



Issue Date: 22 October 2012

ARB CASE NO.: 10-026

ALJ CASE NO.: 2008-AIR-00009

IN THE MATTER OF

**ROGER A. LUDER,
Complainant**

v.

**CONTINENTAL AIRLINES, INC.,
Respondent**

RECOMMENDED DECISION AND ORDER ON REMAND

On January 31, 2012, the Administrative Review Board (Board) issued its Final Decision and Order of Remand finding that substantial evidence as a whole supported the undersigned's findings of fact and conclusions of law that Respondent violated AIR 21 when on October 19, 2008 it suspended him for four days without pay; issued him an 18 month termination warning letter that prevented him from voluntary transferring to another position with the company; and subjected him to termination if he committed further alleged infractions of company policy.

The Board affirmed the undersigned's award of monetary and equitable relief including lost income for the cancelled flight, making him whole for any loss of employee benefits and expunging the termination warning letter from his personnel file. Respondent did not object to these remedies but objected to the remainder of the award to Complainant for lost pay after November 10, 2007 when he ceased flying. The undersigned found, based upon the testimony of Complainant, Captain Mitchell Whatley, and Dr. Vitaliy Shaulov, that Complainant experienced such anxiety following Respondent's unlawful conduct that Complainant was unable to successfully complete simulator training and suffered thereafter with disabling PTSD, depression, and anxiety causing him to be unable to fly.¹

Accordingly, the undersigned ordered Respondent to pay Luder for lost wages accruing after November 10, 2007 and continuing until he had sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment while allowing Respondent

¹ Dr. Shaulov did not initially testify as stated by the undersigned but rather submitted his treatment records in this case.

to deduct from the award any income he earned from suitable alternative employment or any long termed disability amounts.

In discussing the issue of damages and remedies the Board clearly stated that these elements are part of Complainant's claim and must be proven by him and cannot be presumed. Further, the express and presumptive remedy in loss of employment due to unlawful discrimination being reinstatement unless that remedy is not possible for some reason wherein front pay may be used as a substitute.

In the present case there is no question that Complainant's mental and physical condition has prevented reinstatement. In this case the Board has held that the complainant must show by a preponderance of the evidence that the unfavorable personnel action caused or aggravated a pre-existing condition and this burden may be met by credible lay and medical or psychiatry testimony showing complainant suffered from the medical condition and that it was casually related to the unfavorable personnel action.

In this case the Board cited three factors that could have contributed to Complainant's inability to pilot planes for Respondent. One factor which Respondent contends was simply Complainant's failure to pass the simulator test that day. A second factor was his GI bowel problems and anxiety which was attributable, at least in part, to the retaliatory discipline Complainant was subjected to. A third factor with which Complainant was diagnosed in 2008 and continued to the date of hearing was major depression. The Board found the basis for the findings to be unclear, with neither the psychiatrist, Dr. Shaulov, nor psychologist, Dr. Elliot, discussing the element of causation.

The Board noted that remand was indicated to allow the undersigned to address (1) issue of causation; (2) the need for front pay instead of reinstatement in a pilots job or other suitable employment; and (3) the amount of time of the proposed pay award. To that end the Board left it to the undersigned discretion upon remand to determine how to address those issues. Accordingly the undersigned allowed the parties until October 8, 2012 to supply additional evidence of those issues raised upon the Board. Initially Respondent objected to any reopening of the record while Complainant submitted declarations and deposition testimony of Dr. Vitaliy Shaulov, himself and his psychologist, Sandra Jorgensen along with additional medical records from Cardiac Care Consultants; Cardiac Solutions; Dr. Yolanda P. Gomez; Banner Boswell Medical Center; Dr. Oscar Rosales; Arizona Ear, Nose & Throat Physicians; Sun City Electrophysiology; Social Security Administration records; correspondence between Complainant and Harvey Watt; Respondent's seniority lists; pay rates; pass travel agreement; physical examinations; and Complainant's tax returns.

On September 28, 2012, Respondent submitted similar depositions from treating psychiatrist Dr. Shaulov treating psychologist, Sandra Jorgensen, and Complainant together with declarations of Complainant, disability claims, medical records from Dr. Norman R. Shaia, correspondence from J. Michael Young of Harvey Watt and Company, and correspondence from the FAA, declaration from Myke Capps (manager of health and welfare benefits for Respondent). On October 8, 2012, Complainant in response to Respondent's brief submitted information on FAA regulations.

On remand Respondent contends that Luder (1) did not suffer from PTSD or any other long term physical or mental disability; (2) cannot prove his suspension and warning had any influence on his failure to complete simulator training but rather from a mistaken belief that the training was rigged; (3) is not entitled to front pay because Respondent did not cause Luder to stop work or failed to return to work. While the record in this case does not support a diagnosis of PTSD because of the absence of a severe life threatening stressors it does support severe symptoms of high anxiety, depression, hyper vigilance, difficulty sleeping and concentrating and irritability for which he was treated on multiple occasions by Drs. Shaulov and Jorgensen. Dr. Jorgenson did not immediately diagnose PTSD upon seeing Claimant but recognized that Claimant was suffering from major depression anxiety disorder, all symptoms of post-traumatic stress. (CX-4, p. 7). Dr. Jorgenson's approach to treatment of Claimant was through relaxation therapy cognitive behavioral therapy. (CX-4, pp. 8, 10). In addition, he was treated on multiple occasions for ventricular tachycardia which Dr. Shaulov found to be a somatic symptom associated with his mental condition.

Contrary to Respondent's assertion Dr. Shaulov and Dr. Jorgensen expertise to treated and diagnose these symptoms were well documented in the record. Dr. Shaulov is a psychiatrist in private practice and is on Respondent's list of authorized psychiatric providers. Dr. Shaulov received his medical degree from Tartu University in 1984. Since that time he completed his internship in neurology at St. Petersburg Regional Hospital in 1985 where he served as staff neurologist from 1985-1990. From 1997 to 2001 Dr. Shaulov underwent four years of training in psychiatry and neurology at New York Medical College. From 2000 to 2005 he had a private practice in psychiatry in Brooklyn, N.Y. followed by an additional private practice in psychiatry to the present in Laguna Hills, California. Treating psychologist, Dr. Jorgensen received her Ph.D. in psychology from California Graduate Institute and has been in private practice since 1985. She provides counseling services, working closely with Dr. Shaulov on many of his cases, Luder included.

Dr. Shaulov has treated Luder on numerous occasions since January 3, 2008 for symptoms consistent with PTSD, panic disorder, major depression, generalized anxiety, adjustment disorder and anxiety for which he has found Luder disabled and unable to fly. Dr. Shaulov treated Complainant on January 3, 17; February 7; March 6, 13, 23; May 8; June 19; August 17; September 2, 30; October 21; November 21, 2008; January 15; March 11; April 1; May 26; July 6; August 17; November 2; December 10, 2009; January 11; March 8; July 13; August 10, 2010; May 11; and September 21, 2011. Dr. Shaulov considered Respondent's treatment of Luder to represent a serious trauma to Luder making him very anxious and feeling that his whole life was finished at that point (RX-2, pp. 15, 16). In his declaration of April 23, 2012, Dr. Shaulov stated that after seeing and evaluating Luder on this and other occasions, he concluded the above symptoms were caused "by the unfair treatment he received from Continental Airline officials related to his refusal to fly an aircraft he believed had been flown through severe turbulence."

Respondent would discount these observations saying Dr. Shaulov conducted no tests to rule out other causes. However, Respondent ignores the fact that what Dr. Shaulov did was to conduct a mental status evaluation on this and many other occasions. (RX-2, pp. 109-111). Respondent points out that Luder refused on several occasions to take prescribed medications.

However, Dr. Shaulov stated that he did not always insist upon Luder taking medications because of their multiple side effects and Luder's personality. (RX-2, p. 43).

Dr. Shaulov notes that while psychologist Dr. Elliot does not agree with his diagnosis of PTSD, Dr. Elliot states that Luder's psychiatric decline started shortly after his adverse treatment by Continental officials related to his refusal to fly an airplane he believed had been flown through severe turbulence. (Declaration of Dr. Shaulov, p.4). Dr. Elliot's notes at CX-4, p.00229 confirm that Luder was re-experiencing symptoms associated with the "initiating event" i.e., Luder's refusal to accept an aircraft on September 15, 2007 and Respondent's disciplinary action thereafter. The current symptoms include significant neurocognitive deficits in attention, immediate and delayed auditory memory, reasoning, motor coordination under speeded conditions, visual scanning, and mental flexibility skills. (Id. at p.00230). The resulting diagnosis was major depression disorder, moderate with psychotic features (paranoia, suspiciousness, tangential thinking, pre-psychotic thinking, and delusions) and generalized anxiety disorder.

Dr. Elliot moreover agreed with Luder's treating regiment specified by Dr. Shaulov and the relaxation therapy provided by Dr. Jorgensen, stating that the treatment would be long term, considering the severity of the symptoms, with Luder out of work for a minimum of 6 to 12 months and determining Luder to be unfit to fly. Besides diagnosing major depressive disorder, Dr. Elliot also diagnosed tachycardia, sleep disorder, and diarrhea on Axis 3 as general medical conditions related to Luder's psychiatric disorder. (Id. at p. 00231).

Respondent would have the undersigned believe that it placed Luder on long-term disability not because of a diagnosis of PTSD but due to his use of unnamed disqualifying medications presumably related to such diagnosis. Assuming, for the moment, that Respondent is correct, that does not discount the fact that use of psychotropic medications for Complainant's psychiatric condition, whether it be major depression and anxiety or PTSD, has prevented Complainant, along with his heart problems, from flying.

Moreover, it is clear from the record that before the events of Luder's refusal to fly and Respondent's subsequent disciplinary action against him, Luder was functioning as a responsible pilot. However, closely following the adverse action Luder experienced deteriorating symptoms which is an important consideration in determining causation. Indeed, Dr. Shaulov based his determination in large measure on this fact which Respondent never disproved although given the opportunity. *See Kannankeril v. Terminix Int'l*, 128 F.3d 802, 805, 809 (3d Cir. 1997).

Respondent contends that Luder's refusal to complete the simulator training was related to a mistaken belief that the test was "rigged." This was only part of Luder's psychiatric problem, paranoia. Luder also experienced and complained shortly thereafter of tachycardia, sleep disorder, and diarrhea which, according to Dr. Shaulov, were directly related to the psychological event. (RX-2, p. 56-57). Although Luder has received multiple treatments for his psychiatric condition, he had to discontinue such treatment when he moved more than 400 miles away to Sun City, Arizona with Respondent refusing to give him a badge allowing for transport via air as it had promised.

Thus, I find ample support for causation of Complainant's psychiatric and physical problems by Respondent when it retaliated against Luder as set forth above regardless of the

psychiatric diagnosis when the entire record, including the credible testimony of Dr. Shaulov, Dr. Jorgenson, and Luder, is considered.

Concerning the issue of front pay, neither of the parties dispute the fact that Luder has not passed the required FAA medical that would allow him to be reinstated. Respondent argues that Luder is deliberately failing this test. However, Respondent ignores the fact that Luder continues to experience tachycardia for which he must be symptom free for 90 days before being allowed to take and pass his flight physical. Further, Luder must be assessed as passing the psychiatric portions of this test which Respondent has not arranged for Luder to take. As late as December 22, 2011, Luder was seen by Dr. Daley for a FAA First Class Physical to determine his eligibility to fly and on February 3, 2012, was denied his First Class Medical Certificate by the U.S. Department of Transportation. Luder is moreover required under FAA regulations to report all physical and mental problems which would interfere with his safe operation of an aircraft. FAR title 14, Parts 61 and 67. The initial diagnosis by Dr. Elliot of major depression moderate with psychotic features, generalized anxiety disorder, tachycardia, sleep problems, and diarrhea remains, as does his finding of "not fit for duty."

Moreover, there is no evidence to suggest that Luder who has attempted on several occasions to return to work will be able to obtain a medical certificate prior to his mandatory retirement age of 65. In like manner Respondent has not offered him and in all probability will not offer him any other suitable alternative employment. While Luder has done little to search for work Respondent has failed to show what, if any, work he is qualified for. Given Luder's symptoms, Dr. Jorgenson has stated that Complainant might lack the necessary energy or motivation to look for work. (CX-4, p. 15).

Accordingly, I order the following:

1. Luder cannot or will not be reinstated and must instead rely upon front pay as a remedy. In that regard, he is entitled to front pay as a 737 captain from December 13, 2007 (when his sick leave ended) to July 1, 2016 (when he will reach age 65 and is required to retire). The monthly income of \$13,383.92 is to be paid for the period of December 13, 2007, until March 1, 2011 when he would have received a month monthly increase to \$14,147.32. For the period from January, 2011, until his mandatory retirement on July 1, 2016, Respondent will pay Luder the monthly rate of \$14,147.32. This does not include any pay he claims he would have received as a 767 or 777 captain because there is no evidence Luder would have bid on and been qualified for such aircraft.
2. Respondent is to make Luder whole for any loss of benefits he would have received during the above time periods as a 737 Captain for Respondent. This does not include any benefits he claims he would have received as a 767 or 777 captain because there is no evidence Luder would have bid on and been qualified for such aircraft. This includes any retirement he would have received from Respondent.
3. Respondent and will fund Luder's retirement account at rate of 12.75% of his pay for the entire pay period of December 13, 2007 to July 1, 2016 and will reimburse Luder for any additional COBRA payments he paid following his discharge and will issue to him and his dependents a travel pass in accordance with Respondent's Pass Travel policy.

4. Respondent will receive a credit for all long term disability paid Complainant which covers over a 4 year period during which Respondent paid Luder approximately ½ his regular salary. Respondent will also receive a discount rate of 4% for all lump sum payments it makes to Complainant before they become due.

SO ORDERED this 22nd day of October, 2012, at Covington, Louisiana.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**