

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

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<b>L.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1020</b>
	)	<b>Issued: July 10, 2018</b>
<b>DEPARTMENT OF TRANSPORTATION,</b>	)	
<b>FEDERAL AVIATION ADMINISTRATION,</b>	)	
<b>Olathe, KS, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 10, 2017 appellant filed a timely appeal from a November 3, 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 the case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish an emotional condition causally related to work factors occurring on April 29, 2010.

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

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On May 5, 2010 appellant, then a 46-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that, on April 29, 2010, she sustained post-traumatic stress disorder (PTSD) as a result of harassment and intimidation in the course of her federal employment. She stopped work on April 29, 2010.

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 and June 24, 2010 Dr. Gruenebaum diagnosed PTSD as a result of intimidation in the workplace.<sup>2</sup>

By decision dated August 12, 2010, OWCP denied appellant's emotional condition claim. It adjudicated her claim as an occupational disease claim and found that she had not established any compensable employment factors. OWCP reviewed appellant's allegation that, on April 29, 2010, a coworker wrongly accused her of deviating aircraft into his sector in retaliation for her allegation of harassment. It determined that she had not established that the April 29, 2010 incident occurred as alleged.

On August 18, 2010 appellant requested an oral hearing before an OWCP hearing representative. During the December 15, 2010 telephone hearing, her representative advised that she was claiming a traumatic injury on April 29, 2010, noting that, on that date, a coworker accused her of an operational error while she was performing her work duties. The representative explained that an operational error occurred when an air traffic controller failed to adhere to federal regulations designed to prevent encroachment by an aircraft on another aircraft's airspace. The employing establishment investigated the incident and found that appellant did not commit an error. The representative asserted that appellant's resulting stress was compensable as it occurred as part of her regular work duties. During the hearing, appellant related that on April 29, 2010 she was acting as a training instructor when another controller accused her of deviating aircraft into his airspace. She started shaking and became nauseous. G.S., the acting air traffic manager at the employing establishment, related at the hearing that he spoke with appellant on April 29, 2010 and advised her to file a traumatic injury claim. He indicated that he was not controverting or disagreeing with the claim in any way.

On October 21, 2010 Dr. Gruenebaum discussed appellant's filing of a complaint of harassment against four male coworkers on April 27, 2010. Two days later one of the men "reported to management that [appellant] had deviated [into] his work sector with an aircraft. Immediately, following the individual reporting the incident, [appellant] suffered an acute anxiety attack...." Dr. Gruenebaum found that appellant was afraid that the men had "crossed the line

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<sup>2</sup> 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.

from intimidation to a dangerous activity, that of using actual aircraft with live persons on board to prove a point to her. [Appellant] noted that her fear is directly related to the safety of flying passengers.” He diagnosed PTSD due to the April 29, 2010 work incident.

On December 20, 2010 Dr. Debra F. Johnson, a clinical psychologist, reviewed appellant’s statement regarding the events of April 29, 2010. She related:

“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 complaints filed by [appellant]. The complaint addressed increasingly provocative workplace harassment by the four men.”

Dr. Johnson diagnosed PTSD and opined that appellant sustained a psychiatric diagnosis due to the “life-threatening dangerousness of the behavior in the incident on April 29, 2010....”

By decision dated February 7, 2011, OWCP’s hearing representative affirmed the August 12, 2010 decision as modified to show that appellant had established as a compensable work factor that on April 29, 2010 she was performing her specially assigned work duties as a training instructor when she experienced stress working at her sector. She found that appellant’s removal from her duties due to the accusation of an operational error was not compensable as it was an administrative error and also determined that appellant had not established that the April 29, 2010 incident occurred as a result of harassment or retaliation. Further, the hearing representative determined that appellant failed to submit sufficient medical evidence to establish that she sustained an emotional condition causally related to factors of her federal employment.

On December 20, 2011 appellant requested reconsideration. She attributed her stress to the April 29, 2010 employment incident.

In an affidavit dated December 14, 2011, N.T., an air traffic controller and workers’ compensation representative for appellant’s union, related that he spoke with G.S. on August 24, 2010 regarding the April 29, 2010 incident. G.S. did not dispute the validity of appellant’s claim.

In an affidavit dated December 14, 2011, S.B., an air traffic controller, related that G.S. agreed at a meeting on April 29, 2010 that the coworker’s allegation that appellant committed an operational error seemed to be retaliation. In an August 24, 2010 meeting, G.S. indicated that he “was in no way controverting [appellant’s] claim for OWCP benefits....”

OWCP, by decision dated January 25, 2012, denied appellant's request for reconsideration, finding that the evidence submitted was irrelevant and thus insufficient to warrant reopening of her case for further merit review.<sup>3</sup>

Appellant appealed to the Board. By decision dated June 25, 2013, the Board set aside the January 25, 2012 nonmerit decision denying her request for reconsideration under 5 U.S.C. § 8128(a).<sup>4</sup> The Board found that appellant provided statements 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 determined that she had submitted sufficient evidence to warrant reopening her case under section 8128 and remanded the case to OWCP.

On July 17, 2013 OWCP requested that the employing establishment review the statements submitted by appellant and address their accuracy.

By 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 G.S. told N.T. and S.B. that the coworker acted in a retaliatory way on April 29, 2010. OWCP thus accepted appellant's allegation as factual and found that she had established as a compensable work factor that a coworker harassed and retaliated against her by publically alleging that she was involved in an operational error. However, it denied the claim, finding that the medical evidence of record was insufficient to establish causal relationship between the April 29, 2010 work factor and a diagnosed emotional condition.

Appellant subsequently appealed to the Board. By decision dated September 3, 2014, the Board set aside the September 16, 2013 OWCP decision.<sup>5</sup> The Board found that the opinions of Dr. Gruenebaum and Dr. Johnson were sufficient to warrant further development of the evidence to determine whether she developed an emotional condition due to the compensable work factors. The Board noted that OWCP had accepted as compensable that appellant experienced stress while performing her regular work duties and harassment and retaliation on April 29, 2010 when a coworker accused her of an operational error. The Board found that OWCP failed to prepare a statement of accepted facts (SOAF) setting forth the accepted employment factors. The Board further noted that OWCP determined that appellant had not established that the coworker's actions were life threatening to the passengers on an aircraft. The Board determined, however, that 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 and involved the passengers on the aircraft being routed through the airspace. The Board remanded the case for OWCP to prepare a SOAF and refer appellant for a second opinion examination.

OWCP prepared a SOAF indicating that it had accepted as a compensable work factor that a coworker harassed appellant on April 29, 2010 by telling a supervisor and other controllers that

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<sup>3</sup> OWCP referenced a May 13, 2010 employing establishment finding that there was insufficient evidence to establish that appellant was harassed or discriminated against. However, that finding pertains to events preceding April 29, 2010.

<sup>4</sup> Docket No. 12-1617 (issued June 25, 2013).

<sup>5</sup> Docket No. 14-0911 (issued September 3, 2014).

she had committed an operation error by instructing a trainee to deviate into his airspace.<sup>6</sup> It referred her to Dr. William S. Logan, a Board-certified psychiatrist, for a second opinion examination.

In a report dated May 6, 2015, Dr. Logan reviewed the SOAF. He noted that appellant related that when a coworker announced that she had made an operational error, “[appellant’s] major concern was that aircraft would be too close, causing the potential for numerous collisions and loss of passenger lives.” Appellant had symptoms of panic and broke out in hives after the incident. Dr. Logan diagnosed PTSD. Regarding the diagnosis, he related:

“[The coworker’s] announcement that [appellant] had made an operational error would not seem to qualify alone as there was no threat of death or serious injury to [her] personally. [Appellant’s] perception, however, was that [the coworker] diverted numerous aircraft into her sector unannounced. This would qualify as there was the threat of serious injury or death to passengers which were her responsibility. Whether this event described above occurred or did not occur is not addressed in the SOAF. Nonetheless, it was [appellant’s] perception and belief. If this occurred, either due to the fact that the event actually happened, or in a statement of anxiety [she] misperceived this to be occurring, it is my opinion that the threshold criteria for PTSD was met.”

Dr. Logan further advised that appellant’s symptoms met the remaining criteria for PTSD. He noted that she did not have PTSD until the coworker “not only suggested [appellant] committed an error, but also diverted planes to her sector in an unauthorized manner creating a situation of danger which [she] responded to alleviate with the help of others.” Dr. Logan concluded that appellant experienced stress, acute anxiety, and PTSD on April 29, 2010 when the coworker accused her of an error while she was performing her employment duties and “escalated the situation in a manner that directly involved passengers on an aircraft being routed through the airspace.” He found that appellant was currently able to perform her usual employment duties.

By decision dated June 30, 2015, OWCP denied appellant’s emotional condition claim, finding that she had not established that she sustained a diagnosed condition causally related to the accepted work factor. It determined that Dr. Logan’s report represented the weight of the evidence and established that she did not establish PTSD due to the accepted work factor.

On June 7, 2016 appellant requested reconsideration.<sup>7</sup> By decision dated November 3, 2016, OWCP denied modification of its June 30, 2015 decision.

On appeal appellant contends that OWCP did not provide Dr. Logan with a complete SOAF setting forth the compensable work factors. She notes that she did not know whether she

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<sup>6</sup> On April 2, 2015 the employing establishment advised that appellant had stopped work on April 29, 2010 and returned to her usual employment on September 16, 2010.

<sup>7</sup> Appellant resubmitted a statement dated October 14, 2014.

had committed an operational error until a day after April 29, 2010. Appellant asserts that Dr. Logan's report supported that she had employment-related PTSD.

### **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 her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>12</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>13</sup> must be one of reasonable medical certainty<sup>14</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>15</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation,

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<sup>8</sup> *Supra* note 1. *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>9</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> *John J. Montoya*, 54 ECAB 306 (2003).

<sup>13</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

OWCP shares responsibility to see that justice is done.<sup>16</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>17</sup> Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.<sup>18</sup>

When OWCP's medical adviser, a second opinion specialist, or a referee physician renders a medical opinion based on an incomplete or inaccurate SOAF or that does not use the SOAF as the framework in forming the opinion, the probative value of the opinion is diminished or negated altogether.<sup>19</sup> OWCP procedures specify that in emotional condition claims, the SOAF is particularly important since the physician's opinion on causal relationship must be based on an accurate identification of the implicated work factors.<sup>20</sup>

### ANALYSIS

On prior appeal, the Board had remanded the case for OWCP to prepare a SOAF setting forth the compensable work factors and further develop the medical evidence. The Board noted that OWCP had accepted as compensable work factors that appellant experienced stress on April 29, 2010 performing her work duties and that a coworker harassed and retaliated against her on that date by publically accusing her of making an operational error. The Board further found that while she had not established that the coworker's actions threatened the lives of passengers, his making such an accusation while she was performing her work duties of routing air traffic and in front of other air traffic controllers intensified the situation and involved the passengers being routed through the controlled air space. The Board noted that OWCP found that the opinions of Dr. Gruenebaum and Dr. Johnson were insufficient to meet appellant's burden of proof as the physicians found that the coworker endangered passengers on April 29, 2010 rather than the compensable work factors. The Board determined that the physicians' finding that she sustained PTSD supportive of her claim and sufficient to warrant further development of the medical evidence.

On remand OWCP referred appellant to Dr. Logan for a second opinion examination and provided him with a SOAF indicating that it had accepted as compensable that a coworker harassed her on April 29, 2010 by telling her supervisor and coworkers that she had instructed a trainee to deviate into his airspace. It did not include as compensable employment factors that she experienced stress on that date in the performance of her regularly assigned duties and because the coworker escalated the situation in a manner that involved passengers on the controlled airspace.

On May 6, 2015 Dr. Logan reviewed the SOAF and diagnosed PTSD. He noted that appellant experienced fear that she had routed aircraft too close together, potentially jeopardizing

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<sup>16</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>17</sup> 20 C.F.R. § 10.121.

<sup>18</sup> *See Melvin James*, 55 ECAB 406 (2004).

<sup>19</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); A.R., Docket No. 11-0692 (issued November 18, 2011).

<sup>20</sup> *Id.* at Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.2(d)(3) (September 2009).

lives, when her coworker accused her of an operational error. Appellant had symptoms of panic and hives. Dr. Logan related that her perception that a coworker had diverted aircraft into her sector would constitute the threat of serious harm required to support a PTSD diagnosis. He advised that whether the event occurred or not was not set forth in the SOAF, but that regardless of appellant believed that it had happened. Dr. Logan attributed the PTSD to being accused of an operational error on April 29, 2010 while performing her work duties, noting that she feared passengers had been routed into her airspace.

OWCP denied the claim, finding that the evidence of record was insufficient to establish that appellant's coworker actually diverted aircraft into her airspace. Dr. Logan, however, noted that the event may not have occurred, but that it was her perception of passenger endangerment during the incident that warranted the diagnosis of PTSD. The SOAF provided to Dr. Logan did not provide that appellant's perception of passenger endangerment constituted a compensable work factor, and thus his opinion is outside the SOAF as provided to him by OWCP. The only factor outlined in the SOAF is that a coworker alleged that, while training a new controller, she sent planes into his sector.

As noted, to assure that the report of a medical specialist is based upon a proper factual background, OWCP provides a SOAF. When a second opinion physician does not use the SOAF as the framework in forming his opinion, the probative value of the opinion is diminished or negated altogether.<sup>21</sup> To the extent that Dr. Logan's opinion is outside the framework of the SOAF, it is based on an inaccurate history and thus of diminished probative value.<sup>22</sup>

Additionally, as discussed, OWCP did not include all the compensable factors of employment in the SOAF as it did not set forth that she sustained stress in the performance of her work duties on that date or that the coworker's accusation escalated the situation in such a way that involved the passengers in the controlled airspace. When a second opinion specialist renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is diminished or negated altogether.<sup>23</sup> OWCP did not provide Dr. Logan with a comprehensive SOAF including all the compensable work factors; therefore, his report is not based on an accurate factual framework and cannot represent the weight of the medical evidence.<sup>24</sup>

Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>25</sup> Accordingly, the Board finds that the case must be remanded to OWCP. On remand OWCP should prepare a complete and accurate SOAF and request that Dr. Logan submit a clarifying report regarding whether appellant sustained

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<sup>21</sup> See *M.B.*, Docket No. 14-1689 (issued July 2, 2015).

<sup>22</sup> See *V.H.*, Docket No. 17-0439 (issued December 13, 2017); *A.A.*, Docket No. 15-0937 (issued August 17, 2015).

<sup>23</sup> See *supra* note 19.

<sup>24</sup> *Id.*; see also *G.W.*, Docket No. 13-1922 (issued July 29, 2014).

<sup>25</sup> See *R.B.*, Docket No. 14-1043 (issued December 12, 2014); *V.H.*, Docket No. 14-0433 (issued July 3, 2014).



an emotional condition as a result of compensable work factors. Following this and any further development deemed necessary, it shall 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 November 3, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 10, 2018  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board