United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 17-1215**
	)	**Issued: January 10, 2018**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Washington DC, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 12, 2017 appellant filed a timely appeal from a November 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated November 14, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 21, 2010 appellant, then a 49-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that, on March 21, 2010, he developed severe

[1] 5 U.S.C. § 8101 *et seq.*

emotional anxiety which prevented him from working. He attributed his emotional condition to watching an employing establishment-directed video involving graphic violence and death.

In a letter dated May 13, 2010, OWCP requested additional factual and medical evidence in support of appellant's emotional condition claim from appellant. It afforded him 30 days to provide a response. A similar letter was sent to the employing establishment also requesting additional evidence.

In a May 28, 2010 letter, the employing establishment noted that appellant had advised management that he began to experience difficulty performing his duties after viewing a mandatory training video on aircraft accidents. Appellant requested that a supervisor monitor him after watching the video to ensure than he was not compromising safety. Due to his emotional condition he was restricted from performing air traffic control duties as the Regional Flight Surgeon had determined that he was medically incapacitated and could not perform air traffic control duties.

In a June 8, 2010 statement, appellant noted that, after March 21, 2010, he felt continually nervous and eventually experienced anxiety attacks. He reported, "I could not get the quivering voice I heard on the 'Heads Up' video out of my mind." Appellant sought medical treatment. Dr. Thomas Keapu, a licensed clinical psychologist, examined appellant and diagnosed acute stress disorder. He noted that appellant was attending a mandatory training meeting and viewed a video of two airplanes colliding. Dr. Keapu reported, "[Appellant] experienced the graphic reality of the controller 'quivering their voice in fear.'" He opined that this experience triggered an anxiety reaction to the general work environment. Dr. Keapu diagnosed occupational/career stress in reaction to a traumatic training experience and subsequent loss of full duties at work.

The employing establishment provided additional information. It noted that appellant stopped work entirely on April 11, 2010 after he had stopped performing safety-related duties beginning on April 10, 2010. Appellant returned to work on June 7, 2010 performing administrative duties. The employing establishment described the video which he viewed on March 3, 2010 as depicting three specific air traffic events. In the first event, a small aircraft almost collided with a departing jet. The audio indicated a very high level of stress in the controller's voice when he recognized what he had done. The second aviation event was a small aircraft that flew into a weather system and crashed killing the pilot, an experienced aviator, who was the first to pilot an aircraft at twice the speed of sound. The third event was two aircraft that collided and crashed killing five people. One of the airplanes barely missed a high-rise building and did hit a house. The video also included a helicopter and airplane colliding as well as aerial footage of aircraft crash sites. The conclusion of the video was the phrase "Stay out of court, stay out of the headlines."

The employing establishment noted that the video, "Heads UP - Safety Depends on You" was mandatory at the time appellant viewed it on March 3, 2010. It further noted that sometime after March 3, 2010 the video was revised. Controllers were not required to see the revised video if they had already seen the original. Appellant was advised that the video was about safety issues and that it had originally been shown to managers. The employing establishment noted that appellant had not previously seen the video and that he had been employed since

1984. It reported showing other videos about safety and aircraft accidents from time to time, but noted that it was difficult to assess how similar the prior videos were to the "Heads UP" video.

By decision dated August 13, 2010, OWCP denied appellant's traumatic injury claim finding that the event did not occur on March 21, 2010, as alleged.

Appellant requested an oral hearing on June 21, 2011 from a representative of OWCP's Branch of Hearings and Review. In a decision dated July 14, 2011, OWCP's hearing representative denied this request as untimely filed and in its discretion determined that the issue in the case could be adequately addressed through the reconsideration process.

Appellant requested reconsideration of the August 13, 2010 decision on August 8, 2011. He provided numerous documents in support of his request. Appellant provided e-mails from the employing establishment noting that the "Heads UP" video had been revised. In an e-mail sent on March 6, 2010 the employing establishment noted that it had committed to the National Air Traffic Controllers Association (NATCA) to review and edit the current safety video "Heads UP" mandated for viewing and briefing. Until the editing of "Heads UP" was completed the viewing of the initial version of the video was voluntary. On March 18, 2010 the employing establishment directed that those that had not viewed the original video "Heads UP" would be required to view the revised version. Employees could choose to view the original video.

Appellant also submitted a July 8, 2011 report from Dr. C. Alec Pollard, a licensed clinical psychologist, who diagnosed post-traumatic stress disorder (PTSD) as a result of watching the "Heads UP" video at work on March 3, 2010. He also submitted a July 15, 2011 note from Dr. Geeta K. Aatre-Prashar, a licensed clinical psychologist, diagnosing PTSD as a result of viewing a video at work on March 3, 2010.

By decision dated October 6, 2011, OWCP reviewed the merits of appellant's claim and determined that he had established that the claimed event of viewing the "Heads UP" video had occurred as alleged. However, it denied his claim finding that viewing the video was not considered a compensable factor of employment. OWCP found that directing appellant to watch the video was an administrative function of the employing establishment and he had not established error or abuse by the employing establishment. It found that he had not established an injury in the performance of duty.

Appellant provided additional information to OWCP on October 12, 2011. He submitted an employing establishment document, the facilitator guide for managers and supervisors, regarding the "Heads UP" video. The document described the video and provided, "Please use your discretion in involving staff in this briefing who have previously been involved in a fatal air traffic accident. These scenarios, discussions, and headlines show fatal or near-fatal situations that may be difficult for someone who has close experience with similar situations." Appellant also included a statement alleging that he received no warning regarding the content of the "Heads UP" video. He noted that he was previously involved in a fatal accident on October 13, 1987 when a plane that he was controlling developed smoke in the cockpit and crashed.

Counsel requested reconsideration on behalf of appellant on October 1, 2012. In support of this request, he submitted additional medical evidence, a signed and notarized affidavit from appellant reporting the October 13, 1987 fatal crash, the "Heads UP" guide, and e-mails from

NATCA regarding the video. Counsel also provided appellant's application for retirement on June 3, 2012. In a statement dated February 1, 2012, appellant's coworkers noted that they too were required to watch the "Heads UP" video on March 3, 2010 without warning of the disturbing footage of mid-air collisions. Counsel contended that watching the "Heads UP" video occurred while in the performance of duty as part of proficiency training and should be considered a compensable factor of employment. He argued in the alternative that, even if appellant's injury occurred as a result of an administrative function of his employing establishment, the employing establishment acted unreasonably and negligently in showing the video without warning because appellant had previously witnessed a fatal air accident.

By decision dated December 26, 2012, OWCP reviewed the merits of appellant's claim, but denied modification of its October 6, 2011 decision. It again found that the assignment of watching the training video was an administrative function of the employing establishment and that the reaction to the work assignment was self-generated and did not arise in the performance of duty.

On December 16, 2013 appellant again requested reconsideration and provided additional documentation. A coworker, J.B., completed an affidavit on February 11, 2013 and confirmed that he attended the March 3, 2010 meeting and viewed the "Heads UP" video with appellant. He noted that management had not asked if the air traffic controllers had prior close experience with fatal or near-fatal situations. G.B., operations manager for the employing establishment, completed an affidavit on February 12, 2013 and noted that he attended two of the March 3, 2010 meetings with the "Heads Up" video. He noted in each of these meetings the video was presented as mandatory and that no warning regarding the content of the video had been provided to employees.

Appellant e-mailed R.L., a support manager at the employing establishment, on November 19, 2013 and requested that he provide a letter indicating that there was no warning issued prior to the viewing of the "Heads UP" video on March 3, 2010 at the employing establishment. R.L. replied on November 20, 2013, "As long as I am working for the [employing establishment], I can't provide a statement. Sorry." Appellant asked on November 20, 2013 what was preventing R.L. from providing the statement, and he replied that legal had advised that they were not to issue any statement. R.L. noted that if he were asked the question about warnings on the witness stand, "that's one thing, but I can't issue a statement."

Appellant submitted an affidavit from B.W., a coworker, dated December 6, 2013. B.W. reported that the air traffic controllers were required to go to a team meeting on March 3, 2010 and that appellant attended this meeting with him. At the meeting, the "Heads UP" video was shown to all attendees as part of their official job requirements. No warnings were issued about the video during the meeting. The attendees were not surveyed at the meeting to determine if they had prior personal experience with fatal or near fatal air traffic situations. After the March 3, 2010 meeting, B.W. contacted R.L. regarding the facilitator guide for the "Heads UP" video. R.L. denied knowledge of the facilitator guide and denied that he was aware that he was able to exercise discretion in showing the "Heads Up" video. B.W. witnessed appellant's request to G.D., assistant air traffic manager, to provide a letter regarding the lack of warnings and lack of discretion exercised in showing the "Heads Up" video. He also witnessed G.D.'s assent to this request. In June 2013 G.D. and R.L. both reported that no warning was given to appellant prior to the March 3, 2010 video playback.

The employing establishment responded to this additional information on February 6, 2014 and reported that the mentioned management officials identified in the affidavits had retired. It reported that it had no additional comments or documents to submit.

By decision dated November 14, 2014, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decisions. It found that his viewing of the "Heads Up" video was an accepted, but not a compensable factor. OWCP again found that the video was for training and that the assignment to watch a training video was an administrative function.

Appellant requested reconsideration of the November 14, 2014 merit decision on November 6, 2015. In support of this request, he submitted documents from his U.S. Senator regarding his claim. In a March 30, 2015 letter, appellant described his reaction to the "Heads Up" video and noted that no warning of the content of the video was provided by the employing establishment. He noted that he had previously controlled an aircraft that crashed in 1987 killing two people. Appellant alleged that viewing the video was a regularly or specially assigned duty or requirement imposed by the employing establishment and should be considered a compensable employment factor. He contended in the alternative that, even if the requirement that he view the video was not found compensable, the employing establishment committed error or abuse by acting unreasonably in requiring him to watch the video given his history of controlling a fatal air traffic accident.

Appellant also submitted an additional medical report dated October 16, 2015 from Dr. Larry Shapiro, a licensed clinical psychologist, diagnosing PTSD and opining that appellant developed this condition as a direct response to exposure to the work-related training video.

By decision dated November 18, 2016, OWCP declined to reopen appellant's claim for further consideration of the merits. It found that he failed to submit relevant and pertinent new evidence or argument in support of his November 3, 2015 request for reconsideration.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[2] Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.[3] Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.[4] Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(3).

[4] *Id.* at § 10.608.

received by OWCP within one year of the date of OWCP's merit decision for which review is sought.[5]

ANALYSIS

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

Appellant has attributed his emotional condition to the requirement of his employment that he view a required training video, "Heads Up." In his documentation provided to his Senator, appellant included his argument that he had implicated a factor of employment under *Cutler*.[6] OWCP has not addressed this argument in denying appellant's claim. Instead, it has repeatedly and erroneously focused on the analysis established by the Board in *Thomas D. McEuen*,[7] where the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee.

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.[9] There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.[10] 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 results from his emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[11] In contrast, a disabling condition resulting from an employee's feelings of job insecurity *per se* is not sufficient to constitute a person injury sustained in the performance of duty within the meaning of FECA. Thus, disability is not covered when it results from an employee's fear of a reduction-in-force, nor is disability 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.[12]

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[5] *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*¸ Chapter 2.1602.4 (February 2016).

[6] 28 ECAB 125 (1976).

[7] 41 ECAB 387 (1990), *reaff d on recon.*, 42 ECAB 566 (1991).

[8] *Supra* note 6.

[9] *Supra* note 1.

[10] *See Robert W. Johns*, 51 ECAB 136 (1999).

[11] *Supra* note 6.

[12] *Supra* note 7.

As OWCP has repeatedly failed to properly address and consider appellant's arguments regarding the viewing of the "Heads UP" video as a factor of employment under *Cutler*, the Board finds that he has submitted a new argument in support of his claim, which requires review of the merits. On remand, it should consider and apply the appropriate standards of analysis under *Cutler*[13] and further develop his claim following the acceptance of the employment factor prior to issuing an appropriate merit decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT November 18, 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: January 10, 2018
Washington, DC

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

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

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

[13] *Supra* note 6.