result of the harm inflicted by his contentious relationship with subordinate employees. There are no nonindustrial factors of causation."

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<sup>4</sup> In a letter dated October 31, 2014, counsel contended that the statement of accepted facts should include additional compensable work factors.

By decision dated June 17, 2015, OWCP accepted that appellant sustained adjustment disorder with mixed anxiety and depressed mood that had resolved. It further found that Dr. Sasser's February 4, 2015 report represented the weight of the evidence and established that he had no residuals of his condition. Therefore, OWCP terminated entitlement to all wage-loss compensation and medical benefits.<sup>5</sup>

Appellant, on July 14, 2015, filed a claim for compensation (Form CA-7) for leave without pay and a leave buy back for intermittent disability from December 20, 2010 to August 1, 2012 and for a loss of pay from July 14, 2012 to June 26, 2015. In an accompanying letter, the employing establishment related that he voluntarily retired on July 31, 2012 and received administrative leave from May 21 to July 18, 2012. It did not provide leave buy back for retired employees.

OWCP, by letter dated July 15, 2015, requested that appellant clarify whether he had worked during the period claimed and provide contemporaneous medical evidence supporting that he was unable to work.

Appellant's counsel, in a July 28, 2015 response, noted that he was claiming compensation beginning December 20, 2010, prior to the date he began receiving retirement benefits.<sup>6</sup>

In a decision dated September 3, 2015, OWCP denied appellant's claim for disability compensation from October 20, 2010 through June 26, 2015. It found that he had failed to submit medical evidence in support of his claim for disability compensation.

In a report dated January 13, 2016, Dr. Epstein reviewed the compensable work factors from the statement of accepted facts and described in detail the work duties to which appellant attributed his condition, particularly his contentious relationship with J.P. She diagnosed major depression and PTSD and found that the conditions resulted from conflict in the workplace with J.P. Dr. Epstein determined that appellant should not work as an air traffic controller as he was afraid of employees "losing focus on the main job of protecting passengers." She noted that OWCP had denied appellant's claim for wage-loss compensation from October 20, 2010 to June 26, 2015. Dr. Epstein indicated that Dr. Sasser had not addressed the period of disability. She related, "It is my professional medical opinion that [appellant] was totally disabled, at least, during the period from October 20, 2010 through June 26, 2015. Thus, he should be paid benefits at least through the date of his retirement on July 31, 2012."

Counsel, on January 19, 2016, requested reconsideration of the September 3, 2015 decision. He contended that the report from Dr. Epstein was sufficient to establish disability.

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<sup>5</sup> Appellant, through counsel, appealed the June 17, 2015 decision to the Board. By decision dated August 17, 2016, the Board affirmed the June 17, 2015 decision terminating appellant's entitlement to compensation and medical benefits. Docket No. 15-1644 (issued August 17, 2016). Appellant was not paid compensation for total disability for any period.

<sup>6</sup> On December 23, 2015 OWCP received a time analysis form indicating the dates that appellant worked or used leave beginning December 20, 2010.

By decision dated March 21, 2016, OWCP denied modification of its September 3, 2015 decision. It found that Dr. Epstein had based her opinion that he was disabled on some events that were not factually established, and that she had not examined him contemporaneously with the claimed period of disability. OWCP further found that Dr. Apostle had not referenced a compensable work factor when finding appellant disabled.

On appeal appellant argues that OWCP erred in accepting his claim without paying disability. He further questions why OWCP found numerous incidents with subordinate employees did not occur as alleged even though many were not controverted by the employing establishment. Appellant contends that the second opinion examination was based on a misleading statement of accepted facts. He indicates that he is claiming disability only from December 20, 2010 through June 17, 2015 and not any period on which he was placed on administrative leave. Appellant maintains that OWCP has the burden of proof to terminate disability after accepting a claim and failed to appropriately develop the medical evidence.

### **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 evidence.<sup>7</sup> For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.<sup>8</sup> Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>9</sup>

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>10</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>11</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>12</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

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<sup>7</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986)

<sup>8</sup> See *Amelia S. Jefferson*, *id.*

<sup>9</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>10</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>11</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>12</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>13</sup>

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.<sup>14</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>15</sup> Additionally, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.<sup>16</sup>

### ANALYSIS

The Board, in a decision dated April 23, 2014, found that appellant had established compensable work factors the performance of his work duties as a manager including negotiating with union representatives and making daily managerial decisions. More specifically that handled hundreds of grievances under a national collective bargaining unit, and had different relationship with two union representatives, one of whom (J.P.) had alleged that appellant made her feel like she was being raped. The Board remanded the case for OWCP to further develop the medical evidence and determine whether he sustained a diagnosed condition as a result of the accepted employment factors.

OWCP, on remand, referred appellant to Dr. Sasser for a second opinion examination. Based on Dr. Sasser's February 4, 2015 report, it accepted appellant's claim on June 17, 2015 for resolved adjustment disorder with mixed anxiety and depressed mood. OWCP then, based on Dr. Sasser's opinion that all residuals of the accepted condition had resolved, terminated entitlement to all wage-loss compensation and medical benefits.

On July 14, 2015 appellant filed a claim for wage-loss compensation from December 20, 2010 to August 1, 2012 and for loss of pay from July 14, 2012 to June 26, 2015.

The Board finds that the case is not in posture for decision. OWCP requested that Dr. Sasser evaluate whether appellant's condition was due to his work injury and whether it had resolved but not whether he had any specific period of disability. Consequently, the physician's opinion does not directly address the issue of disability. Dr. Sasser did find, however, that in 2011 and 2012 appellant took medication due to stress in his work environment that prevented him from working in his usual position.

In support of his claim, appellant submitted reports from Dr. Apostle and Dr. Epstein. On February 15, 2011 Dr. Apostle diagnosed an adjustment reaction and depression due to his employment and found that he was disabled from his job as a manager. In a report dated

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<sup>13</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>14</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>15</sup> 20 C.F.R. § 10.121.

<sup>16</sup> *Melvin James*, 55 ECAB 406 (2004).

March 3, 2011, he noted that appellant had problems with labor and management while performing his managerial duties. Dr. Apostle diagnosed an adjustment disorder with anxiety and depression. On February 23, 2012 he advised that appellant was disabled from work as an air traffic controller, but could perform administrative duties. In a report dated July 16, 2012, Dr. Apostle discussed the allegation of psychological rape made by J.P. and his difficulty working with her and another employee. He noted that appellant could not work while taking Lexapro to treat his stress-related condition. In a July 21, 2012 work capacity evaluation, Dr. Apostle opined that he was disabled from work as an air traffic controller.

Dr. Epstein, in a report received December 15, 2014, discussed the September 24, 2014 statement of accepted facts, including J.P.'s allegation that she felt that appellant had raped her and the fact that management took her exaggerated statement "quite literally." She diagnosed major depression and PTSD due to his conflicts with J.P. and found that he was unable to work in air traffic control. On March 22, 2015 Dr. Epstein diagnosed major depression and PTSD due to appellant's difficult relationships with his subordinate employees. She found that he was totally disabled.

In a report dated January 13, 2016, Dr. Epstein again reviewed the compensable work factors from the statement of accepted facts as well as appellant's description of work events. She diagnosed major depression and PTSD due to his conflict in the workplace with J.P.. Dr. Epstein advised that appellant was totally disabled from October 20, 2010 through June 26, 2015.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>17</sup> Appellant submitted reports from Dr. Apostle and Dr. Epstein diagnosing a stress-related condition due, at least in part, to his interactions with J.P. and her allegation of psychological rape, a compensable work factor. Their reports are supportive and based on a firm diagnosis and an accurate work history.<sup>18</sup> Additionally, as noted, the report from Dr. Sasser, while not obtained specifically to address appellant's allegation of disability, opines that appellant suggested that he did sustain a period of disability. Once OWCP undertakes to further develop the medical evidence, it has the responsibility to do so in a proper manner.<sup>19</sup> Accordingly, the Board will remand the case to OWCP. On remand it should further develop the medical evidence to determine whether appellant sustained a period of disability as a result of his employment injury. Following this and such further development as OWCP deems necessary, it shall issue an appropriate decision.

On appeal appellant questions why OWCP found many allegations not compensable when they were not controverted by the employing establishment. In its September 24, 2014 statement of accepted facts, OWCP acknowledged as a compensable factor dealing with

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<sup>17</sup> A.A., 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>18</sup> *Id.*

<sup>19</sup> See *Melvin James*, *supra* note 16.

contentious union officials and handling many grievances. It further noted as a compensable factor that one of the officials, J.P., told appellant that he made her feel raped. OWCP complied with the Board's instructions to find appellant's daily work duties as a manager and negotiating with union representatives compensable work factors. Despite the fact that other alleged factors were uncontroverted, the Board found the evidence insufficient to establish any other factors.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 21, 2016 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: February 8, 2017  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board