

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

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<b>T.K., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0150</b>
	)	<b>Issued: July 9, 2020</b>
<b>DEPARTMENT OF TRANSPORTATION,</b>	)	
<b>FEDERAL AVIATION ADMINISTRATION,</b>	)	
<b>Westbury, NY, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 25, 2019 appellant filed a timely appeal from a June 17, 2019 merit decision and an August 9, 2019 nonmerit 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.

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish an emotional condition causally related to the accepted December 2, 2018 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On December 4, 2018 appellant, then a 41-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on December 2, 2018 he sustained severe mental trauma due to observing a loss of separation between two aircrafts while in the performance of duty. He stopped work on that same date.

In a development letter dated December 12, 2018, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary information.

Appellant subsequently submitted a continuation of pay nurse report dated December 20, 2018 from Ruth Shafer, who indicated that he was treated for a stress claim due to an operational error that occurred at work when two planes he was directing had a loss of separation and nearly collided. Ms. Shafer noted that he was having difficulty sleeping and remained off work because of stress and mental trauma.

In response to OWCP's questionnaire, appellant submitted a December 27, 2018 narrative statement in which he recounted that on December 2, 2018 he was controlling several aircraft from the operations floor. He indicated that, at the time of the incident, he worked on three radar positions and was responsible for sequencing and vectoring Newark sector and Teterboro sector arrivals. Appellant explained that he was working on his positions for about an hour when, due to the bad weather, LaGuardia Airport changed its approach in use to one that was not compatible with the approach he was issuing to the Teterboro arrivals. He explained that, due to this sudden change, he began vectoring multiple aircrafts off of the original approach and towards a place where he could hold them. Appellant noticed that two of the aircraft being vectored towards the holding area were in the same altitude at 3,000 feet and instructed both to follow in a safe order. However, the first aircraft, possibly due to strong wind, was having delays in making its turn while the second aircraft made its turn very quickly, which resulted in the two aircraft being on a collision course. Appellant noted that he immediately became overwhelmed with stress and anxiety and was relieved from his duty by the employing establishment.

Appellant further asserted that many controllers had been under more stress at that time due to a staffing shortage and because many were working more positions combined at once. He indicated that the December 2, 2018 employment incident left him feeling very nervous, anxious, distracted, and remorseful because he had allowed two aircraft to get so close to one another. Appellant explained that thinking about the incident or thought of working aircraft made these feelings worse and left him unable to perform his duties as an air traffic controller. He indicated that he had a prior similar emotional condition that was also caused by the loss of separation between two aircraft. Appellant reported that he had no hospitalization prior to the incident and no other sources of stress outside of his employment.

By decision dated January 19, 2019, OWCP denied appellant's claim. It found that, while he had established that the employment incident occurred as alleged, the evidence of record was insufficient to establish a medical diagnosis in connection with the accepted incident. Thus,

OWCP concluded that the requirements had not been met to establish an emotional injury as defined by FECA.

OWCP continued to receive evidence. In a December 7, 2018 narrative report, Dr. Bruce S. Herman, an attending clinical psychologist, detailed appellant's description of the accepted December 2, 2018 employment incident. On examination, he found signs of depression, anxiety, and preoccupation with the incident. Dr. Herman observed that appellant was experiencing many of the symptoms characteristic of individuals who had been exposed to or involved in a traumatic incident or event. He also reported that appellant scored an 88 on the modified post-traumatic stress disorder symptoms scale and a 24 on the Beck Depression Inventory, which indicated that appellant was currently experiencing a significant clinical depression. Dr. Herman indicated that appellant reported recurrent and intrusive distressing thoughts about the December 2, 2018 employment incident that included nightmares, flashbacks, and becoming emotionally upset when reminded of the incident. He diagnosed acute stress disorder and noted that appellant had difficulty sleeping, constantly blamed himself for his faults, and was negative about his current situation. Dr. Herman opined that, as a direct result of the accepted December 2, 2018 employment incident, appellant was unable to return to functioning as an air traffic controller and should be granted leave along with psychotherapeutic sessions to help appellant recover from the incident.

The employing establishment properly executed an authorization for examination and/or treatment form (Form CA-16). On Part B of that form, attending physician's report, dated January 15, 2019, Dr. Herman listed the nature of the injury as a traumatic injury, diagnosed acute stress disorder, and checked a box marked "Yes" to indicate that the diagnosed condition was caused or aggravated by the described employment activity. He further found that appellant was totally disabled from work for the period December 7, 2018 to January 15, 2019, and thereafter could return to regular work. In a duty status report (Form CA-17) of even date, Dr. Herman noted that appellant sustained a traumatic injury on December 2, 2018 and was depressed, anxious, and sleepless. He again diagnosed acute stress disorder and released appellant to full-time work with no restrictions.

On March 29, 2019 appellant requested reconsideration of the January 19, 2019 decision, and in an attached statement he noted that he was including his medical reports with his request.

In a May 8, 2019 statement of accepted facts (SOAF), OWCP noted that it had accepted as a compensable employment factor that a loss of separation occurred between appellant and two aircraft he was controlling that were on a collision course towards one another. It forwarded a copy of the SOAF to Dr. Herman and requested that he submit a detailed narrative medical report that included an explanation of how events/incidents described in the SOAF caused or contributed to appellant's emotional condition. OWCP afforded Dr. Herman 30 days to respond. No further evidence was received.

By decision dated June 17, 2019, OWCP modified its prior decision finding that appellant had established both the factual and medical components of fact of injury. However, appellant's claim remained denied because the medical evidence of record was insufficient to establish that his diagnosed acute stress disorder was causally related to the accepted December 2, 2018 employment incident.

On July 23, 2019 appellant requested reconsideration. In an attached statement dated June 16, 2019, he argued that the medical evidence of record supported his claim that he sustained an emotional condition as a direct result of the accepted December 2, 2018 employment incident. Appellant indicated that Dr. Herman was submitting a more detailed report and he would also be submitting a second opinion and new medical evidence directly from the physician's office. No further evidence was received.

By decision dated August 9, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,<sup>2</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> 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.<sup>4</sup>

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.<sup>5</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.<sup>6</sup> In the case of *Lillian Cutler*,<sup>7</sup> 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

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<sup>2</sup> *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>3</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>4</sup> *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>5</sup> *See W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>6</sup> *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

<sup>7</sup> 28 ECAB 125 (1976).

under FECA.<sup>8</sup> When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.<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.<sup>11</sup> 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>12</sup>

The medical evidence required to establish causal relationship between a claimed condition and an employment incident is rationalized medical opinion evidence.<sup>13</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment factors identified by the employee.<sup>14</sup>

It is well established that, proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>15</sup> Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>16</sup> It has an obligation to see that justice is done.<sup>17</sup>

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<sup>8</sup> See *G.M.*, Docket No. 17-1469 (issued April 2, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>9</sup> *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, *supra* note 7.

<sup>10</sup> *P.P.*, Docket No. 15-0753 (issued November 3, 2016); *D.L.*, 58 ECAB 217 (2006).

<sup>11</sup> *P.P.*, *id.*; *K.W.*, 59 ECAB 271 (2007); *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

<sup>12</sup> *Robert Breeden*, 57 ECAB 622 (2006).

<sup>13</sup> *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>14</sup> *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>15</sup> See *C.C.*, Docket No. 18-1453 (issued January 28, 2020); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

<sup>16</sup> *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>17</sup> *N.L.*, Docket No. 19-1592 (issued March 12, 2020); see *B.C.*, Docket No. 15-1853 (issued January 19, 2016).

## ANALYSIS -- ISSUE 1

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

OWCP accepted that on December 2, 2018 appellant was in the performance of duty as an air traffic controller when he experienced a loss of separation of two aircrafts, causing them to nearly collide with one another. As noted above, the Board has held that, where an employee experiences emotional stress in carrying out employment duties and the medical evidence establishes that the disability results 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.<sup>18</sup>

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 that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.<sup>19</sup>

The Board finds that the medical evidence, although it is insufficiently rationalized to establish that appellant sustained a work-related emotional condition, is generally supportive of causal relationship. In his December 7, 2018 narrative report, Dr. Herman described the accepted December 2, 2018 employment incident as related by appellant and indicated that appellant felt that he could no longer function at his position. He examined appellant, determined that appellant had signs of depression and anxiety, observed that he was preoccupied with the incident, and diagnosed acute stress disorder. Dr. Herman opined that, as a direct result of the accepted December 2, 2018 employment incident, appellant was unable to return to functioning as an air traffic controller and should be granted leave along with psychotherapeutic sessions to help him recover from the incident.

Additionally, in his Form CA-16 dated January 15, 2019, Dr. Herman checked a box marked "Yes" to indicate that the diagnosed emotional conditions were caused or aggravated by the described employment factor related to the accepted December 2, 2018 employment incident. He further found that appellant was totally disabled from work for the period December 7, 2018 to January 15, 2019 as a result of the accepted employment incident. While these reports are not completely rationalized, they are consistent in indicating that appellant sustained an employment-related emotional condition in reaction to the accepted December 2, 2018 employment incident.<sup>20</sup>

It is well established that, proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares

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<sup>18</sup> *Supra* note 8.

<sup>19</sup> *T.G.*, Docket No. 18-1718 (issued May 9, 2019); *A.A.*, Docket No. 17-0127 (issued June 18, 2018); *M.D.*, 59 ECAB 211 (2007); *William P. George*, 43 ECAB 1159, 1168 (1992).

<sup>20</sup> *D.B.*, Docket No. 13-2047 (issued May 12, 2014).

responsibility in the development of the evidence.<sup>21</sup> While Dr. Herman's reports do not contain sufficient rationale to discharge appellant's burden of proof by the weight of the reliable, substantial, and probative evidence that appellant's emotional condition was caused or aggravated by the accepted factor of his employment, these reports raise an inference of causal relationship sufficient to require further development of the case record by OWCP.<sup>22</sup>

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 his emotional disorder is causally related to the accepted compensable employment factor.<sup>23</sup> Following such further development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>24</sup>

### 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 causally related to the accepted December 2, 2018 employment incident.<sup>25</sup>

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<sup>21</sup> *J.H.*, Docket No. 18-1637 (issued January 29, 2020). *See also A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

<sup>22</sup> *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

<sup>23</sup> Upon return of the case record OWCP should consider whether to administratively combine the present claim with appellant's additional claim files relating to emotional conditions.

<sup>24</sup> In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

<sup>25</sup> The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. 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. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2019 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 9, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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